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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT OF CERTIORARI*

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QUESTION PRESENTED

1. Whether the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements was properly applied to a discretionary drug testing program targeting hospital patients that was created and implemented with police and prosecutors primarily for law enforcement purposes?

LIST OF PARTIES

The Petitioners are Crystal M. Ferguson, Theresa Joseph, Darlene M. Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and Laverne Singleton.

The Respondents are the City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker, Jr., Dr. Charles B. Hanna, Dr. Cotesworth P Fishburne, Dr. E. Conyers O'Bryan, Melvyn Berlinsky, Patricia T. Smith, M.J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W. Peoples, and Dr. Carroll V. Bing, Jr., in their official capacities as Trustees of the Medical University of South Carolina, Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar O. Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., and Melesia Henry, R.N., personally and in their official capacities.

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Petitioners, ten women whose urine was searched for evidence of drug use when they sought obstetrical care at the Medical University of South Carolina ("MUSC") under a policy designed to gather evidence of criminal activity, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit entered on July 13, 1999, to the extent that it denied petitioners' appeal of their claim that the drug testing violated their rights under the Fourth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 186 F.3d 469. The opinion is set forth in the Appendix (App. 3). The only written opinion of the United States District Court for the District of South Carolina is unreported and is set forth in the Appendix (App. 36).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 13, 1999. A petition for rehearing en banc was denied by an 8-5 vote on September 2, 1999. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Const. amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Introduction

Petitioners, nine African-American women and one white woman, brought this action under 42 U.S.C. § 1983 challenging Respondents' policy of warrantless and non-consensual drug testing for criminal investigatory purposes ("the Search Policy") of a virtually all-black group of indigent pregnant women who sought obstetrical care at MUSC, the public hospital located in Charleston, South Carolina.[1] The Search Policy was developed and implemented jointly by members of an interagency group consisting of personnel from MUSC, the City of Charleston Police Department ("CCPD"), and the Charleston County Solicitor's Office,[2] and applied only at the one hospital in Charleston whose patient population was predominantly African-American. An "initial and continuing focus of the Search Policy" was on arrest and prosecution of the targeted group, *Ferguson v. City of Charleston,* 186 F.3d 469, 484 (4th Cir. 1999) (Blake, J., dissenting); search results were routinely used to arrest and prosecute women who tested positive for cocaine and, in some cases, the threat of arrest and prosecution was used as a mechanism to coerce women into drug treatment programs, which Respondents knew to be inadequate.

II. The Search Policy was Designed and Implemented to Gather Evidence to Prosecute the Petitioners.

The record establishes that the Search Policy was designed and implemented to collect evidence in support of criminal investigations. Indeed, Defendant Shirley Brown, R.N. ("Nurse Brown"), a case manager in the Obstetrics Department at MUSC, heard a report about arrests of pregnant women under the South Carolina child abuse statute for drug use during pregnancy. Nurse Brown mentioned the report and the possibility of participating in

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[1] Jurisdiction over this action was proper in the district court pursuant to 28 U.S.C. §§ 1331 and 1343(a).

[2] In South Carolina, the Solicitor is the local prosecuting attorney.

such a program to MUSC's General Counsel Joe Good when she ran into him on her way into the Hospital. Brown Tr. at 4:10-5:17 (App. 76-77). As a result of this conversation, on August 23, 1989, Mr. Good wrote to then-Charleston County Solicitor Charles Condon to inquire as follows:

> I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs . . .
>
> Please advise us if your office is anticipating future criminal action and what if *anything our Medical Center needs to do to assist you in this matter.*

PX 2 (App. 67) (emphasis added).[3] On August 31, 1989, Solicitor Condon wrote to Charleston Police Chief Reuben Greenberg to ask him to consider co-chairing with Solicitor Condon a task force consisting of members from MUSC, the Solicitor's Office and the CCPD. The purpose of the task force was "to consider possible prosecution of the mothers of drug affected babies. . . ." PX 6 (App. 69).

As a result, a joint interagency task force was formed, consisting of members from MUSC, the Solicitor's Office and CCPD. Trial Tr. 12/17/96 at 17:18 – 20:24, 5:13-16 (Condon),[4] Sanders Tr. 102:3 – 103:14 (App. 105-106); Newman Tr. 180:14-18 (App. 93); Cornely Tr. 321:25 – 322:7 (App. 91); Trial Tr. 12/17/96 at 5:13-16 (Condon); *see also, e.g.*, PX 6 (App. 69-71). The Search Policy was first memorialized by law enforcement

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[3] Plaintiffs" Exhibits will be cited as "PX –"; Joint Exhibits as "JX –." When included in the Appendix to this Petition, citations also indicate the page of the Appendix on which the Exhibit appears as "App. –"

[4] Citations to the trial transcript appear as "Trial Tr." with the date, page and line numbers, and witness's name following, unless the cited portions of the transcript are contained in the Appendix to this Petition. In the latter case, citations are to the witness's name, page and line number and page of the Appendix on which the cited transcript appears.

personnel, not MUSC officials, in a series of separate internal memoranda setting forth the guidelines by which women would be selected for testing and tested for drugs and by which a chain of custody for the evidence would be maintained and positive drug tests would be reported to the police.[5] *See, e.g.*, JX 1 (10/12/89 memo written by CCPD Captain) (App. 49); JX 15 (10/17/89 memo written by Solicitor) (App. 64). The 10/12/89 operational guidelines issued by CCPD refer to the positive drug tests as "probable cause" for arrest of the mother. JX 1 (App. 49). A December 19, 1989 letter from Mr. Good explaining the MUSC program states that it was developed by MUSC "*[a]t the suggestion of law enforcement and the solicitor's office. . . ,*" PX 28 (emphasis added) (App. 72), and MUSC personnel were to maintain a formal "chain of custody" for the urine samples collected pursuant to the Search Policy, *see* JX 2 at 2 (App. 54), but not for urine specimens taken for purely medical reasons.

Accordingly, the district court instructed the jury:

> But what makes this case unusual and what brings it within the coverage of the Fourth Amendment is the fact that you have law enforcement and medical service people acting together.
>
> It is the fact that the so-called search, the taking of the urine sample and the testing of it for cocaine, was to be used not only for medical diagnosis, but if it was positive it was also going to be used for police and prosecutorial purposes.

Transcript of Jury Charge 17:22-18:4 (App. 47). As the dissent below wrote:

> Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using

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[5] When the Search Policy was first implemented, pregnant women who tested positive for cocaine were arrested. Later, pregnant women were offered an opportunity to avoid arrest by participating in "treatment" programs. *Ferguson v. City of Charleston*, No. 2:93-2624-2 (D.S.C. Sept. 29, 1997) (App. 36).

> crack cocaine was a motivating force in the development of the MUSC Search Policy, it nevertheless is clear from the record that an initial and continuing focus of the Search Policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use.

Ferguson, 186 F.3d at 484 (footnote omitted) (Blake, J., dissenting); *id.* ("The prosecutorial purpose of the Search Policy and the substantial involvement of law enforcement officials from the very beginning of its implementation" were clear).[6]

III. The Essential Elements of the Search Policy

Discretionary Criteria for Drug Testing: Collecting urine and performing urine drug screens for cocaine was the first step leading to an arrest under the Search Policy. *See* JX 1 (App. 49); JX 2 (App. 53). However, only a targeted group of women -- those who met certain criteria -- were tested. JX 2 at 1 (App. 53-54); Brown Tr. 28:17 – 30:15 (App. 79-81). These criteria included such discretionary criteria as "inadequate prenatal care," women with "no prenatal care," and women with "[p]reviously known drug or alcohol abuse." *Id.;* Newman Tr. 220-227 (App. 94-104). Eventually, neonatologists were also required to test infants whose mothers met the criteria. Trial Tr. 11/25/96 at 41:2-17 (Patrick). As the Medical Director of the Neonatal Intensive Care Unit testified, testing was not being done for medical reasons,

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[6] This overwhelming contemporaneous documentary evidence, evidence that cannot be altered by failed memory, wishful thinking or political spin, was improperly overlooked by the majority below in favor of self-serving testimony by the Respondents providing post hoc rationalizations for the Search Policy. *Ferguson,* 186 F.3d at 475 n.3. Such self-serving testimony is simply not as reliable as contemporaneous documentary evidence. *See United States v. United States Gypsum*, 333 U.S. 364, 396 (1948) ("[W]here such testimony is in conflict with contemporaneous documents we can give it little weight."); *Burns v. Secretary, Dep't of Health and Human Services*, 3 F.3d 415, 417 (Fed. Cir. 1993) ("Supreme Court counsels that oral testimony in conflict with contemporaneous documentary evidence deserves little weight.").

but solely for purposes of the Search Policy. *Id.* (before the Search Policy, infants were tested for medical reasons, but after the Search Policy was instituted, infants were being tested based solely on the policy criteria); *see also* Chasnoff Tr. 15-17, 42 (App. 84-88, 88-89) (discretionary criteria "medically senseless").

Lack of Search Warrants or Consent to Search: It is undisputed that no search warrants or court orders were obtained before women's urine was collected and searched for drugs. Transcript of Jan. 6, 1997 Jury Charge at 18:15 ("Jury Charge") (App. 48). No specific consent was obtained from the Peitioners for performing a search of their urine, nor were they given any indication that the hospital's confidentiality policy, pursuant to which "medical records and all communication pertaining to [patient] care are . . . treated as confidential," *see* PX 105 (App. 75), did not apply to urine test results. *See, e.g.,* Trial Tr. 11/20/96 at 27 (Griffin); Trial Tr. 11/25/96 at 149 (Powell); Trial Tr. 11/22/96 at 121-22, 139 (Knight); Trial Tr. 11/20/96 at 71 (Singleton).

As the district court correctly held, MUSC's two general consent forms, were "not sufficient consent to warrant a search where the search information is furnished to law enforcement officers." Trial Tr. 1/6/97 at 21 (Jury Charge). Even MUSC's General Counsel Joe Good admitted that he was concerned that the consent forms were inadequate. Trial Tr. 12/16/96 at 202:6-9 (Good). All the other forms related to the Search Policy were given to the woman only *after* she had already been tested for drugs and did not seek either the patient's consent or authorization. For example, "Solicitor's Letters" were only shown to patients after their urine was tested for drugs, i.e., after the search was conducted. *See, e.g.,* Trial Tr. 11/21-22/96 at 50:7-14 (Brown); Trial Tr. 12/10/96 at 279:24-280:7 (Newman); *see also* JXs 5-7 (letters stating "[d]uring your recent examination you tested positive for drugs"). Similarly, Respondents' claim that all patients receiving prenatal care at MUSC were shown the "To Our Patients" letter, JX 10, before they were tested for cocaine, Trial Tr. 11/21-22/96 at 199-202 (Brown), Trial Tr. 12/10/96 at 242-243 (Newman), is belied by the letter itself. JX 10 (stating that if "we *continue* to detect evidence of drug abuse") (emphasis added).

Nursing notes for the only plaintiff whose medical record indicates that she was shown this document at all confirm this. PX 280 at BRO-WN-1415 (noting that Plaintiff Pamela Pear was "given letter from the Dept. of [ob/gyn]" *after* testing positive).

Unauthorized Disclosure of Medical Information: Positive results for cocaine were recorded in the patient's medical chart, as well as on Rolodex cards that Nurse Brown kept in her own office. Trial Tr. 11/21/96 at 59:6-15 (Brown). She provided this information to the Solicitor's Office and, in some circumstances, to the CCPD; Solicitor's Office employees actually had access to the Rolodex and the files in Nurse Brown's office. Trial Tr. 11/21-22/96 at 60:7 – 61:18 (Brown); Trial Tr. 12/10/96 at 193 (Newman); Trial Tr. 12/6/96 at 296:21 – 297:1 (Legare); Trial Tr. 12/16/96 at 216:25 – 217:18 (Good); JX 1 at 2. Neither the Solicitor's Office nor the CCPD had a search warrant, subpoena or court order for medical information it obtained in this manner. Trial Tr. 12/6/96 at 312:25-313:18 (Legare). Moreover, a copy of the patient's discharge summary, containing other confidential medical information such as the patient's medical history, incidence of sexually transmitted diseases, sterilization procedures done while in the hospital, and HIV status, was disclosed to the CCPD officer who came to the hospital to arrest the patient. Trial Tr. 12/6/96 at 217:6-218:6 (Good).

Patients testing positive were also tracked as part of the Suspected Child Abuse and Neglect ("SCAN") meetings at which personnel from the hospital, the Department of Social Services, the Solicitor's Office, and CCPD discussed suspected child abuse. Confidential medical information on the patients to be discussed, such as HIV status and information on tubal ligations, was sent to all members of the SCAN team, including personnel from the Solicitor's Office and CCPD. Trial Tr. 12/9/96 at 125-126 (Hildebrand); PX 228-E; PX 178. Information on each of the Petitioners was disclosed without their consent and without a warrant.

Grounds for Arrest: Under the Search Policy, women who tested positive for cocaine could be arrested or threatened with arrest on the basis of their urine tests for the crimes of possession of drugs, child neglect, or distribution of drugs to a person under

eighteen, depending upon the point in pregnancy at which their cocaine use was discovered.[7] JX 2 at 11 (App. 62-63). The CCPD had never before applied these statutes to address a pregnant woman's drug use, Trial Tr. 11/26/96 at 13:19-25 (Roberts), nor was any male patient ever arrested by CCPD and charged with drug possession based solely on a positive urine drug screen. *Id.* at 50:6-13. The Search Policy applied at all stages of pregnancy, both before and after fetal viability. *See, e.g.*, JX 2 at 9-12 (App. 60-63). Indeed, plaintiff Theresa Joseph was confronted by Nurse Brown and threatened under the Search Policy when she was only sixteen weeks pregnant. PX 277.

Arrests: As Respondents admit, from October 1989 until at least January 1990, women who tested positive for cocaine at the time they gave birth were arrested based on that single positive drug test. *See, e.g.*, JX 3. Nurse Brown would call CCPD, file a complaint, inform them when a patient who had tested positive was about to leave the hospital and help coordinate the woman's in-hospital arrest. Trial Tr. 11/21-22/96 at 90-91 (Brown); Trial Tr. 11/26/96 at 23-24 (Roberts). These women received no referral for drug treatment and no opportunity to obtain treatment as an "alternative" to arrest. Trial Tr. 11/21-22/96 at 37-40 (Brown); *see also, e.g.*, Trial Tr. 11/25/96 at 152:2-5 (Powell) ("And I asked, please, what could I do to stop this or could you help me, I mean, because, you know, what is going on? And then she just said you will be locked up.").[8] Even after these women were arrested, no one associated with the Search Policy provided them with any information about treatment.[9]

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[7] *See* S.C. Code Ann. § 44-53-370 (possession of cocaine misdemeanor carries a maximum sentence of two years for first offense); S.C. Code Ann. § 20-7-50 (criminal child neglect felony carries maximum penalty of ten years); S.C. Code Ann. § 44-53-440 (distribution to persons under eighteen carries maximum sentence of twenty years).

[8] Medical records indicate that Ms. Powell repeatedly requested help in obtaining drug treatment. PX 281, 01-M-12-13 (patient "re-emphasizes her desire for drug treatment"); *id.*, 01-M-13 (patient "desires to be free of addiction to cocaine "and "was accepting of information").

[9] Although defendant Condon insisted at trial that the Search Policy was always intended to provide "amnesty," *see generally* Trial Tr. 12/17/96

Women subject to arrest were, in some instances, denied the opportunity to change out of their hospital gowns or to make a phone call to family members to make arrangements for care of their children. *E.g.*, Trial Tr. 11/20/96 at 61:11-14, 68:22-24, 69:5-8 (Singleton); Trial Tr. 11/25/96 at 152:2-11; 157:4 (Powell); Trial Tr. 11/22/96 at 124:20 – 125:17 (Knight); Trial Tr. 11/20/96 at 11:9 – 12:4 (Griffin). Some women were arrested while still bleeding, weak and in pain from having just given birth. *E.g.*, Trial Tr. 11/20/96 at 68 - 69:8 (Singleton); Trial Tr. 11/25/96 at 153:7-20, 155:8-16 (Powell) ("I pretty much couldn't move on my own"); Trial Tr. 11/22/96 at 125, 136:10-13 (Knight) (arrested while bleeding heavily vaginally from her first vaginal childbirth; and still vomiting). Some women were put in handcuffs that were attached to a chain that went around their belly. *E.g.*, Trial Tr. 11/20/96 at 9:12-25 (Griffin). Some were also put in leg shackles when they were taken into custody. *E.g.*, Trial Tr. 11/20/96 at 62 (Singleton); Trial Tr. 11/20/96 at 8 – 22 (Griffin); Trial Tr. 11/25/96 at 190:2-6 (Ferguson). A blanket or sheet would be placed over the woman and she would be wheeled out of the hospital to a waiting police car. *E.g.*, Trial Tr. 11/20/96 at 62-64 (Singleton); Trial Tr. 11/25/96 at 154 – 156 (Powell); Trial Tr. 11/20/96 at 10 (Griffin); Trial Tr. 11/22/96 at 126 (Knight).

Pregnant women who tested positive for cocaine during prenatal care visits or hospitalizations before delivery were supposed to be given an opportunity to obtain treatment before they were arrested, JX 2 (App. 53), while those testing positive at delivery were simply arrested. Even some women in the former category, though, like Plaintiff Lori Griffin, were arrested with no offer of a treatment alternative. Trial Tr. 11/20/96 at 10 (Griffin).

(Condon), in August 1989 he described the policy as regarding "the prosecution of the mothers." PX 6 at 1 (App. 69); *see also* Trial Tr. 12/5/96 at 28:1-3 (Horger) (confirming that "amnesty is a term that was never used in any of the initial meetings concerning the policy").

IV. The Search Policy Was Not Effective in Improving Fetal Health.

The Search Policy did not reduce cocaine use, improve pregnancy outcome, or increase the number of women successfully completing drug treatment. Indeed, if the Search Policy were responsible for a decrease in cocaine-exposed infants, one would expect to see an increase in cocaine-exposed infants after the Search Policy was terminated, but no such increase took place. Trial Tr. 11/25/96 at 49:22-50:21 (Patrick). Moreover, Martha Jessup, Associate Professor of Nursing at the University of California at San Francisco, a specialist in the treatment of pregnant women and substance abuse, testified that numerous studies have shown that punitive programs drive women away from prenatal care and treatment programs, and do not improve pregnancy outcomes for either mother or child. Trial Tr. 12/9/96 at 89:11-97:2, 115-118 (Jessup).

V. Procedural Background.

Petitioners filed suit in 1993 for damages and injunctive relief claiming *inter alia* that urine drug tests performed pursuant to the Search Policy constituted warrantless searches in violation of the Fourth Amendment. After a six week trial, the trial court submitted Petitioners' Fourth Amendment claim to the jury which found against the Petitioners. After inviting Petitioners to file a Rule 50(b) motion on the Fourth Amendment claim, the court then denied that motion. Petitioners appealed this claim, as well as three others, to the United States Court of Appeals for the Fourth Circuit which affirmed the Judgment of the trial court by a 2-1 vote. Petitioners' petition for rehearing *en banc* was denied by the court below by an 8-5 vote.

REASONS FOR GRANTING THE WRIT

This case concerns the scope of the "special needs" exception to the warrant and individualized suspicion requirements of the Fourth Amendment. At stake is the continued vitality of fundamental Fourth Amendment protections where government is involved in traditional enforcement of its duly enacted criminal laws pursuant to policies that target alleged law breakers--in this

case pregnant women--for searches as a means of obtaining evidence for arrests and prosecution. The Fourth Circuit held that the warrant and cause requirements of the Fourth Amendment are not applicable where the government can articulate a non-law enforcement rationale for the program or policy, even where the policy implements the state's criminal law by traditional means of searches, arrests and prosecutions. We submit that this radical extension of the "special needs" doctrine is entirely inconsistent with this Court's Fourth Amendment jurisprudence and, if allowed to stand, threatens the very integrity of the Fourth Amendment.

The decision by the Fourth Circuit would permit law enforcement or other governmental officers to engage in searches as a means of gaining evidence for arrests and prosecutions, without a warrant or individualized suspicion, so long as the government can present a health or safety reason for its actions. But nearly every application of the criminal law serves some health or safety purpose. Under the novel theory espoused by the Fourth Circuit any such articulation could be the basis of a claim for the "special needs" exemption. This Court's cases, however, permit "special needs" analysis only where the law enforcement purpose (if any) is clearly secondary or incidental to the non-law enforcement purpose. Thus, except in the case of probationers, this Court has never approved the application of the "special needs" doctrine where the state conducts the search as a direct predicate to arrest and prosecution.

Here, the record plainly establishes that the Search Policy and program was to be directly effectuated by means of the arrest and prosecution of the individuals who were searched. In these circumstances, as a Fourth Amendment issue, it matters not that the state may have had the safety and health of the pregnant mother or the fetus in mind. Once it implements this policy by normal law enforcement means, it must comply with the warrant and cause components of the Fourth Amendment. As the Fifth Circuit stated in *United Teachers v. Orleans Parish School Board*, 142 F.3d 853, 857 (5th Cir. 1998):

> special needs are just that, special, an exception to the command of the Fourth Amendment. It cannot

> be the case that a state's preference for means of detection is enough to waive off the protections of privacy afforded by insisting upon individualized suspicion. It is true that the principles we apply are not absolute in their restraint of government, but it is equally true that they do not kneel to the convenience of government, or allow their teaching to be so lightly slipped past.

I. By Applying the Special Needs Exception to the Discretionary Searches of Persons Conducted in This Case for Law Enforcement Purposes, the Fourth Circuit's Decision Conflicts with the Decisions of This Court.

It is well-settled that a search conducted without a warrant issued upon probable cause, like the urine drug screens at issue in this case, is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted); *see also Flippo v. West Virginia*, 120 S. Ct. 7 (1999). It is equally well-settled that urine drug screens are searches of the person governed by the Fourth Amendment. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). The only exception asserted by the Respondents in this case was consent. Accordingly, the district court correctly instructed the jury that the searches here were "unreasonable and in violation of the Constitution of the United States, unless the defendants have shown by the greater weight or preponderance of the evidence that the plaintiffs consented to those searches." Tr. Jury Charge at 18:20-23 (App. 48).

Rather than examining whether the Petitioners actually provided valid consent to the urine drug screens, however, the Fourth Circuit held that these searches were "reasonable" under the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment, even though the Search Policy was specifically designed to gather evidence to be used against the Petitioners for criminal purposes. *See supra* at 2-4. The court below ignored that the Search Policy expressly served the normal needs of law enforcement by prescribing searches for evidence of crimes and delineating standards for maintaining a

proper chain of custody. The court reasoned that "the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals; the method chosen to address that need . . . effectively advanced the public interest; and the intrusion suffered by Appellants was minimal." *Ferguson,* 186 F.3d at 479.

A. The Special Needs Exception Has Never Before Been Applied to a Search Policy Serving the Normal Needs of Law Enforcement.

Application of the exception here conflicts with this Court's decisions, which have repeatedly limited the special needs exception to administrative searches that were designed for other than law enforcement purposes, and could not be implemented by traditional law enforcement means. *See Chandler v. Miller,* 520 U.S. 305, 314 (1997) ("When such 'special needs' – *concerns other than crime detection* – are alleged in justification of a Fourth Amendment instrusion, courts must undertake a context-specific inquiry.") (emphasis added); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 651-53 (1995) (applying exception where results of search available only to school officials); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (applying exception where search serves "special governmental needs, *beyond the normal need for law enforcement*") (emphasis added); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 & n.5 (1989) ("While [the provision permitting drug testing of railroad personnel] might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been so used."); *New Jersey v. T.L.O.*, 469 U.S. 325, 356 (1985) (Brennan, J., concurring in relevant part) (In a search conducted under promulgated regulations, the state may be able to avoid the Fourth Amendment if it can establish a "special governmental interest *beyond the need merely to apprehend lawbreakers.*") (emphasis added).[10]

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[10] This Court looks to four factors to determine whether the special needs exception is applicable to a given search: 1) there must be a truly special need that is not merely symbolic, *see Chandler v. Miller*, 520 U.S. at 322

This Court has stressed that results from the searches in question in the "special needs" cases could not be, or simply were not, used in criminal prosecution. For example, in *Von Raab*, this Court emphasized that the test results in the case could "not be used in a criminal prosecution of the employee without the employee's consent." *Von Raab*, 489 U.S. at 666. Similarly, in *Skinner*, where the respondents had claimed that the test results might be used by the police, *see* 489 U.S. at 621 n.5, the Court noted that nothing in the record indicated that the government would use the testing results for any purpose other than employment purposes. *Id.* at 626 n.7.

Indeed, in none of the "special needs" cases cited by the Fourth Circuit were the results of the searches intended for use in criminal prosecutions.[11] *See, e.g., Von Raab*, 489 U.S. at 666 (applying special needs exception to program of drug testing of certain employees in sensitive positions by United States Customs Service where "test results may not be used in a criminal prosecution of the employee without the employee's consent"); *Acton*, 515 U.S. at 651; *Skinner*, 489 U.S. at 621 n.5 (record did not disclose that results of drug testing of railroad personnel was

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(1997); 2) that need must be beyond the normal need for law enforcement, *see, e.g., Von Raab*, 489 U.S. at 665; 3) the need must make the warrant requirement impracticable, *see, e.g., Skinner*, 489 U.S. at 624; and 4) and the need must make the probable cause requirement impracticable, *see, e.g., id.* at 631.

[11] In only one case has this Court sanctioned the application of the special needs exception for law enforcement purposes, and that case involved searches of people with specially limited constitutional protections. In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court allowed a warrantless search by a probation officer at the home of a criminal defendant on probation. The search fell within the "special needs" exception even though the results of the search were used for law enforcement purposes only because probationers have lesser constitutional protections than the public at large. *See id.* at 875 (previous finding of guilt of probationer permitted impingement on privacy that would not be constitutional if applied to the public at large); *see also Penn. Bd. of Parole v. Scott*, 524 U.S. 357, 118 S. Ct. 2014, 2021 (1998) (exclusionary rule inapplicable in parole revocation proceedings); *Ferguson,* 186 F.3d at 486 (Blake, J., dissenting). Although a "special needs" case, *Griffin* is limited to the special circumstance of those with limited constitutional protections, a situation clearly not present here.

"intended to be, or actually has been, [released to law enforcement authorities]"); *T.L.O.*, 469 U.S. 325 (investigative activities of school officials); *Yin v. State of California*, 95 F.3d 864, 869, 873 (9th Cir. 1996) (state employee required to submit to medical examination solely to determine her ability to perform normal work duties); *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993) ("investigative home visits are not subject to the same scrutiny as searches in the criminal context"); *Dimeo v. Griffin*, 943 F.2d 679, 685 (7th Cir. 1990) (en banc) (jockeys and other participants in horse racing required to undergo random drug tests as condition of occupational licensure); *see also United Teachers*, 142 F.3d at 856 ("There are exceptions based on 'special needs, beyond the normal need for law enforcement.'") (quoting *Skinner*, 489 U.S. at 619). *See generally Ferguson v. City of Charleston*, 186 F.3d at 486-87 (Blake, J., dissenting) (discussing cases).

B. The Exceptions to the Warrant and Probable Cause Requirements for Law Enforcement Searches Relied on By the Court Below Have No Application Here.

The era is past in which pregnant women were regarded as peculiarly subject to the authority of the state because of their status as child-bearers. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 896-98 (1992); *id.* at 896 ("The effect of state regulation [with respect to a woman's pregnancy] on a woman's protected liberty is doubly deserving of scrutiny . . . , as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.").[12] Yet the Fourth Circuit's reliance on *Michigan Dep't of State Police v. Sitz*, 496 U.S. at 444, and *Griffin v. Wisconsin*, 483 U.S. 868 (1987), relegates pregnant women in their doctors'

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[12] *See also Casey*, 505 U.S. at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law . . . if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.").

offices to a status comparable to the one occupied by convicted criminals on probation, leaving them with less protection under the Fourth Amendment than this Court provides motorists in their cars.

As the court below notes, this Court has applied a balancing test to uphold the constitutionality of government checkpoints set up to detect drunken drivers, *Sitz*, 496 U.S. at 444, and illegal immigrants, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). However, the Fourth Circuit's reliance on these cases ignores the many distinctions between checkpoint searches and the search at issue here.

This Court has stressed that the checkpoint cases involved no more than an "initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." *Sitz*, 496 U.S. at 450-51. Indeed, the very randomness and universality of these checkpoint seizures is what saves them by preventing their abuse. As this Court cautioned in distinguishing between such checkpoint "seizures" in which drivers are observed by officers who stand outside the stopped car, and situations, such as those at issue here, where the personal property or body of an individual itself is searched: "[D]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard." *Sitz*, 496 U.S. at 451 (citation omitted). Thus, under the Fourth Circuit's ruling, which guts the individualized suspicion standard for low-income pregnant women seeking prenatal care late in pregnancy (and who thus fall within the Search Policy's dragnet), pregnant women have fewer rights than motorists.

Similarly, at least since *United States v. Ortiz*, 422 U.S. 891 (1975), it has been clear that the limited exception to the individualized suspicion requirement that justifies temporary seizures of motorists at properly operated checkpoints does not serve also to allow searches of one's person or even one's effects. As the Court held in *Ortiz*, "at checkpoint stops removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Ortiz*, 422 U.S. at 896-97; *see also Martinez-Fuerte*, 428 U.S. at 567 (after brief questioning at illegal immigrant checkpoint, any further invasive conduct must "be based on consent or probable cause")

(citations omitted); *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987) (pat-down searches of known KKK members entering rally unconstitutional despite record of violent behavior). Under the Fourth Circuit's ruling, though, the body of a pregnant woman can be searched for law enforcement purposes in the privacy of her doctor's office without consent or probable cause.

Furthermore, the Search Policy's allowance for discretion takes it completely outside the bounds of *Sitz* and the other checkpoint cases relied upon by the Fourth Circuit, because the special needs exception only applies to policies authorizing non-discretionary searches. *Ferguson*, 186 F.3d at 479 ("cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches.") (quoting *Turner v. Dammon*, 848 F.2d 440, 446-47 (4th Cir. 1988)). As this Court noted in *Sitz*, "standardless and unconstrained discretion is the evil the Court has discerned." *Sitz*, 496 U.S. at 454 (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)); *see also T.L.O.*, 469 U.S. at 342 n.8; *Prouse*, 440 U.S. at 654-55. As this Court held in a case involving an attempted search of a student's backpack by school officials, "a search conducted in the absence of individualized suspicion would be reasonable only in a narrow class of cases," where, *inter alia*, "'safeguards are available to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" *DesRoches v. Caprio*, 156 F.3d 571, 575 (4th Cir. 1998) (quoting *T.L.O.*, 469 U.S. at 342 n.8).

But the court of appeals erred in asserting that the Search Policy at issue here involved such neutrality. Although, as the panel notes, "the urine drug screens were conducted whenever one of the criteria for testing was met; a treating physician had no discretion to decline to order a urine test under the Search Policy," *Ferguson*, 186 F.3d at 479, the problem here was that the criteria themselves included such discretionary criteria as "inadequate prenatal care," women with "no prenatal care," and women with "[p]reviously known drug or alcohol abuse." JX 2 at MUSC-763; Trial Tr. 12/10/96 at 220-227 (Newman); JX 2 at MUSC-763; Trial Tr. 12/5/96 at 9-18 (Horger); Trial Tr. 11/21-22/96 at 28:17 – 30:15 (Brown). As Plaintiffs' expert Ira Chasnoff, M.D., testified,

such "medically senseless" criteria, Trial Tr. 12/4/96 at 15-17, 42 (Chasnoff), invited discriminatory testing because selecting which patients to test based on lack of prenatal care constituted a proxy for selecting poor African-American patients,[13] and because giving physicians the discretion to determine whom to test would produce a racially disproportionate impact. Trial Tr. 12/4/96 at 15-17, 42 (Chasnoff).[14]

The Fourth Circuit's reliance on *Griffin v. Wisconsin*, 483 U.S. 868 (1987), is similarly misplaced for the reasons noted above: probationers have lesser constitutional protections than the public at large. *See Griffin*, 483 U.S. at 875 (previous finding of guilt of probationer permitted impingement on privacy that would not be constitutional if applied to the public at large).[15] *See infra* at 14 n. 11. Under the Fourth Circuit's ruling, pregnant women are improperly placed in a lower status than the public at large, and are relegated to the same level of constitutional protections as parolees, probationers and prisoners.

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[13] Numerous studies show that policies concerning drug use among pregnant women are implemented in a racially biased manner. Trial Tr. 12/4/96 at 17-20 (Chasnoff); *see also* Ira Chasnoff, M.D., Harvey J. Landress, A.C.S.W., Mark E. Barrett, Ph.D., "The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida," 322 New Eng. J. of Med. 1202 (Apr. 26, 1990).

[14] As the court of appeals found, the Search Policy did indeed have a racially discriminatory impact on African-American women. *Ferguson*, 186 F.3d at 481. Moreover, after implementation of the new subjective criteria for testing, the proportion of African American women tested rose by an amount equal to approximately 10.5 standard deviations. Trial Tr. 11/25/96 at 139-141 (Shapiro).

[15] *See also United States v. Jarrad*, 754 F.2d 1451, 1453 (9th Cir. 1985) (warrantless parole search does not run afoul of the Fourth Amendment when the parole officer reasonably believes such search is necessary in the performance of his duties) (citing *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975) (en banc)).

C. The "Special Needs" Exception Does Not Apply Here Because the Need Articulated is Merely "Symbolic."

The court below also erred by applying the "special needs" exception without considering that the claimed non-law enforcement need in this case was purely "symbolic," not special. *See Chandler v. Miller*, 520 U.S. 305, 322 (1997). In *Chandler*, this Court found the drug-testing scheme for candidates for elected office in Georgia unconstitutional because "[t]he need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Id.; see also Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (government had not shown that the need to test customs employees for drugs was special because "neither frequency of use nor connection to harm is demonstrated or even likely."); *id.* (the testing program was "a kind of immolation of privacy and human dignity in symbolic opposition to drug use.")

The courts of appeals have relied on *Chandler* to determine whether the need is "special" and not "symbolic." For example, in *United Teachers of New Orleans v. Orleans Parish School Board*, 142 F.3d 853, 856-57 (5th Cir. 1998), the Fifth Circuit held that a drug testing program for teachers involved in workplace accidents was not based on a special need because the state interest was not well-defined or based on "demonstrated realities":

> . . . [I]t is self-evident that we cannot rest upon the rhetoric of the drug wars. As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use," that troubled Justice Scalia in *Von Raab*.

Id. at 857 (citation omitted) (rules on testing both under- and overinclusive). Similarly, in *19 Solid Waste Department Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072-75 (10th Cir. 1998), the Tenth Circuit held that a drug testing program for garbage truck mechanics was not based on a special need because

the program "lacks a real capacity to address drug use in the workplace." *Id.* at 1074.

In this case as well, the Search Policy was similarly under and over inclusive, and "lack[ed] a real capacity to address drug use" by pregnant women. The Respondents could not establish a sufficient nexus between the testing program and their claimed purpose of promoting healthy pregnancies, because the testing criteria used here was both under- and overinclusive. *See United Teachers*, 142 F.3d at 856-57. It was underinclusive because women were only reported for positive cocaine tests and not for the numerous other harmful substances also tested. It was overinclusive because it tested all women who had "inadequate prenatal care," despite the fact that this is more of a marker for poverty and racial status than it is for substance abuse. *See id.* (striking Search Policy of testing teachers who have been injured because of "insufficient nexus between suffering an injury at work and drug impairment").

Thus, because the decision of the court below conflicts with the decisions of this Court on the important question of the applicability of the special needs exception, the petition should be granted. Sup. Ct. R. 10(c).

II. The Opinion of the Court Below Decides an Important Federal Question That Has Not Been, but Should Be Decided by This Court and Conflicts with Decisions from Several United States Courts of Appeals, All of Which Have Rejected Application of the Special Needs Exception to Search Policies with a Dual Purpose.

As this Court stated in *Skinner*:

> We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program.

Skinner, 489 U.S. at 621 n.5; *see also T.L.O.*, 469 U.S. at 341 n.7 ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question"). This case squarely presents the important federal question left open by *Skinner* and *T.L.O.*.

To the extent that some "special" need beyond the normal needs of law enforcement was even slightly served by the Search Policy at issue here,[16] *but see supra* at 18-20, this case presents the important question, "le[ft] for another day" in *Skinner*, of "whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature" of the Search Policy. This question, of whether a search policy serving both the normal needs of law enforcement, but *also* serving minimally some other "special need," may be exempt from the Fourth Amendment's requirements of warrants and individualized suspicion, is "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

Although this Court has not addressed this question in its "special needs" cases, this Court's discussion of the issue of overlapping law enforcement and administrative purposes in cases concerning administrative searches is illuminating here. For example, in *Michigan v. Clifford*, 464 U.S. 287 (1984), the Court evaluated a search of a home in the aftermath of a fire, distinguishing between the search to determine the cause of the fire and a second separate search to gather evidence of criminal arson. *Id. at 294*. The Court held that, unless a search was justified by exigent circumstances or consent, even a search to determine the cause of the fire required a warrant, albeit an administrative one.

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[16] At best, the Search Policy here was designed with a dual purpose: to improve the health of fetuses and to collect evidence for criminal prosecutions. *Ferguson*, 186 F.3d at 484 (Blake, J., dissenting) (noting that although the health of fetuses "was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers . . . ").

Id. Moreover, noting that "the object of the search determine[d] the type of warrant required,"*id.*, the Court stated:

> If the *primary* object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. . . . If the *primary* object of the search is to gather evidence of a criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

Id. at 294 (emphasis added).

On the other hand, in the context of administrative inspections of a "pervasively regulated business," where the privacy interests of property owners are reduced, *see New York v. Burger*, 482 U.S. 691 (1987), this Court approved an administrative search without a warrant, even where the search might also uncover evidence of crimes. *Id.* at 716. The Court stressed that the administrative scheme in question was not being used as a "'pretext' to enable law enforcement authorities to gather evidence of penal law violations," *id.* at 716 n.27, indicating that if the administrative purpose is dominant and the law enforcement goals are merely incidental to the regulatory goals, the search should be analyzed under the administrative search exception. *Id.* at 716-17. The court below, however, did not apply even this lower level of review to searches of the bodies of pregnant women, examining neither whether the primary object of the search was to gather evidence of criminal activity, nor whether the drug testing scheme was a "pretext" to enable authorities to gather evidence of penal law violations. Thus, under the Fourth Circuit's approach, application of the "special needs" exception to a dual purpose case such as this one, where the law enforcement goals of the search policy are so extensive, does not even provide the level of protection provided in *Clifford* and *Burger*.

Indeed, no other court has applied the "special needs" exception in circumstances similar to this case. Application of the "special needs" exception in the lower courts reveals two distinct categories: cases in which there is no law enforcement purpose whatsoever, and cases in which the person being searched has

reduced constitutional rights because of his or her status as a parolee, probationer or prisoner, where there is a special need unrelated to law enforcement coupled with an overlapping law enforcement purpose. The courts of appeals have applied the "special needs" exception only in these two categories.

In the first category, the courts of appeals have allowed drug testing in various fields of employment and in a variety of school situations, following this Court's lead in *Skinner*, 489 U.S. 602, *Von Raab*, 489 U.S. 656, *O'Connor v. Ortega*, 480 U.S. 709 (1987), *Acton*, 515 U.S. 646, and *T.L.O.*, 469 U.S. 325. In each of these cases a key factor in applying the "special needs" exception was that there was no law enforcement use of the drug testing results. *See, e.g.*, *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (school custodian); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998) (students involved in extra-curricular activities); *Stigile v. Clinton*, 110 F.3d 801 (D.C. Cir. 1997) (Office of Management and Budget employees); *International Brotherhood of Electrical Workers v. United States Nuclear Regulatory Commission*, 966 F.2d 521 (9th Cir. 1992) (clerical, warehouse, and maintenance employees at a nuclear power plant); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (applicants for Department of Justice positions); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (fire fighters and police officers); *Bluestein v. Department of Transportation*, 908 F.2d 451 (9th Cir. 1990) (various categories of employees in the private commercial aviation industry); *Transport Workers' Union v. Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (3d Cir. 1988) (safety sensitive transit authority employees); *Thomson v. Marsh*, 884 F.2d 113 (4th Cir. 1989) (civilian employees at chemical weapons plant); *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (student athletes).

Second, following *Griffin*, many courts have applied the "special needs" exception to cases involving searches of probationers, parolees, and prisoners, all people with reduced constitutional protections because of a prior criminal conviction. *See* 483 U.S. at 873-74 (search of a probationers' residence); *see, e.g.*, *Roe v. Bosco*, 193 F.3d 72 (2d Cir. 1999) (convicted sex

offenders); *United States v. Payne*, 181 F.3d 781 (6th Cir. 1999) (parolee); *United States v. Vincent*, 167 F.3d 428 (8th Cir. 1999) (terms of probation); *United States v. Jones*, 152 F.3d 680 (7th Cir. 1998) (parolee); *United States v. Ward*, 131 F.3d 335 (3d Cir. 1997) (person convicted of sexual assault); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) (persons convicted of murder or any sexual offense); *United States v. Lewis*, 71 F.3d 358 (10th Cir. 1995) (parolee); *Shea v. Smith*, 966 F.2d 127 (3d Cir. 1992) (probationer); *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (parolee); *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990) (probationer); *United States v. Cardona*, 903 F.2d 60 (1st Cir. 1990) (parolee); *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) (prisoner); *United States v. Richardson*, 849 F.2d 439 (9th Cir. 1988) (probationer). Like this Court in *Griffin*, 483 U.S. at 874 (probationers "do not enjoy 'the absolute liberty to which every citizen is entitled . . .'") (quoting *Morissey v. Brewer*, 408 U.S. 471, 480 (1972)), the courts in these cases stressed the limited constitutional protections available to those convicted of a crime. *See, e.g.*, *Rise*, 59 F.3d at 1560 ("Once a person is convicted of one of the felonies included as predicate offenses . . . his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling."); *Hill*, 967 F.2d at 909 ("In fact, parole may be an even more severe restriction on liberty because the parolee has already been adjudged in need of incarceration."); *Shea*, 966 F.2d at 131 (reciting *Griffin*'s analysis relying on the fact that "probationers have a diminished expectation of privacy by virtue of their status").

Beyond these two classes of warrantless searches not based on probable cause, however, the courts of appeals that have dealt with this issue, with the exception of the Fourth Circuit in this case, have uniformly found that searches with a law enforcement purpose not involving persons in prison or on parole or probation are outside the "special needs" exception, even though the government claims that an important, and even compelling, non-law-enforcement purpose is served by the policy at issue. For example, in *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993), the court rejected application of the "special needs" exception to a

police officer's search of a child's vaginal area and of the child's parent's home. *Id.* at 790-91. While recognizing the importance of "society's interest in protecting young children from abuse and neglect," *id.* at 788, the court distinguished between a search by a social worker where the "principal focus is the welfare of the child," and the search by the police officer where the "focus was not so much on the child as it was on the potential criminal culpability of her parents." *Id.* at 791.

Similarly, in *United Teachers*, the Fifth Circuit rejected application of the special needs exception to a policy of drug testing the urine of teachers injured on the job despite recognizing the state's important interest in responding to the presence of drugs in the public schools. *United Teachers*, 142 F.3d at 856-57. There, the court held that "[t]he two parish school boards have offered no legal justification for insisting upon drug testing urine [of teachers injured on the job] without a showing of individualized suspicion of wrongdoing in a given case, *certainly nothing beyond the ordinary needs of law enforcement.*" *Id.* (emphasis added).

Moreover, in *Nelson v. City of Irvine*, 143 F.3d 1196, 1203 (9th Cir. 1998), the Ninth Circuit rejected application of the special needs exception to blood tests conducted on DUI arrestees, despite the state's interest in ensuring the safety of public roadways. In *Nelson*, the court noted that in *Skinner*, this Court cited as examples of "special needs" cases, "searches of probationers' homes, searches of the premises of highly regulated businesses, work-related searches of employees' desks and offices, searches of students' property by school officials and body cavity searches of prison inmates." *Id.* The court held that "[i]t is untenable to equate the police DUI traffic stops with the pervasively regulated environments where special needs can justify even suspicionless drug testing," *Id. See also United States v. Colyer*, 878 F.2d 469, 478 (D.C. Cir. 1989) (rejecting application of special needs test to search for drugs by DEA agent and his drug sniffing dog, the court noted that "[i]n no case has the Supreme Court indicated that a search for evidence qua evidence might qualify as a 'special need' that would warrant reasonableness balancing. Common sense suggests that it is not.").

Certiorari is, therefore, warranted under Supreme Court Rules 10(a) and 10(c) because application of the "special needs" exception to a policy serving both law-enforcement and non-law enforcement purposes raises an important issue of federal law as yet undecided by this Court and conflicts with decisions from four other courts of appeals.

III. Assuming, *Arguendo*, that the "Special Needs" Exception Does Apply Here, the Court Below Erred By Applying the Balancing Test Used in "Checkpoint Seizure" Cases.

As this Court has held, in "special needs" cases, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-66. Assuming, *arguendo*, that the need in this case is indeed "special" and is sufficiently "beyond the normal need of law enforcement," the Fourth Circuit ignores this important balancing step that is necessary under this Court's precedent before concluding that the "special needs" exception actually applies. Instead of analyzing whether the warrant and probable cause requirements were impracticable on the facts before it, the Fourth Circuit leapfrogged directly to the application of the balancing test applied in checkpoint "seizure" cases which requires "consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, *i.e.*, the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective standpoint." *See Ferguson*, 186 F.3d at 476.[17] Thus, the court below did not consider at all whether it would have been impractical to require a warrant or some level of individualized suspicion in this context.

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[17] Neither case cited by the majority, *see Ferguson*, 186 F.3d at 476, to support its use of this test is applicable here. The *Sitz* checkpoint "seizure" test is inapposite in this discretionary program for the reasons outlined above, and *DesRoches v. Caprio*, 156 F.3d 571, 574 (4th Cir. 1998), does not appear to apply this test at all.

Second, even in applying the *Sitz* balancing test the court below erred in two additional ways. For the reasons outlined above, there was not sufficient evidence that the Search Policy was "effective." *Supra* at 9-10. As the dissent notes, *Ferguson*, 186 F.3d at 488, seven of the ten Petitioners were arrested *after giving birth*, often directly from their hospital beds, wearing nothing but hospital gowns, rather than during the prenatal period, when intervention according to the Respondents was crucial. So the searches at issue here were effective in identifying women to arrest, but not in insuring a drug-free pregnancy. Nor did Respondents present any empirical data on the effectiveness of the targeted testing program in achieving its goal. *Cf. Sitz*, 496 U.S. at 454-55 (noting importance of the empirical data on effectiveness present in that case).

Moreover, contrary to the finding of the court below, *see Ferguson*, 186 F.3d at 479, nothing about the intrusiveness of the searches here was "minimal." The court below relies on the analysis in *Sitz* to evaluate the intrusiveness of the urine drug tests here, using the "'duration of the seizure and the intensity of the investigation'" to measure "the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained." *Id.* (quoting *Sitz*, at 452). But this case does not involve such a "minimal" intrusion as a quick glance into a car at a checkpoint on a highway. *See Sitz*, 496 U.S. at 452-53 (where signs warning of checkpoint stops allow person to avoid the stop, result is "appreciably less" "subjective intrusion" than even "roving patrols"). Rather, the Petitioners' *bodies* were searched. Such a nonconsensual search of a person's body for evidence of crime is among the most intrusive searches imaginable. *See Rochin v. California*, 342 U.S. 165, 210 (1952).

Indeed, this Court has established that drug testing invades personal privacy in a fashion that brings the requirements of the Fourth Amendment to bear in full force. *New Jersey v. T.L.O.*, 469 U.S. at 337 ("[w]e have recognized that even a limited search of the person is a substantial invasion of privacy") (citing *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967)). As a result, it has approved suspicionless drug testing as "reasonable" only in a narrowly circumscribed set of circumstances. In *Skinner* and *Von Raab*, for

example, the Court upheld carefully constrained programs that applied only to a limited number of government employees. By contrast, the program at issue here – if upheld – puts at risk the privacy of every pregnant woman in South Carolina. In effect, it decrees that women, by becoming pregnant and seeking medical attention, place themselves in the same category as minor students in the custody of the public schools: a "custodial and tutelary" relationship "permitting a degree of supervision and control that could not be exercised over free adults." *Acton*, 515 U.S. at 655.

This result is radically at odds with the assumptions that have historically attended medical treatment of adults, in which the obligation of the medical profession is to guard the confidences of patients as a "sacred trust." And it is irreconcilable with the teaching of this Court in *Planned Parenthood v. Casey* that it is unconstitutional to treat pregnant women as dependents requiring the tutelage of the state. *Planned Parenthood*, 505 U.S. at 895 (contrasting the "quite reasonable assumption that minors will benefit from consultation with their parents" with the constitutional impermissibility of adopting "parallel assumption about adult women").

Nor does the fact that the urine drug tests took place as part of a medical examination minimize the intrusiveness of the search.[18] Indeed, the fact that the Petitioners had no idea that their physicians were revealing what the Petitioners believed to be confidential information[19] to law enforcement officers rather than simply using the information for medical purposes only increases the intrusive aspect of the search. Just because one does not know that one is being searched for criminal purposes does not lessen the impact of the invasion. For example, a search of one's home even when one was not there would not be considered minimal, even

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[18] Both cases cited by the court of appeals, *see* 186 F.3d at 479, involved searches for purposes of employment and not for criminal investigation. *See Yin*, 95 F.3d at 869; *Dimeo*, 943 F.2d at 682 (tests for noncriminal purposes); *id.* (distinguishing person who has frequent medical examinations because of illness from person who has them because of a job).

[19] MUSC's Patient Handbook, given to all patients, stated "medical records and all communication pertaining to your care are also treated as confidential." PX 105 (App. 75).

though searching the home when the occupants are not inside would *drastically* minimize "fear and surprise" on the part of those searched. *Cf. Ferguson,* 186 F.3d at 479; *see also id.* at 488 (Blake, J., dissenting).

Therefore, certiorari is also warranted to correct the Fourth Circuit's application of the "special needs" exception as it conflicts with this Court's past decisions. Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

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Dated: December 1, 1999.

No. 99-____

99 936 DEC 1 - 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR *WRIT OF CERTIORARI*

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PUBLISHED
UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT.
186 F.3d 469

Crystal M. FERGUSON; Paula S. Hale; Ellen L. Knight; Patricia R. Williams; Lori Griffin; Pamela Pear; Sandra Powell; Laverne Singleton; Theresa Joseph; Darlene M. Nicholson, Plaintiffs-Appellants,
and
State-Record Company, Incorporated; The Evening Post Publishing Company, Intervenors-Plaintiffs,
v.
CITY OF CHARLESTON, SOUTH CAROLINA; Dr. Harrison L. Peoples; Dr. Thomas C. Rowland, Jr.; Dr. Stanley C. Baker, Jr.; Dr. Charles B. Hanna; Dr. Cotesworth P. Fishburne; Dr. E. Conyers O'Bryan; Melvyn Berlinsky; Patricia T. Smith; M.J. Cooper; Herbert C. Granger; Robert C. Lake, Jr.; Phillip D. Sasser; Claudia W. Peoples; Dr. Carroll V. Bing, Jr., in their official capacities as Trustees of the Medical University of South Carolina; Reuben Greenberg; Charles Molony Condon; David Schwacke; Shirley Brown, R.N.; Edgar O. Horger, III, M.D.; Victor Del Bene; John Sanders; William B. Pittard, M.D.; Roger Newman, M.D.; Harold Bivins, M.D.; Melesia Henry, R.N., personally and in their official capacities, Defendants-Appellees.

Center For Constitutional Rights, Amicus Curiae.

No. 97-2512

Appeal from the United States District Court for the District of South Carolina, at Charleston.
C. Weston Houck, Chief District Judge.
(CA-93-2624-2-12)

Argued: Oct. 26, 1998.

Decided: July 13, 1999.

Before WILKINS and NIEMEYER, Circuit Judges, and BLAKE, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge WILKINS wrote the majority opinion, in which Judge NIEMEYER joined. Judge BLAKE wrote an opinion dissenting in part.
Affirmed.

Blake, J., filed opinion dissenting in part.

COUNSEL

ARGUED: Priscilla Joyce Smith, Center for Reproductive Law & Policy, New York, New York, for Appellants. Barbara Wynne Showers, Joseph Camden Wilson, IV, Hood Law Firm, L.L.C., Charleston, South Carolina, for Appellees. ON BRIEF: Susan K. Dunn, Charleston, South Carolina, for Appellants. Robert H. Hood, Hood Law Firm, L.L.C., Charleston, South Carolina, for Appellees. Kimani Paul-Emile, Barbara Olshansky, Center for Constitutional Rights, New York, New York, for Amicus Curiae.

OPINION

WILKINS, Circuit Judge:

This litigation involves constitutional, statutory, and common-law challenges to a policy instituted by the Medical University of South Carolina (MUSC) in consultation with the Solicitor of the Ninth Judicial Circuit of South Carolina; the City of Charleston, South Carolina Police Department (CCPD); and various social services agencies. The policy was intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling. Appellants, ten women who were tested pursuant to the policy, brought this action claiming, inter alia, that the testing of their urine for evidence of cocaine use constituted a warrantless search in violation of the Fourth Amendment; that the policy had a racially disparate impact in violation of regulations implementing Title VI of the Civil Rights

Act of 1964, as amended, 42 U.S.C.A. §§ 2000d to 2000d-6 (West 1994 & Supp. 1998); that the disclosure of medical information to law enforcement personnel violated their constitutional right to privacy; and that MUSC personnel committed the state-law tort of abuse of process in administering the policy. The district court entered judgment for Appellees[1] on each of these claims at various stages of the litigation. For the reasons set forth below, we affirm.

I.

In the fall of 1989, MUSC instituted a policy providing for the testing of the urine of pregnant women suspected of cocaine use and for the reporting, under certain circumstances, of test results to law enforcement officials. The impetus behind the policy came from Nurse Shirley Brown, a case manager in the obstetrics department at MUSC. Brown was concerned about a perceived rise in cocaine use among pregnant women and the consequences for the health of the users' children. Brown spoke with the General Counsel for MUSC who in turn contacted the Ninth Circuit Solicitor (chief prosecuting attorney) concerning the development of a policy to address the problem. Eventually, a task force was formed that included Nurse Brown, the Solicitor, the Chief of CCPD, and doctors from various departments involved in perinatal care at MUSC. During the course of task force meetings, the Solicitor informed the participants that because a viable fetus was a "person" under South Carolina law, a woman who ingested cocaine after the 24th week of pregnancy was guilty of the crime of distributing a controlled substance to a person under the age of eighteen, see S.C. Code Ann. § 44-53-440

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[1]The complaint filed by Appellants named as defendants the City of Charleston, South Carolina; the trustees of MUSC; CCPD Chief Reuben Greenberg; former Ninth Circuit Solicitor Charles Condon; current Ninth Circuit Solicitor David Schwacke; Nurse Shirley Brown; Nurse Melesia Henry; and several physicians and MUSC officials involved in obstetrical and neonatal care at MUSC. For ease of reference, we refer to these parties collectively as "Appellees." The parties evidently agree that only injunctive relief is being sought against those individual Appellees who are state officers sued in their official capacities. See Edelman v. Jordan, 415 U.S. 651, 677, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

(Law.Coop.Supp.1997).[2]

Pursuant to the policy formulated by the task force and implemented in late October or early November 1989, urine drug screens to detect evidence of cocaine use were given to all MUSC maternity patients when certain indicia of cocaine use were present: (1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without an obvious cause. When a patient tested positive, the test result was reported to CCPD or a representative of the Solicitor's Office and the patient was arrested for distributing cocaine to a minor. In early 1990, the policy was amended so that a patient who tested positive for cocaine use was given a choice between being arrested and receiving drug treatment. Positive test results of a patient who elected drug treatment were not forwarded to CCPD, and the patient was not arrested, unless she tested positive for cocaine use a second time or failed to comply with treatment obligations. A patient who was arrested could avoid prosecution by completing a drug treatment program. Upon successful completion of such a program, the charges would be dismissed.[3]

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[2] The South Carolina Supreme Court previously had held that a viable fetus was a person within the meaning of South Carolina criminal law. See State v. Horne, 282 S.C. 444, 319 S.E.2d 703, 704 (1984). Subsequently, the court upheld a conviction for criminal child neglect in a case involving a woman who ingested cocaine while pregnant with a viable fetus. See Whitner v. State, 328 S.C. 1, 492 S.E.2d 777, 778-84 (1997), cert. denied, --- U.S. ---, 118 S.Ct. 1857, 140 L.Ed.2d 1104 (1998).

[3] The dissent repeatedly characterizes Appellees' actions in implementing the policy as animated by a vindictive purpose to prosecute women who used cocaine during pregnancy. The record simply does not support this. Although the very real possibility of arrest was employed as an incentive for women to comply with treatment obligations, the record is abundantly clear that Appellees were motivated by a desire to protect the health of children born at MUSC, and that the policy was formulated and implemented with this goal in mind. Indeed, the district court so found. See J.A. 2739 (finding that the "goal [of the policy] was not to arrest patients but to facilitate their

Implementation of the policy by MUSC involved substantial record keeping and educational efforts. A maternity patient whose urine tested positive for cocaine use was shown an educational video concerning the harmful effects of cocaine use during pregnancy and was given letters from the Solicitor's Office and the hospital staff relating to the policy. In addition, MUSC personnel advised the patient of the need to obtain substance abuse counseling and scheduled an initial appointment for such counseling. The patient then was given a document noting the date and time of the appointment. Additionally, MUSC maintained records on patients whose urine tested positive for cocaine use as a means of tracking them to ensure that they complied with the

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treatment and protect both the mother and unborn child"). And, the evidence in the record more than amply supports this finding. See, e.g., J.A. 583 (testimony of Nurse Shirley Brown) (confirming that the reason for the policy was "concern ... for the health and safety and care of these fetuses and soon to be children"); id. at 602 (testimony of Nurse Shirley Brown) (agreeing that "it was always the intention of you and the people at the Medical University of South Carolina, and in fact from what you learned at these meetings, [the] Charleston Police Department, ... [and] the Solicitor, to help the women get treatment, not to arrest them, not to prosecute them, not to cause them to go to jail"); id. at 779-80 (testimony of Solicitor Charles Condon) (stating that "the problem presented to us at that time [was], how to help these babies and how to stop the totally preventable damage being done to these innocent little children" and explaining that "[t]he policy from its inception was amnesty-based.... [I]f you lived up to some very basic requirements, number one being drug free, ... and, number two, if you would go to free drug treatment, not a thing would happen to you"); id. at 785-86 (testimony of Solicitor Charles Condon) ("The idea that we were involved in a prosecution program is almost laughable.... The idea was not to prosecute people and put them in jail, the idea was to use legal intervention that was working to change human behavior to protect children, to protect babies."); id. at 863 (testimony of MUSC's General Counsel) ("[T]his was not supposed to be a punitive policy where we went out and punished people for doing something, even though we knew the activity was illegal. What we were trying to do is give those babies a chance to be born normal."). Indeed, while some of the Appellants were arrested, not one of them was prosecuted; this fact belies the dissent's assertion that a purpose of the policy was to convict and punish women who used cocaine during pregnancy.

requirements of the policy.

Appellants, all of whom were subjected to the policy,[4] brought this action asserting, as pertinent here, infringement of their constitutional right to privacy; violation of their Fourth Amendment right to be free of unreasonable searches and seizures; disparate impact discrimination on the basis of race; and commission of the state-law tort of abuse of process. After presentation of the evidence, the district court granted judgment as a matter of law to Appellees on the claims of commission of abuse of process and violation of the right to privacy to the extent Appellants sought damages. The jury returned a verdict in favor of Appellees on the Fourth Amendment claim. At a post-trial hearing, the court denied injunctive relief on Appellants' claims of the denial of their constitutional right to privacy. Finally, the district court rendered findings of fact based on the evidence presented at trial and ruled in favor of Appellees on the Title VI claim of disparate impact discrimination.

On appeal, Appellants challenge the submission of the Fourth Amendment claim to the jury and the sufficiency of the evidence supporting the verdict; the decision of the district court granting judgment to Appellees on the Title VI claim; and the orders of the court granting Appellees judgment as a matter of law on the claims for violation of the constitutional right to privacy and commission of the tort of abuse of process. We review these issues seriatim.

II.

At trial, Appellants contended that the urine drug screens constituted searches within the meaning of the Fourth Amendment. They further claimed that because they did not consent to the screens, the tests violated the Fourth Amendment.[5] The district court ruled that the urine screens fell within the ambit of the Fourth

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[4] At least two Appellants were subjected to urine drug screens shortly before formal adoption of the policy. Testimony in the record indicates, however, that MUSC personnel began to apply the policy informally in October 1989.

[5] MUSC personnel did not obtain warrants before conducting the urine drug screens.

Amendment and submitted the question of whether Appellants had consented to the searches to the jury, which found in favor of Appellees. Appellants now maintain that the district court erred in submitting the issue of consent to the jury and, alternatively, that the verdict is not supported by the evidence. We find it unnecessary to address these contentions because we affirm on the basis that the searches were reasonable as special needs searches.

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides in pertinent part that "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures[ ] shall not be violated." U.S. Const. amend. IV; see Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Simply put, this amendment guarantees that governmental intrusions into privacy by means of searches or seizures must be reasonable. Typically, this reasonableness requirement acts as a constraint on governmental authority to undertake a search or seizure in the absence of individualized suspicion. See Chandler v. Miller, 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Generally, a search performed without a warrant is unreasonable per se unless it fits within a narrowly defined exception to the warrant requirement. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (en banc). Nevertheless, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Rather, there are situations in which "a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement." Id. In such cases, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Id. at 665-66, 109 S.Ct. 1384; see Chandler, 520 U.S. at 314, 117 S.Ct. 1295 (explaining that "[w]hen ... 'special needs'-- concerns other than crime detection--are alleged in justification of a Fourth Amendment intrusion, courts must

undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties"). This balancing requires consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, i.e., the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective stand point. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990); id. at 451-55, 110 S.Ct. 2481 (applying test); DesRoches v. Caprio, 156 F.3d 571, 574 (4th Cir. 1998).

The parties evidently have agreed throughout this litigation that MUSC is a state hospital and that MUSC employees therefore are government actors.[6] And, the district court found as a fact that MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts.[7] Accordingly, the question presented is whether a

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[6] Our analysis is premised on the assumption that when a state hospital develops a general policy to test the urine of certain patients suspected of drug use, the testing constitutes a search within the meaning of the Fourth Amendment. But cf. United States v. Attson, 900 F.2d 1427, 1432- 33 (9th Cir. 1990) (holding that government-employed doctor who, for medical purposes, tests a patient's urine for evidence of alcohol use does not conduct a search within the meaning of the Fourth Amendment unless he "act [s] with the intent to assist the government in its investigatory or administrative purposes and not for an independent purpose").

[7] The district court declined to hold the searches at issue here reasonable under a special needs analysis because law enforcement officers were involved in the formulation of the policy. However, the involvement of law enforcement officers does not make a special needs analysis inappropriate. See Sitz, 496 U.S. at 451-55, 110 S.Ct. 2481 (upholding, under a special needs balancing test, a sobriety checkpoint operated by uniformed police officers); Norwood v. Bain, 166 F.3d 243, 245 (4th Cir. 1999) (en banc)(per curiam), cert. denied, --- U.S.---, 119 S.Ct. 2342, 144 L.Ed.2d 239 (U.S. 1999).

The dissent makes the related argument that the use of evidence obtained during the searches to support the arrest of some patients precludes application of the special needs balancing test. We disagree with this proposition, as does the Supreme Court. See Griffin v. Wisconsin, 483 U.S. 868, 870, 875-77, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (determining that

balancing of MUSC's interest in protecting the health of children whose mothers use cocaine during pregnancy, the effectiveness of the policy to identify and treat women who use cocaine during pregnancy, and the degree of intrusion experienced by women whose urine was tested for evidence of cocaine use results in a conclusion that the searches violated the Fourth Amendment.

A.

The first factor to be considered is the governmental need. The Fourth Amendment does not require a governmental need that is compelling in an absolute sense. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Instead, the interest must be "important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." Id.; see Chandler, 520 U.S. at 318, 117 S.Ct. 1295. The hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one. See Chandler, 520 U.S. at 318-19, 117 S.Ct. 1295; Vernonia, 515 U.S. at 662-63, 115 S.Ct. 2386 (explaining that a sharp rise in drug use by student athletes supported school officials' assertion that random drug testing without individualized suspicion was warranted).

The policy at issue here was developed after medical personnel at

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warrantless search based on reasonable grounds was justified by the special needs of the Wisconsin probation system even though evidence gathered during the search was employed to support a criminal conviction); see also Sitz, 496 U.S. at 448, 110 S.Ct. 2481 (noting that suspicionless stop at sobriety checkpoint resulted in arrest for driving under the influence). The dissent's attempt to distinguish Sitz is unpersuasive. It is true that the decision of the Court "address[ed] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers." Sitz, 496 U.S. at 450-51, 110 S.Ct. 2481. However, the fact that the initial suspicionless seizures led ultimately to an arrest cannot have escaped the attention of the Court. If, as the dissent contends, the intent to use information obtained during a suspicionless seizure to further investigate and ultimately arrest an individual rendered the special needs analysis inappropriate, Sitz would have been decided differently.

MUSC noticed an alarming increase in the number of pregnancies affected by cocaine use. Maternal cocaine use is associated with a number of pregnancy complications, including low birth weight, premature labor, birth defects, and neurobehavioral problems. Even a single use of cocaine during pregnancy may result in separation of the placenta from the uterine wall--a condition that may threaten the life of the mother and the fetus--or a stroke in the fetus. Moreover, costs related to caring for infants exposed to cocaine in utero are substantial, as evidenced by the testimony of an expert for Appellants who testified that he had estimated in the late 1980s that such expenses nationwide might exceed three billion dollars annually over the next ten years. In light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women. Cf. Vernonia, 515 U.S. at 661-62, 115 S.Ct. 2386 (concluding that interest in deterring drug use by school children was important in light of severe effects of drug use on adolescents).

B.

The second factor, the effectiveness of the search, focuses on "the degree to which [it] advances the public interest." Sitz, 496 U.S. at 453, 110 S.Ct. 2481 (internal quotation marks omitted). In analyzing this factor, however, our review must leave "the decision as to which among reasonable alternative ... techniques should be employed to deal with a serious public danger" to "the governmental officials who have a unique understanding of, and a responsibility for, limited public resources." Id. at 453-54, 110 S.Ct. 2481.

Here, there can be little doubt that testing the urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use while conserving the limited resources of a public hospital. Indeed, prenatal testing was the only effective means available to accomplish the primary policy goal of persuading women to stop using cocaine during their pregnancies in order to reduce health

effects on children exposed to cocaine in utero.

Appellants argue, however, that the policy was ineffective because it was both underinclusive and overinclusive. The policy was underinclusive, Appellants claim, because it did not address use of other drugs--such as alcohol and nicotine--that may pose risks to a developing fetus. And, Appellants maintain that the policy was overinclusive because women were tested on the basis of having received inadequate prenatal care, a factor that Appellants contend is more accurately associated with poverty than with cocaine use.

Neither of these assertions, even if true, has any bearing on the effectiveness of the means adopted to achieve the goal of identifying and treating maternal cocaine use among MUSC patients. The first fails because it addresses only the wisdom of the policy itself. And, the second fails because the fact that the criteria for testing under the policy did not necessarily correlate with cocaine use in all patients did not render those criteria ineffective. Accordingly, we conclude that the method chosen by MUSC officials was an effective one.[8]

C.

Finally, the degree of intrusion, both objective and subjective, suffered by Appellants was minimal. The objective intrusion suffered by an individual is "measured by the duration of the seizure and the intensity of the investigation." Id. at 452, 110 S.Ct. 2481. The subjective level of intrusion is measured by the extent to which the method chosen minimizes or enhances fear and

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[8] The dissent maintains that the urine screens were not an effective means of identifying cocaine use by pregnant women because some patients were arrested after giving birth, when "any adverse effect of maternal cocaine use on the developing fetus had already occurred." Infra at 27. In applying the special needs balancing test, however, the proper focus is not on whether any arrests under the policy were an effective means of advancing the identified government interest, but rather on the effectiveness of the urine screens. Urine screens conducted up to the time of birth unquestionably were effective to determine whether a woman had used cocaine during her pregnancy and thus whether her child required treatment for prenatal exposure to cocaine.

surprise on the part of those searched or detained. See id.

Generally, the privacy interests implicated by the collection and testing of urine are not minimal. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The context in which the searches at issue here occurred, however, indicates that they were only minimally intrusive. In the first place, the collection and testing of urine was conducted in the course of medical treatment to which Appellants had consented. The giving of a urine sample is a normal, routine, and expected part of a medical examination. See Yin v. California, 95 F.3d 864, 870 (9th Cir. 1996) (observing that "[i]n today's world, a medical examination that does not include either a blood test or urinalysis would be unusual"). Therefore, on an objective level, the duration and intensity of the search indicate that the Fourth Amendment intrusion was minimal at best. Cf. Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1991) (en banc) (indicating that a urine drug screen conducted in the course of a medical examination presents reduced privacy concerns). With respect to the subjective level of intrusion, we note that urine drug screens were conducted whenever one of the criteria for testing was met; a treating physician had no discretion to decline to order a urine test under the policy. See Turner v. Dammon, 848 F.2d 440, 446-47 (4th Cir. 1988) (explaining that "[t]he cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches"). This fact, combined with the routine nature of urine testing in medical examinations, indicates that the searches were minimally intrusive on a subjective level.

D.

In sum, the rising use of cocaine by pregnant women among MUSC's patient base and the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals; the method chosen to address that need--testing the urine of pregnant women when indicia of possible cocaine use were present--effectively advanced the public interest; and the intrusion suffered by Appellants was minimal.

Therefore, a balancing of these factors clearly demonstrates that the searches conducted were reasonable and thus not violative of the Fourth Amendment.

III.

Title VI provides in pertinent part that "[n]o person in the United States shall, on the ground of race, ... be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d. Pursuant to Title VI, Appellants[9] challenged MUSC's policy of testing for and reporting cocaine use by pregnant women, maintaining that it disparately impacted African-American women.[10]

In order to succeed on a Title VI disparate impact claim, a plaintiff first must establish a prima facie case of discrimination by showing "that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). The burden then "shifts to the defendant to demonstrate the existence of a substantial legitimate justification for the allegedly discriminatory practice." New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam) (internal quotation marks omitted). If the defendant succeeds in doing so,

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[9] Of the ten Appellants, eight are African-American, one is of mixed race, and one is Caucasian.

[10] Although the statutory language of Title VI addresses only intentional discrimination, federal agencies that provide funds may prohibit disparate impact discrimination through regulations implementing Title VI. See Alexander v. Choate, 469 U.S. 287, 293, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (discussing holdings of Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983)); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam). The parties agree that at least one federal agency that provides funds to MUSC has promulgated regulations prohibiting disparate impact discrimination in the operations of programs or activities. See, e.g., 45 C.F.R. § 80.3(b)(2) (1997) (providing that recipients of funds from the Department of Health and Human Services may not, in furnishing services or benefits, "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race").

the plaintiff nevertheless will prevail by showing "that other less discriminatory means would serve the same objective." Id.

Here, Appellants maintained that the policy disproportionately affected African-Americans in several ways. Specifically, Appellants argued that African-Americans were disproportionately affected by application of the policy (1) only at MUSC; (2) only to certain departments at MUSC; and (3) only to cocaine. Appellants further asserted that the application of the factors utilized to determine which patients would be tested for cocaine use disproportionately affected African-Americans. The district court concluded that Appellants had failed to establish a prima facie case of discrimination with respect to any of the challenged practices. Additionally, the district court determined that even if a prima facie case of discrimination had been established, MUSC[11] had offered a legitimate justification for the policy -- that it identified pregnant women who abused cocaine so that they could be referred for treatment. Further, the court held that Appellants had failed to carry their burden of establishing the existence of an equally effective practice that would have a less disparate impact because the alternative practices offered by Appellants would have been prohibitively expensive.

Appellants now contend that the district court erred in concluding

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[11] Appellants' counsel represented to the district court that Appellants were pursuing the Title VI claim only against MUSC. Appellants now contend, however, that this representation was "mistaken" and should be ignored by this court. Reply Br. of Appellants at 11. Even if we could do so, the evidence presented was inadequate to establish liability under Title VI against the Solicitor or the City of Charleston -- the defendants to whom Appellants now point.

Our review of the record reveals nothing to support a conclusion that the Solicitor or the City of Charleston possessed authority to require other hospitals to implement the policy. Accordingly, Appellants failed to prove that either of these parties implemented a policy that resulted in a disparate impact on African-Americans. Indeed, the testimony of Solicitors Condon and Schwacke indicates that they unsuccessfully attempted to persuade other area hospitals to adopt policies similar to MUSC's; this testimony leaves the unmistakable impression that if either Solicitor could have forced health care providers to implement such a policy, he would have done so.

that they failed to establish a prima facie case of discrimination and to provide a viable, less discriminatory alternative. With respect to the establishment of a prima facie case, Appellants assert that the policy resulted in a disproportionate impact on African-Americans in two respects.

First, Appellants point to the fact that the policy was implemented only at MUSC and maintain that failure to apply the policy at all area hospitals resulted in a disproportionate effect on African-Americans. However, we need not consider whether the failure to apply the policy to all area hospitals would suffice to establish a prima facie case of discrimination. Because there is no evidence in the record to support a conclusion that MUSC could have forced other hospitals to adopt the policy, requiring MUSC to implement the policy at other area hospitals could not constitute a viable, less discriminatory alternative. Appellants consequently cannot prevail on this claim.

Second, Appellants maintain that MUSC's decision to target cocaine rather than all substances that are potentially harmful to fetuses -- including nicotine and alcohol -- disproportionately affected African-American women. In support of this contention, Appellants note that only 68 percent of maternity patients who tested positive for any drug were African-American, while 90 percent of maternity patients who tested positive for cocaine were African- American.[12] We agree that this disparity -- 5.44 standard deviations -- is sufficient to establish a prima facie case of disparate impact discrimination. See Hazelwood Sch. Dist. v.

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[12] The district court rejected this argument, concluding without explanation that the relevant comparison was between the racial composition of the group of women who tested positive for cocaine use and the racial composition of the group of women who were arrested based on positive urine drug screens. The difference in the racial composition of these two groups, the court noted, was not statistically significant. We reject this reasoning. As the Supreme Court has noted, it is not sufficient for a defendant to show a racial balance at the end of a selection process; rather, the pertinent question for purposes of a disparate impact analysis is whether a given step in the process disproportionately affects members of one race. See Connecticut v. Teal, 457 U.S. 440, 450-51, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

United States, 433 U.S. 299, 311 n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (observing that a variance "of more than two or three standard deviations" permits an inference of discrimination); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 568-69 & n. 13 (4th Cir. 1985) (noting that variance of five to eight standard deviations permits an inference of discrimination).[13]

MUSC justified its decision to target cocaine on the basis of a perceived rise in the number of pregnant women abusing cocaine and the resistance of these women to obtaining treatment for their addictions. Appellants do not dispute that these are legitimate, nondiscriminatory reasons for MUSC's actions, but rather assert that at least two alternative practices exist which, if adopted, would have lessened the discriminatory impact of the policy: (1) reporting use of all illegal drugs and alcohol, and (2) testing all maternity patients.[14] The district court found that both of these practices would have been prohibitively expensive. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (explaining that determination whether alternative measures exist that would serve the same purpose as a

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[13] In its memorandum opinion, the district court stated that the comparison was "between the MUSC maternity population and those who tested positive for cocaine." J.A. 2743. We need not resolve this ambiguity, however, because either comparison results in a statistical difference of greater than three standard deviations.

[14] Appellants also argue that other substances, including nicotine and alcohol, pose dangers to a fetus that are as great, or greater than, the dangers posed by cocaine. Appellants therefore assert that MUSC's decision to target cocaine -- a drug predominantly used by African-Americans -- is merely a pretext for discrimination. First, we note that this argument is relevant only to Appellants' claim of intentional racial discrimination, a claim that was rejected by the jury and that Appellants have not raised on appeal. Second, we find no evidence of pretext in MUSC's decision to target cocaine use -- a problem that MUSC perceived as being particularly urgent -- rather than testing for all potentially harmful substances. Cf. Bowen v. Owens, 476 U.S. 340, 347, 106 S.Ct. 1881, 90 L.Ed.2d 316 (1986) (noting that "[t]his Court consistently has recognized that in addressing complex problems a legislature 'may take one step at a time, addressing itself to the phase of the problem which seems most acute' " (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955))).

challenged practice with a less disparate impact should take into account whether the proposed alternatives impose undue costs or other burdens). With respect to the first alternative, Appellants point out that the urine drug screens conducted by MUSC indicated the past use of any drug, not just cocaine. Appellants do not challenge, however, the factual finding of the district court that application of the policy -- including its tracking and reporting requirements -- to all drugs would have been prohibitively expensive. Further, they do not assert that the district court committed clear error in finding that testing the urine of all maternity patients at MUSC would have been prohibitively expensive. Accordingly, we cannot conclude that Appellants have demonstrated the existence of a means of accomplishing the goals of the policy that would have been equally effective while imposing a less disparate impact on African-Americans. We therefore conclude that the district court correctly granted judgment to Appellees on the Title VI claim.

IV.

Next, Appellants maintain that the district court erred in rejecting their claim that the disclosure of information contained in their medical records to a representative of the Solicitor's Office and officers of the CCPD violated their constitutional right to privacy.[15] We conclude that any privacy interest Appellants possessed in their medical records was outweighed by a compelling governmental interest, particularly in light of the nonpublic nature of the disclosure.

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[15] Appellants also contend that the actions of Nurse Laura Hildebrand, who disclosed medical information concerning Appellants at meetings of the Suspected Child Abuse and Neglect (SCAN) committee, violated their right to privacy. The district court concluded that even if these allegations of disclosure were correct, Appellants were not entitled to any damages based on the actions of Nurse Hildebrand because she was not a party defendant. Further, the court concluded that Appellants were not entitled to injunctive relief because the SCAN committee had been disbanded and there was no indication that it would be reconstituted at any point in the future. We affirm these rulings.

The Constitution does not include a general right to privacy. See Condon v. Reno, 155 F.3d 453, 464 (4th Cir. 1998). Nevertheless, the Supreme Court has recognized that individuals possess a constitutional "interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). This interest, however, is limited to disclosures of information that touch on rights that "are fundamental or implicit in the concept of ordered liberty." Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (internal quotation marks omitted); see Bloch v. Ribar, 156 F.3d 673, 684 (6th Cir. 1998); United States v. McFillin, 713 F.2d 57, 60 (4th Cir. 1981) (holding that a constitutional right to privacy is implicated when the information disclosed "affects an essential component of a person's dignity"); cf. Condon, 155 F.3d at 464 (noting that the Supreme Court has recognized a constitutional right to privacy only with respect to certain limited areas, such as "matters of reproduction, contraception, abortion, and marriage" (citations omitted)). Moreover, even in those instances in which a constitutional right of privacy attaches to personal information, disclosure of that information will not violate the Constitution if "the government's interest in disseminating the information" outweighs "the individual's interest in keeping the information private." Bloch, 156 F.3d at 684.

Although the Supreme Court addressed a claim to a right of privacy in medical records in Whalen, it declined to decide whether such information merits constitutional privacy protection. See Whalen, 429 U.S. at 605-06, 97 S.Ct. 869. And, the circuit courts of appeals are divided on this issue. Compare Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133,1137 (3d Cir. 1995) (recognizing that an individual possesses a constitutional privacy right in medical records), with Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) (holding that no constitutionally protected privacy interest exists in medical records). We need not decide the question, however, because we conclude that even if Appellants possess a constitutional interest in the nondisclosure of their medical records, that interest is outweighed by the interest of the government in disclosure.

It is well settled that a state has a compelling interest in the identification of law breakers and in deterring future misconduct. See Bloch, 156 F.3d at 686; Sanitation & Recycling Indus., Inc. v. New York, 107 F.3d 985, 998 (2d Cir. 1997). Here, any medical records disclosed were disseminated only to a limited number of law enforcement personnel -- the prosecuting attorney and arresting officers -- in the course of their official duties. There is no indication that Appellants' medical records were disclosed to others within the Solicitor's Office, the CCPD, or the public in general. See American Fed'n of Gov't Employees, AFL-CIO v. Department of Housing & Urban Dev., 118 F.3d 786, 793 (D.C.Cir. 1997) (holding "that the individual interest in protecting ... privacy ... is significantly less important where the information is collected by the government but not disseminated publicly"); Watson v. Lowcountry Red Cross, 974 F.2d 482, 487-88 (4th Cir. 1992) (indicating that disclosure of information to a district court did not abridge constitutional privacy interest because the disclosure was not public). Accordingly, we hold that no privacy right of Appellants was violated.

V.

Finally, Appellants maintain that the district court erred in granting Appellees judgment as a matter of law on the claim that the manner in which the policy was applied constituted the state-law tort of abuse of process. More specifically, Appellants assert that MUSC personnel improperly threatened Appellants with arrest in order to coerce them into obtaining substance abuse counseling.

Under South Carolina law, "[t]he essential elements of abuse of processare: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, 860 (1983). "The improper purpose usually takes the form of coercion to obtain a collateral advantage[ ] not properly involved in the proceeding itself." Hainer v. American Med. Int'l, Inc., 328 S.C. 128, 492 S.E.2d 103, 107 (1997). In order to satisfy the requirement of an improper act, the plaintiff must show that the

defendant made "[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process.... There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id.

Here, the district court determined that MUSC personnel did not have an improper ulterior purpose in advising women who tested positive for cocaine use that they would be subject to arrest if they did not obtain substance abuse counseling. Since Appellees did not seek to obtain any collateral advantage for themselves, the court reasoned, there could be no abuse of process. We need not decide whether Appellees had an ulterior purpose, however, because we conclude that they performed no act not authorized by the process. At most, Appellees accurately informed Appellants that ingestion of cocaine after the 24th week of pregnancy constituted a criminal offense for which they could be prosecuted. That maternity patients who tested positive for cocaine use could avoid criminal prosecution by obtaining treatment does not render the implementation of the policy abusive. Cf. Johnson, 307 S.E.2d at 861 (holding that offer to abandon criminal prosecution in exchange for restitution did not amount to abuse of process).

VI.

In sum, we reject Appellants' challenges to the judgments in favor of Appellees. Accordingly, we affirm.

AFFIRMED.

BLAKE, District Judge, dissenting in part:

The majority has concluded that the warrantless testing of urine for evidence of cocaine use which resulted in the arrest of nine of the 10 plaintiffs in this case constituted a reasonable search under the "special needs" exception to the warrant requirement of the Fourth Amendment. On this point, respectfully, I dissent. Furthermore, I disagree with the majority's conclusion that as to the Title VI claim the appellants failed to demonstrate the

existence of a less discriminatory alternative policy. Accordingly, I would reverse the district court's decisions concerning the appellants' Fourth Amendment and Title VI claims and remand for consideration of appropriate relief.

I.

Some additional factual background is necessary to explain my position on the Fourth Amendment issue. Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using crack cocaine was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use.[1] The prosecutorial purpose of the policy and the substantial involvement of law enforcement officials from the very beginning of its implementation are both illustrated by a letter sent by MUSC General Counsel Joseph C. Good to Charles Condon, Charleston City Solicitor, on August 23, 1989. In the letter, Mr. Good wrote:

> I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs....
> Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

(J.A. Vol. III at 2052.) In addition, operational guidelines issued by Captain Roberts of the Charleston police force on October 12, 1989, with copies to Solicitor Condon and to MUSC nurse Shirley Brown (one of the instigators of the MUSC program), refer to the positive drug tests as "probable cause" for arrest of the mother, on charges of possession only if the pregnancy is 27 weeks or less, and on charges of both possession and distribution to persons

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[1] As set forth in greater detail below, seven of the plaintiffs were arrested after the birth of their children.

under 18 if the pregnancy is 28 weeks or more. (J.A. Vol. III at 1412-1414.)[2] Further, a letter from Mr. Good to a Senior Assistant Attorney General on December 19, 1989, explaining the MUSC program, states that it was developed by MUSC "[a]t the suggestion of law enforcement and the solicitor's office...." (J.A. Vol. III at 1457.) These are merely a few examples of the evidence in the record that supports a finding of both prosecutorial intent on the part of MUSC and substantial involvement of law enforcement officials in developing the program.

Following is a short summary of the circumstances under which the plaintiffs in this case were tested and arrested:

Sandra Powell, African-American, received prenatal care at MUSC from the end of her first trimester. (J.A. Vol. I at 322.) In October 1989, she delivered her child at MUSC and tested positive for cocaine. (J.A. Vol. III at 1842-44, 1853.) She was arrested at the hospital the following day. (J.A. Vol. III at 1844, 1852.)

Lori Griffin, African-American, received prenatal care at MUSC beginning in July 1989. (J.A. Vol. III at 1563.) She was admitted to the hospital on October 7, 1989, with contractions. (J.A. Vol. III at 1560.) She tested positive for cocaine. (J.A. Vol. III at 1559.) She was arrested and taken to the county jail. (J.A. Vol. III at 1560, 1563.) She was returned to MUSC from jail on October 25, 1989, to deliver her child.

Ellen Knight, African-American, received prenatal care at MUSC prior to the fall of 1989. (J.A. Vol. I at 293.) She arrived at the hospital on November 6, 1989, in labor. (J.A. Vol. III at 1698.) Although her cocaine test was negative, her child tested positive at birth. (J.A. Vol. III at 1705, 1707.) She was arrested at the

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[2] In regard to the Title VI issue, it should be noted that the police department guidelines are not limited to cocaine only but refer to "illegal drugs" generally, which the guidelines define as "heroin, crack/cocaine, amphetamines, and any other drug illegally ingested by the patient that medical authorities deem a threat to the life and safety of the unborn child." (J.A. Vol. III at 1412.)

hospital on November 8, 1989.

Laverne Singleton, African-American, delivered her child on November 9, 1989, in the ambulance on the way to MUSC. (J.A. at I 225; Vol. III at 1859, 1865.) She tested positive for cocaine at the time of admission. (J.A. Vol. III at 1859-60.) She was arrested at the hospital the next morning. (Id.)

Paula Hale, African-American, first arrived at MUSC in December 1990 in labor. (J.A. Vol. III at 1581-83.) She tested positive for cocaine at delivery and was referred to substance abuse counseling. (Id.) She was arrested in March 1991 after failing to complete the drug treatment program. (J.A. Vol. III at 1585-86.)

Pamela Pear, African-American, arrived at MUSC in July 1990 with pre-term labor symptoms. (J.A. Vol. III at 1817.) She tested positive for cocaine during that visit. (Id.) She was referred to substance abuse counseling. (J.A. Vol. III at 1736.) In August 1990, she was again admitted to MUSC for pre-term labor and tested positive for cocaine. (J.A. Vol. III at 1757.) She was arrested at the hospital and was released on bond the same day. She delivered her child at MUSC in September 1990. (J.A. Vol. III at 1765.)

Theresa Joseph, who was multi-racial,[3] was first seen at MUSC on June 5, 1991, for a non-pregnancy related matter. (J.A. Vol. III at 1599.) She tested positive for cocaine at that time and was referred to the obstetrical clinic. (J.A. Vol. III at 1601-02.) She was admitted to the hospital again, for the same non-pregnancy complaint, on June 13, 1991. She again tested positive for cocaine and was referred to substance abuse counseling. (J.A. Vol. III at 1612, 1626.) She failed to complete the substance abuse program in July 1991. (J.A. Vol. III at 1656, 1682.) She was seen again in September 1991 and once more tested positive for cocaine. (J.A. Vol. I at 515; Vol. III at 1628- 29.) Finally, she arrived at MUSC

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[3] Ms. Joseph is now deceased. She was described as "black" on her Charleston Police Department Incident Report. (J.A. Vol. III at 1655.)

in October 1991 in labor and tested positive for cocaine. (J.A. Vol. III at 1632, 1634.) Her child was born on October 18, 1991, and Ms. Joseph was arrested at the hospital. (Id.)

Crystal Ferguson, African-American, tested positive for cocaine during a prenatal visit to MUSC in June 1991. (J.A. Vol. III at 1530.) She agreed to attend substance abuse counseling. (J.A. Vol. III at 1537.) On August 4, 1991, she delivered her child at MUSC. She tested positive for cocaine at that time. (J.A. Vol. III at 1533.) She was arrested on August 7, 1991, for failing to comply with the drug treatment program. (J.A. Vol. III at 1541.)

Patricia Williams, African-American, received prenatal care at MUSC beginning in January 1992. (J.A. Vol. III at 1910.) She tested positive for cocaine at the time of her first visit and was referred to substance abuse counseling. (J.A. Vol. III at 1903, 1939-40.) She did not complete the counseling program and returned for additional prenatal care three times, testing positive for cocaine each time. (J.A. Vol. III at 1901-02, 1907.) In March 1992, she arrived at the hospital in labor. (J.A. Vol. III at 1910-11.) She again tested positive for cocaine. (Id.) Her baby was born on March 10, 1992, and on March 12, 1992, she was arrested at the hospital. (Id.)

Darlene Nicholson, Caucasian, received regular prenatal care at MUSC. (J.A. Vol. I at 447-48, 450; Vol. III at 1717, 1724.) At her December 17, 1993 prenatal visit she tested positive for cocaine. (J.A. Vol. I at 452-53.) At that time, she was told that she must voluntarily admit herself to the MUSC psychiatric unit for substance abuse treatment or she would be arrested. (Id.) She entered the psychiatric unit and remained there until she was released after 30 days. (J.A. Vol. III at 1717.) She delivered her child at MUSC on February 21, 1994. (J.A. Vol. I at 458.)

In none of these cases was a warrant obtained before the urine testing was done or before the results were turned over to the police and the plaintiffs were arrested. Furthermore, the consent forms signed by the plaintiffs did not advise them that their drug test results would be disclosed to the police. The majority excuses

the lack of a warrant, or indeed any determination of probable cause, by relying on the "special needs" exception to the ordinary Fourth Amendment requirement that a warrant be obtained.

II.

The Supreme Court has held that

> where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (emphasis added). Similarly, the Court has instructed that

> When such "special needs" -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Chandler v. Miller, 520 U.S. 305, 314, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (emphasis added). Several aspects of the "special needs" exception require careful analysis in the context of this case.

First, as the emphasized portions of the above quotations make clear, the "special needs" exception does not apply where the governmental intrusion is intended to be used for law enforcement purposes. In Von Raab, the issue was whether "it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions." 489 U.S. at 659, 109 S.Ct. 1384. The Supreme Court in that case held that the Fourth Amendment permitted the suspicionless testing of employees who applied for positions directly involving the use of firearms or the interdiction of illegal drugs. Id. at 679, 109 S.Ct. 1384. In reaching this conclusion, the Court applied a "special needs" analysis, balancing the individuals' privacy interests against the non-law enforcement

governmental interests served by the urinalysis policy. Significantly, in deciding to apply the "special needs" balancing test to the facts before it, the Court emphasized that "[i]t is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent." Id. at 666, 109 S.Ct. 1384 (emphasis added). In fact, in none of the cases relied on by the majority, other than the sobriety checkpoint and probation supervision cases which will be addressed below, were the results of the drug tests or other searches intended for use in a criminal prosecution. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 651, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (authorizing only certain school officials to have access to test results); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621 & n. 5, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("While [the provision permitting drug testing of railroad personnel] might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used."); Yin v. State of California, 95 F.3d 864, 869, 873 (9th Cir. 1996) (state employee required to submit to medical examination solely to determine her ability to perform normal work duties); Dimeo v.Griffin, 943 F.2d 679, 685 (7th Cir. 1990) (en banc) (jockeys and other participants in horse racing required to undergo random drug tests as condition of occupational licensure). In sharp contrast, nine out of ten of the plaintiffs in this case were arrested based on the test results, and one avoided arrest only by committing herself to a psychiatric unit. Under these circumstances, I believe the "special needs" exception does not apply.

The majority cites Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), for the proposition that the defendants' intention to use the results of the drug tests as probable cause to arrest the plaintiffs in this case does not preclude application of the special needs balancing test. In Sitz, however, the Supreme Court was careful to explain that the special needs exception applied only to the

suspicionless "seizure," that is, the initial stop of each motorist and the associated preliminary questioning and observation, 496 U.S. at 450-51, 110 S.Ct. 2481, which the Court characterized as only a "slight" intrusion. Id. at 451, 110 S.Ct. 2481. The Court specifically noted that the "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." Id. at 451, 110 S.Ct. 2481 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 559, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). The Sitz balancing test, which justifies the relatively slight intrusion of a checkpoint seizure, does not serve also to justify searches of the motorists' persons or effects without consent or probable cause. See United States v. Ortiz, 422 U.S. 891, 896- 97, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975). Griffin also is readily distinguishable. In that case, the Supreme Court upheld the validity of a warrantless search conducted by a state probation officer at the home of a criminal defendant on probation under a regulation which permitted such searches as long as the probation officer had "reasonable grounds" to believe the probationer possessed contraband forbidden under the conditions of his probation. The Court noted that probation was a form of criminal sanction imposed after a finding of guilt, 483 U.S. at 874, 107 S.Ct. 3164, and supervision of probationers was a " 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." Id. at 875, 107 S.Ct. 3164.

Accordingly, I believe the majority reads Sitz and Griffin too broadly in suggesting that the special needs exception can justify a suspicionless search of a member of the public intended to produce evidence for use in a criminal arrest.

In this case, the MUSC policy was intended from its inception to result in the arrest and possible prosecution of pregnant women who were patients at the state hospital. In all the other special needs cases cited by the majority, arrest was at most an incidental possibility and not a direct result of the warrantless Fourth Amendment intrusion sought to be justified. It is simply inconsistent with the record in this case to identify the drug testing imposed by MUSC as not serving normal law enforcement needs.

I would find that the avowed and actual purpose of arresting patients who tested positive for cocaine, as well as the extensive involvement of law enforcement officials in designing and implementing the policy, preclude application of the special needs analysis in this case.

Even if I assume, however, that a special needs balancing test should be applied, and further assume that the governmental interest identified by the majority -- i.e., the adverse effect of maternal cocaine use on the health of children exposed to cocaine in utero -- is substantial, I believe that the policy fails the test of "effectiveness," i.e., "[t]he degree to which the search advances the public interest." See Sitz, 496 U.S. at 453, 110 S.Ct. 2481. It is undisputed that seven of the plaintiffs were arrested after giving birth (indeed, several were taken into custody at the hospital wearing only their hospital gowns), rather than during the prenatal period.[4] By that time, any adverse effect of maternal cocaine use on the developing fetus had already occurred, and the arrest could only have had a punitive rather than a preventive purpose.

Nor is it correct to say that the degree of intrusion on the mother's privacy was "minimal" simply because the test occurred in the context of a hospital examination. Unlike the policy in Von Raab, under the MUSC policy the test results are reported not simply to a licensed physician, but to law enforcement officials with no medical reason for receiving the information. Cf. Von Raab, 489 U.S. at 672 n. 2, 109 S.Ct. 1384 (noting as one of the procedures that minimized the intrusiveness of the drug-screening program that "an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician").

For all the above reasons, I agree with the trial court that the drug testing policy applied to the plaintiffs in this case violated the

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[4] Moreover, several of the plaintiffs who were not arrested until after giving birth had tested positive for cocaine multiple times during the prenatal period when, according to the purported purpose of the policy, intervention was crucial.

Fourth Amendment, in the absence of valid consent.

The district court also properly found that the various consent forms signed by the plaintiffs, which did not advise them that the drug test results would be disclosed to the police, did not alone establish valid consent. Accordingly, the court submitted this case to the jury on the issue of consent, and the jury returned a verdict in favor of the defendants. The plaintiffs moved for judgment under Fed.R.Civ.P.50(b), and the court denied the motion.

I disagree that the evidence presented at trial was sufficient to sustain the jury's verdict. When considering a Rule 50(b) motion for judgment as a matter of law, the district court must view the evidence in the light most favorable to the non-moving party and then determine whether a reasonable jury could draw only one conclusion from the evidence. See Townley v. Norfolk & Western Ry. Co., 887 F.2d 498, 499 (4th Cir. 1989). We review the district court's ruling on a Rule 50(b) motion by applying the same standards de novo. Id. In addition to the consent forms, the defendants presented other evidence, such as letters that either accompanied the forms or were distributed after a positive test result, and a public service announcement issued by the Solicitor's Office in 1990. The public service announcement indicated that pregnant women who tested positive for drug use could be subject to prosecution; however, it was seen by only two of the plaintiffs. (J.A. Vol. I at 374, 518-19.) The plaintiffs' presumed familiarity with this information, even when combined with a general knowledge that use of cocaine is illegal, is not sufficient to establish the plaintiffs' voluntary and knowing consent to the possible use against them in a criminal case of drug test results taken in the course of their pregnancy and labor. Cf. Von Raab, 489 U.S. at 666, 109 S.Ct. 1384 (positive test results "may not be used in a criminal prosecution without the employee's consent"). I also question whether consent can be voluntary, in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state's public hospital. If the special needs exception had been held not to apply, a more thorough analysis of this issue would have been necessary.

III.

I agree with the majority's analysis of the Title VI issue, except with regard to the availability of an equally effective alternative policy with a less discriminatory impact.[5] The plaintiffs point out, correctly, that the urine tests being performed under the MUSC policy indicate a patient's past use, not just of cocaine, but of other illegal drugs as well. (J.A. Vol. II at 1336-42.) Consequently, applying the policy to the past use of all illegal drugs, not just cocaine, as the plaintiffs suggested, would not have increased the cost of the testing. The district court's finding that testing for all illegal drugs "would be prohibitively expensive," therefore, is not supported by the record. In affirming the decision below, the majority states that the plaintiffs have not challenged the district court's factual finding "that application of the policy – including its tracking and reporting requirements – to all drugs would have been prohibitively expensive." The district court, however, made no such finding. In considering the alternative of focusing on all illegal drugs, not just cocaine, the court relied only on the cost of testing, not tracking or reporting, to reject that alternative.[6] (J.A. Vol. IV at 2746). Since the plaintiffs have shown that their proposed alternative of applying the testing policy to past use of any illegal drug would not have resulted in any additional cost, the district court's fact- finding on the issue of the cost of testing is clearly erroneous, and the plaintiffs have carried their burden of demonstrating the availability of an equally effective alternative with a less discriminatory impact.[7] Accordingly, I would reverse the judgment in favor of the defendants on the Title VI claim and remand for consideration of injunctive relief.

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[5] The appellants' brief challenges the factual findings of the district court concerning the cost of the testing program and the overall effectiveness of the policy. (Brief of Appellants at 49).

[6] Nor is any evidence on this issue apparent in the record, except for evidence suggesting that the Charleston Substance Abuse Clinic, not MUSC, would notify police regarding missed substance abuse appointments, (J.A. Vol. III at 1430), and that the Solicitor's Office would be responsible for tracking compliance, generally. (J.A. Vol. I at 610-11.)

[7] The plaintiffs have not shown that the district court erred in rejecting their second alternative, i.e., testing all maternity patients at MUSC.

IV.

In summary, I would reverse the district court on the Fourth Amendment and Title VI claims, and remand for consideration of appropriate relief. On these two issues, respectfully, I dissent.

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DENYING PETITION FOR REHEARING AND REHEARING EN BANC
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 2, 1999

No. 97-2512
CA-93-2624-2-12

CRYSTAL M. FERGUSON; PAULA S. HALE; ELLEN L. KNIGHT; PATRICIA R. WILLIAMS; LORI GRIFFIN; PAMELA PEAR; SANDRA POWELL; LAVERNE SINGLETON; THERESA JOSEPH; DARLENE M. NICHOLSON

Plaintiffs - Appellants

And

STATE-RECORD COMPANY, INCORPORATED; THE EVENING POST PUBLISHING COMPANY

Intervenor - Plaintiff

- v.

CITY OF CHARLESTON, South Carolina; HARRISON L. PEOPLES, Dr.; THOMAS C. ROWLAND, JR., Dr.; STANLEY C. BAKER, JR., Dr.; CHARLES B. HANNA, Dr.; MELVYN BERLINSKY; PATRICIA T. SMITH; M. J. COOPER; HERBERT C. GRANGER; ROBERT C. LAKE, JR.; PHILLIP D. SASSER; CLAUDIA W. PEOPLES; CARROLL V. BING, JR., Dr., as Trustees of the Medical University of South Carolina in their official capacities; RUEBEN GREENBERG; CHARLES HORGER, III, M.D.; VICTOR DEL BENE; JOHN SANDERS; WILLIAM B. PITTARD, M.D.; ROGER NEWMAN, M.D.;

HAROLD BIVENS, M.D.; MELESIA HENRY, R.N., personally and in their official capacities

Defendants - Appellees

CENTER FOR CONSTITUTIONAL RIGHTS

Amicus Curiae

On Petition for Rehearing and Rehearing En Banc

Appellants filed a petition for rehearing and rehearing en banc.

The panel voted to deny the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams and Traxler voted against rehearing en banc and Judges Murnaghan, Ervin, Michael, Motz and King voted to rehear the case en banc. The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Wilkins for the Court.

For the Court,

/s/ Patricia S. Connor

CLERK

Filed September 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 2:93-2624-2

Crystal M. Ferguson, Theresa Joseph, Darlene Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and LaVerne Singleton,
Plaintiffs,

vs.

The City of Charleston, South Carolina, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This action was brought by ten women pursuant to 42 U.S.C. §1983 alleging their rights were violated by the defendants when the women were arrested for drug use while pregnant. The plaintiffs asserted ten claims: (1) violation of the right to privacy; (2) violation of the right to procreate; (3) violation of the Fourth Amendment; (4) violation of the Equal Protection clause based on gender discrimination; (5) violation of the Equal Protection clause based on racial discrimination; (6) violation of Title VI of the Civil Rights Act; (7) violation of the Federal Confidentiality Statute, 42 U.S.C. §290dd-2; (8) abuse of process; (9) violation of the Due Process clause of the Fourteenth Amendment; and (10) violation of the right to refuse medical treatment

The action came to trial before the court with a jury from November 20, 1996, to December 19, 1996. The court granted judgment as a matter of law for the defendants on the claims for intentional discrimination on the basis of gender, due process, right to refuse medical treatment, 42 U. S.C. §290dd-2, and abuse of

process. The court charged the jury on the plaintiffs' claims for violations of the Equal Protection clause and Fourth Amendment and the jury rendered a verdict in favor of the defendants on both claims. The court them too'-,-.. under advisement the claims for denial of the right to privacy, right to procreate, and Title VI. On August 13, 1997, the court denied the plaintiffs' request for injunctive relief in the right to procreate and right to privacy claims and allowed to parties to submit further briefs on the Title VI claim. The court has now considered the Title VI claim, After weighing the testimony of the witnesses, examining the exhibits introduced, and studying the applicable law, the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiffs are eight black women, one white woman, and one woman who is multiracial.

2. The defendants are either agencies of the State of South Carolina or agencies of political subdivisions thereof.

3. All of the plaintiffs presented at the Medical University of South Carolina ("MUSC") in Charleston, South Carolina for gynecological services. All of the plaintiffs either delivered children at MUSC or were treated postpartum at MUSC.

4. All of the plaintiffs except. Darlene Nicholson were arrested when the defendants discovered they were using drugs while pregnant. Instead of being arrested, Darlene Nicholson was involuntarily committed to MUSC's Institute of Psychiatry for drug treatment.

5. The catalyst for targeting these individuals was a policy designed to prevent cocaine abuse in pregnant women. During the fall of 1989, the defendants formulated a policy ("policy") for treating pregnant women who tested positive for cocaine at MUSC. The policy was not implemented at any other hospital in

Charleston by these defendants nor was it applied to women who were less than twenty-four weeks pregnant.

The policy identified probable drug abuse through screening all maternity patients who met certain criteria. A female patient was tested for cocaine through the use of a urine drug screen ("UDS") if she presented with one or more of the following symptoms: (1) *abruptio placentae*, or separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care; (5) incomplete prenatal care; (6) pre-term labor of no obvious cause; (7) history of cocaine use; (8) unexplained congenital anomalies; or (9) intrauterine growth retardation of no obvious cause.

6. If a patient tested positive for cocaine, an employee of MUSC would confront the patient and question her about her drug use. At some point thereafter, the positive results of the UDS were provided to the Ninth Circuit Solicitor's office or to the Charleston City Police Department. An officer of the latter then arrested the patient who had tested positive.

7. The policy was applied in all maternity departments at MUSC. Its goal was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child.

8. Prior to 1990, if a patient tested positive for cocaine she was arrested without further ado. However, the defendants changed the policy in 1990 to give patients a choice to receive treatment for their drug use or be arrested and prosecuted under South Carolina law.

9. The large majority of MUSC's maternity patients are black. The maternity population at MUSC during the time period relevant to this action was approximately sixty-seven percent (67%) black and thirty-three percent (33%) white.

10. The racial composition of the women who tested positive for cocaine at MUSC during the period in question was approximately ninety percent (90%) black and ten percent (10%)

white. Of the thirty women who were arrested under the policy, ninety-six percent (96%) were black and four percent (4%) were white.

The plaintiffs' expert witness Dr. Martin Shapiro testified that the disparity of racial composition between the MUSC maternity population and the persons who tested positive for cocaine was roughly 5.54 standard deviations from chance. Such a deviation means that the likelihood that chance is the cause is less than I in 100,000. Dr. Shapiro explained that some reason other than chance must be the cause of the disparity.

The defendants' expert statistician Dr. McCabe testified that there was no statistically significant difference between the racial composition of the population of women who tested positive for cocaine and women who were arrested, and therefore no disparity exists between white and black patients in these two categories. According to Dr. McCabe there was no significant racial disparity in implementing MUSC's policy.

11. MUSC receives financial assistance from the United States Department of Health and Human Services to render health care. MUSC uses part of this financing in its OBGYN clinic to treat indigent patients. There is no evidence in the record that any other defendant receives relevant financial assistance from the United States.

Conclusions of Law

A. This court has jurisdiction pursuant to 28 U. S.C. § 13 3 1 (1994).

B. The plaintiffs brought this action in part under Title VI of the Civil Rights Act, Title 42, section 2000d. Section 2000d provides "[no] person in the United States shall on the ground of race, color, or national origin ... be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 2000d-4a defines "program" to "mean all of the operations of... a department, agency, ... or other

instrumentality of the state ... or an entire corporation ... which is principally engaged in the business of providing ... health care ... any part of which is extended Federal financial assistance." Federal regulations provide that a state or its agency cannot "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race...." 45 C.F.R. §80.3(b)(2) .

C. While Title VI itself only prohibits intentional discrimination, the regulations promulgated thereto clearly prohibit a state agency from administering a program which has a discriminatory impact on a protected person. Alexander v. Choate, 469 U.S. 287 (1985).

D. The plaintiffs bear the ultimate burden of persuading the court that the defendants' violated Title VI by establishing each of the following elements: (1) each defendant is an entity which receives funds from the federal government and is subject to the requirements of Title VI; (2) the plaintiffs are persons protected under Title VI and the regulations promulgated pursuant thereto; (3) the plaintiffs challenge a specific practice, procedure, or course of action of the defendants; and (4) the practice, procedure, or course of action of the defendants has an adverse discriminatory effect on the plaintiffs.

E. MUSC is the only defendant which has been shown to receive the requisite federal assistance. MUSC receives federal assistance from the Department of Health and Human Services and admits that it is subject to Title VI. Furthermore, the plaintiffs conceded at trial that MUSC is the only defendant subject to the requirements of Title VI.

F. Eight of the plaintiffs are black and therefore protected by the regulations promulgated under Title VI.

G. The plaintiffs challenge a specific practice, procedure, or course of action of the defendants. The plaintiffs challenge the following practices: (a) application of the policy only at MUSC;

(b) application of the policy only to certain parts of MUSC; (c) application of the policy only to cocaine; and (d) application of testing criteria that would inevitably result in testing more blacks.

H. The plaintiffs must prove. that the practice, procedure, or course of action caused the adverse discriminatory effect on them. Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). For instance, the plaintiffs must show that the policy itself, as opposed to MUSC's general or maternity population, caused the disparate impact. None of the challenged practices, procedures, or courses of action of the defendants have an adverse discriminatory effect on the plaintiffs.

The plaintiffs introduced statistical evidence to prove their claim of disparity which the defendants countered with their own statistics. The evidence is conflicting, and the court concludes that the plaintiffs have not proven racial disparity through statistics. To do so, they must "offer statistical evidence of the kind and degree sufficient to show that the practice in question caused" the adverse impact on black patients. Elston, 997 F.2d at 1407 (emphasis added). In other words, the practice must affect black patients significantly more than white patients; if white patients are affected equally, then there is no disparate impact. Edwards v. Johnston County Health Dept., 885 F.2d 1215, 1223 (4th Cir. 1989). "The standard by which this greater adverse impact allegation must be tested is 'whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied.'" Edwards, 885 F.2d at 1223 (quoting Betsey v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984)). Dr. Shapiro pointed to a large disparity between the MUSC maternity population and those who tested positive for cocaine, but the court concludes those are the wrong numbers to compare. To determine if the policy had an adverse impact on black women, one must compare the racial composition of women who tested positive for cocaine with those actually arrested, because the true impact of the policy was *the arrest,* not the UDS testing. Dr. McCabe testified there is no statistical difference between the racial composition of those two groups, and the court

agrees. Therefore, the plaintiffs have not shown a statistically significant disparate impact on black women in this case. Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982).

Even though the plaintiffs have not proven a statistically significant disparate impact, the court has nevertheless considered each challenged practice *seriatim.* The plaintiffs first challenge the practice of employing the policy only at MUSC rather than at other hospitals in the Charleston, South Carolina metropolitan area, However, this challenge is irrelevant since MUSC is the only party subject to Title VI and MUSC cannot control or implement the policy at hospitals not controlled by MUSC. Therefore, the fact that the policy was not applied at other hospitals is not a practice that can be challenged under Title VI because it was not a practice administered by a defendant subject to Title VI.

The plaintiffs next challenge the practice of applying the policy only at certain discreet sections of MUSC As the court found above, the policy was applied at all maternity departments throughout MUSC, and the practice challenged by the plaintiffs did not exist and cannot be used to prove disparate impact.

The plaintiffs further challenge the practice of applying the policy only to cocaine users. They argue that cocaine is a drug preferred by blacks, and thus a policy isolating it would necessarily impact blacks. This argument fails for two reasons. First, the alleged disparate use of cocaine by blacks causes the disparate impact, not the isolation of cocaine by MUSC In this instance, the plaintiffs have not proven that the practice of the defendant causes the disparate impact. Secondly, the evidence shows that white cocaine users were treated the same as black cocaine users. If a patient had cocaine in her system, then she was given a choice of treatment or jail. No disparity exists in t that form of treatment.

Finally, the plaintiffs challenge the practice of employing subjective testing criteria. By targeting symptoms such as "no prenatal care" or "incomplete prenatal care" in deciding to test for drugs, MUSC allegedly targeted blacks because they typically

have no or incomplete prenatal care. The plaintiffs have offered little evidence to support the allegation that blacks typically have incomplete or no prenatal care. In fact, they offered the testimony of Dr. Chasnoff who testified that the criteria were medically senseless and merely a proxy for selecting black women. This testimony addresses the legal justification argument and is based solely on Dr. Chasnoff's opinion, not on statistical analysis. Furthermore, the plaintiffs argue that because the number of black women tested for drugs rose after the policy was implemented, the criteria must a fortiori disparately impact blacks.

The court finds these arguments unpersuasive. MUSC adopted these medially valid criteria to avoid the very subjectivity in testing about which the plaintiffs complain. The evidence presented by the defendants shows that whenever a patient presented with one of the criteria, they were tested. There is no evidence that the criteria were applied subjectively. The allegation that more black maternity patients may have taken cocaine into their systems than white maternity patients does not prove that the policy disparately impacted black women. The plaintiffs have failed to prove that the MUSC policy disparately impacts black women in violation of Title VI.

I. However, assuming *arguendo* that the plaintiffs have shown a prima facie case for disparate impact under Title VI, the defendants can meet and rebut the plaintiffs prima facie case by showing the following: (a) they had legitimate needs or goals; (b) the challenged practice, procedure, or course of action was necessary to meet those needs or goals; and (c) the practice, procedure, or course of act ion adopted by the defendants satisfied those needs or goals. The court concludes that the defendants have shown such.

J. MUSC officials stated that they implemented this policy to identify mothers who abused cocaine while pregnant and eliminate as far as possible the harmful effects of cocaine on fetuses. After implementing a protocol to test for illegal drugs, MUSC officials noticed an increase in the number of women who tested positive for those drugs Furthermore, many women were not

responding to MUSC requests to get help for their drug abuse. The policy at issue was then adopted and made mandatory throughout MUSC.

MUSC states that the policy isolates cocaine and is designed to get help to those who need it most: mothers abusing cocaine The criteria were developed based on symptoms MUSC officials knew were associated with Cocaine abuse, and made mandatory to supplant random or subjective application of UDS testing. These criteria limit testing to isolate potential problem patients for testing, and the UDS further narrows the field of potential patients. The court concludes that the policy was necessary to help cocaine-dependant mothers and their babies

and actually achieved hat goal as evidenced by he fact that a substantial majority of plaintiffs stopped abusing cocaine.

K. Since the defendants have rebutted the plaintiffs' prima facie case (if the same were in fact made out), the plaintiffs can only carry their ultimate burden of persuasion by demonstrating that other, less discriminatory practices would be as comparably effective as the challenged practice, but would result in less disproportionality. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). The plaintiffs propose the following procedures, practices, or courses of action would result in less disproportionality: (a) focussing on all illegal drugs and alcohol, not just cocaine; or (b) testing all maternity patients.

The criteria set out in the policy were developed to minimize the costs of testing, because focussing on all illegal drugs or testing all patients would be prohibitively expensive and a waste of resources. MUSC cannot afford to implement the policy as suggested by the plaintiffs because of the sheer number of patients they treat every year. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the [defendant's] legitimate ... goals." Wards Cove, 490 U.S. at 661. The court concludes these

alternatives suggested by the plaintiffs, while laudable goals, are not as comparably effective as the challenged practices of MUSC. Therefore, the plaintiffs have failed to carry their ultimate burden of persuasion as required by Title VI. Since the plaintiffs have not prevailed on this claim, the court hereby directs the clerk to enter judgment in favor of the defendants on the plaintiffs' claims brought pursuant to Title VI and the regulations promulgated thereunder and to dismiss this action with prejudice.[1]

AND IT IS SO ORDERED.

/s/
C. WESTON HOUCK
CHIEF UNITED STATES
DISTRICT JUDGE

Charleston, South Carolina
September 29, 1997

[1] The plaintiffs' motion to substitute parties filed on April 11, 1997 is rendered moot by this order.

EXCERPT OF TRANSCRIPT OF JURY CHARGE

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IN OTHER WORDS, THE EVIDENCE MUST AT LEAST REASONABLY LEAD YOU TO THE INFERENCE THAT THE DEFENDANTS POSITIVELY OR TACITLY CAME TO A MUTUAL UNDERSTANDING TO TRY TO ACCOMPLISH A COMMON AND IMPROPER PLAN.

LET'S LOOK MORE CLOSELY NOW AT THE CONSTITUTIONAL CLAIMS AND WHAT IS NECESSARY TO BE SHOWN FOR THERE TO BE A VIOLATION OF THE FIRST THE FOURTH AMENDMENT AND THEN NEXT THE FOURTEENTH AMENDMENT.

AS I STATED EARLIER, THE FOURTH AMENDMENT STATES IN PERTINENT PART THAT THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED. THE FOURTH AMENDMENT, WHICH I JUST READ, USUALLY FOCUSES ON POLICE ACTION. WHEN WE RUN INTO THE FOURTH AMENDMENT, WE ALMOST ALWAYS DO IT WHERE A POLICE OFFICER HAS MADE AN IMPROPER SEARCH OR AN IMPROPER SEIZURE OR PROPERTY. A SEARCH OR SEIZURE WITHOUT A WARRANT.

NORMALLY ON THE OTHER SIDE OF THE COIN, PERSONNEL WORKING IN A HEALTH CARE FACILITY, SUCH AS THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, COULD ROUTINELY TEST A PATIENT'S

URINE OR TEST A PATIENT'S BLOOD OR PERFORM OTHER DIAGNOSTIC TESTS WITHOUT BEING SCRUTINIZED UNDER THE FOURTH AMENDMENT. BUT WHAT MAKES THIS CASE UNUSUAL AND WHAT BRINGS IT WITHIN THE COVERAGE OF THE FOURTH AMENDMENT IS THE FACT THAT YOU HAVE LAW ENFORCEMENT AND MEDICAL SERVICE PEOPLE ACTING TOGETHER.

IT IS THE FACT THAT THE SO-CALLED SEARCH, THE TAKING

[PAGE 18]

OF THE URINE SAMPLE AND THE TESTING OF IT FOR COCAINE, WAS TO BE USED NOT ONLY FOR MEDICAL DIAGNOSIS, BUT IF IT WAS POSITIVE IT WAS ALSO GOING TO BE USED FOR POLICE AND PROSECUTORIAL PURPOSES. IT IS THAT CONCERT, THAT JOINING TOGETHER BY THESE TWO GROUPS OF PEOPLE TO PERFORM THIS SEARCH THAT BRINGS IT WITHIN THE SCOPE OF THE FOURTH AMENDMENT.

THE FOURTH AMENDMENT SPEAKS OF UNREASONABLE SEARCH AND SEIZURES. USUALLY WHEN WE SPEAK OF UNREASONABLE SEARCHES AND SEIZURES WE ARE SPEAKING OF SEARCHES AND SEIZURES WHERE THERE IS NOT A SEARCH WARRANT. THERE ARE, HOWEVER, UNDER OUR LAW, A NUMBER OF RECOGNIZED EXCEPTIONS TO THAT RULE. THERE ARE A NUMBER OF CASES IN WHICH A WARRANTLESS SEARCH AND

SEIZURE CAN BE REASONABLE UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

THERE WERE NO SEARCH WARRANTS IN THIS CASE. THERE WERE SOME SEARCH WARRANTS ISSUED LATER IN THE PROSECUTION TO OBTAIN MEDICAL RECORDS, BUT THERE WERE NO SEARCH WARRANTS ISSUED BY A MAGISTRATE OR ANY OTHER PROPER JUDICIAL OFFICER PERMIT THESE URINE SCREENS TO BE TAKEN. THERE NOT BEING A WARRANT ISSUED, THEY ARE UNREASONABLE AND IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, UNLESS THE DEFENDANTS HAVE SHOWN BY THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFFS CONSENTED TO THOSE SEARCHES.

NOW, THERE IS A LAW THAT HAS BEEN READ TO YOU HAVING TO DO WITH THE REPORTING OF CHILD ABUSE. IT'S SECTION

***

JOINT EXHIBIT #1

Joseph P. Riley, Jr.
Mayor

City of Charleston
South Carolina

Reuben M. Greenberg
Chief of Police

POLICE DEPARTMENT

TO: Central Detectives

FROM: Captain R. H. Roberts

SUBJECT: Operational Guidelines

DATE: 12 October 1989

Pregnant women abusing illegal drugs is a growing problem that poses potentially fatal consequences for the unborn child. This threat to human life has necessitated police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

For the purpose of this memorandum, illegal drugs are defined as: heroin, crack/cocaine, amphetamines, and any other drug illegally ingested by the patient that medical authorities deem a threat to the life and safety of the unborn child.

Effective immediately, the operational guidelines listed below are to be followed when responding to complaints from MUSC personnel regarding drug abuse by pregnant women:

1. RECEIPT OF COMPLAINT

MUSC personnel will notify the Detective Division of drug abuse by pregnant women when:

a. the patient has tested positive for drug abuse and, after counseling and warning, has failed to keep

scheduled appointments for pre-natal care and/or substance abuse therapy. In this instance a criminal report will be made and an arrest warrant issued for the accused. Depending upon circumstances, the arrest warrant may be delivered to Sgt. J. Doyle, Warrants Division, for service.

b. the patient has tested positive a second time for drug use. In this instance the subject will be taken into custody immediately upon her medical release. Time constraints may dictate an arrest without warrant.

c. the patient delivers a child that tests positive for illegal drugs. In this instance a criminal report will be made and the arrest warrant served on the patient immediately after her medical release. DSS will be notified to take the newborn child into protective custody.

Aggravated circumstances and/or refusal by the patient to agree to voluntary assistance may justify arrest at the first report (1a) of drug abuse.

2. EVIDENCE

Probable cause to arrest is not limited to the presence of medical test results indicating the presence of illegal drugs in the patient's system. Written or oral statements made by the patient to third parties admitting use of illegal drugs is sufficient to justify an arrest.

Detectives must obtain copies of all medical records pertinent to the criminal charges when receiving complaints from MUSC personnel. It is also beneficial to obtain written documentation

that the patient's condition permits incarceration in a jail facility.

3. CHARGES TO BE FILED

The following criminal charges will be filed against arrestees:

a. if the pregnancy is 27 weeks or less -
Possession of _____
S.C. Code 44-53-370

b. if the pregnancy is 28 weeks or more -
Possession of _____
S.C. Code 44-53-370
AND
Distribution to persons under eighteen
S.C. Code 44-53-440

c. if the patient delivers while testing positive for illegal drugs and/or her newborn tests positive for drugs -
Unlawful neglect of a child
S.C. code 20-7-50

4. QUESTIONING OF SUSPECT

As in the case of all arrests, the suspect shall be questioned concerning the charges against her and a written record made of same. Every effort should be made to ascertain the identity of the subject who provided the illegal drugs to the suspect.

5. MUSC CONTACT

Ms. Shirley B. Brown, R.N.
Case Manager - Obstetrics
MUSC
792-2123

6. CASE ASSIGNMENT

Detective Geretha Waring will serve as the lead investigator in cases of this nature. Detectives I. Choice and Ruley Davis will assist her. MUSC personnel have been instructed to contact the police dispatcher and request a Crimes v. Persons detective for cases requiring immediate response after normal business hours.

cc: Chief Greenberg
Major Oliver
Sgt. Doyle
Solicitor Charles M. Condon
Ms. Shirley Brown, RN, MUSC√

***

JOINT EXHIBIT #2

POLICY M-7

MEDICAL UNIVERSITY OF SOUTH CAROLINA
MUSC MEDICAL CENTER POLICY MANUAL

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

PURPOSE:

To ensure appropriate management of patients abusing illegal drugs during pregnancy.

POLICY:

Pregnant women abusing illegal drugs is a growing problem which poses potentially fatal consequences for the unborn child. This threat to human life has necessitated medical/police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

PROCEDURE:
MUSC Medical Center staff will follow the following steps to identify/assist pregnant patients suspected of drug abuse:

I. Identification of Drug Abusers

Pregnancies to be screened by urine drug screens:

1. No prenatal care
2. Late prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placentae
5. Intrauterine fetal death
6. Preterm labor "of no obvious cause"

7. IUGR "of no obvious cause"
8. Previously known drug or alcohol abuse
9. Unexplained congenital anomalies

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

B. Chain of custody will be followed on obtaining urine samples.

II. Education Efforts

A. Prenatal visit (initial to clinic) or initial hospitalization.

1. Video presentation of harmful effects of drug abuse during pregnancy.

2. Written statement from OB service regarding harmful effects of drug abuse during pregnancy (attached).

3. Statement to be signed by the mother, attesting that she has received counseling (attached).

B. Protocol for follow-up after identification of drug abuse during pregnancy by positive urine drug screen:

1. The Case Manager for OB or her designee will be notified by the resident of positive urine drug screen : on nights or holidays the Patient Care Coordinators will be notified.

2. Video presentation of harmful effects of drug abuse during pregnancy will be shown by nursing staff.

3. The Case Manager for OB or designee will give the written statement from OB service regarding harmful effects of drug abuse during pregnancy to the patient (attached).

4. Referral to Substance Abuse Clinic will be made by the OB Case Manager or designee and the OB clinic

Appointment will be made by the ward clerk. The OB Case Manager or designee will give the appointment letter to the patient (attached).

5. The OB Case Manager or designee will give the written statement from the solicitor's office to the patient (attached).

6. If any clinic appointments (substance abuse or OB Clinic) are not kept, the police department will be notified. Substance abuse will notify the police department for any substance abuse appointments missed or positive urine drug screens obtained by them (attached statement from Capt. Roberts).

7. If any further drug screens are positive, police department to be notified and patient will be arrested. (reference Capt. Roberts statement).

III. Protocol for follow-up after identification of drug abuse for patient who has delivered an infant:

1. Notify the OB Case Manager or designee: on nights, holidays, weekends, notify OB Patient Care Coordinator.

2. Notify police department (reference Capt. Roberts statement).

Date Originated:
Date Reviewed: 1/91, 3/93
Date Revised:
Committee Approved: 3/93

Legal Review Date: 3/93

Date Effective: 11/89, 3/93

MEDICAL DIRECTOR Date

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

Page 4 of 12

MEDICAL UNIVERSITY OF SOUTH CAROLINA
Department of Obstetrics # Gynecology
Maternal and Fetal Medicine
(803) 792-2864

TO OUR PATIENTS:

171 Ashley Avenue
Charleston, South Carolina 29422-2233

The increasing use of street drugs, particularly Cocaine and crack, by pregnant women is a cause for great concern. The use of these drugs has been strongly associated with complications such as the death of the baby (stillbirth), premature delivery, bleeding due to the early separation of the afterbirth (abruption placenta), retarded growth and mental development of the baby, and birth defects. Drug abuse during pregnancy is also associated with withdrawal symptoms and sudden death (SIDS) of the infant. It is very important that you understand the risks, not only to yourself, but also to your unborn baby if you are using drugs during pregnancy.

If you are using drugs, please stop! If you are unable to stop, please let your doctor know. We want to help mothers get off drugs for the benefit of both you and your baby. We will provide you counseling about the harms of drug abuse and will make

arrangements for you to be seen at the Substance Abuse Clinic. We realize that drug abuse is a very difficult problem and we will do all that we can to help you.

If, however, we continue to detect evidence of drug abuse or a failure to follow recommended treatment, we will take action to protect your unborn child. The Charleston Police, the solicitor's office, and the Protective Service Division of DSS are also committed to the protection of unborn and newborn children from the harms of illegal drug abuse.

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

Page 5 of 12

We hope that you can understand the tragedy which is being caused by the continued use of illegal drugs during pregnancy. This policy of providing warning, counseling and treatment for pregnant women using illegal drugs is the best way for us to help. For those women who fail this treatment, we must ask for help to protect the life and health of our most innocent unborn children.

Sincerely,

Department of Obstetrics and Gynecology
Medical University of South Carolina Medical Center

MUSC MEDICAL CENTER

I have seen a video on substance abuse and have been advised of the risks to myself and my baby. I understand that the MUSC Medical Center staff is willing to assist me in obtaining assistance for drug abuse treatment.

Patient's Signature:_____
Patient's Social Security Number:_____
Date:_____
Witness' Signature:_____

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

MUSC MEDICAL CENTER

Date: _____

To: _____
(Patient's Name)

_____
(Patient's Social Security Number)

From: Medical University of South Carolina Medical Center

During your recent examination you tested positive for drugs. These drugs may cause immeasurable harm to your unborn child. We have made an appointment for you at our Prenatal Clinic at____o'clock on the ___ day of _____ 19 ___. We have also made an appointment for you with the Charleston County Substance Abuse facility at _____ at _____ o'clock on the ____ day of _____, 19 ____. We expect you to keep these appointments.

I have read and understand this and I agree to meet these appointments for my benefit and that of my unborn child.

_____ (L.S.)
Patient's Signature

_____
Witness' Signature

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

THE STATE OF SOUTH CAROLINA
SOLICITOR, NINTH JUDICIAL CIRCUIT
CHARLESTON AND BERKELEY COUNTIES
County Court House
POST OFFICE BOX 58
CHARLESTON, S.C. 29402-0058
TELEPHONE: 803-723-6714

October 18, 1989

Reference: Substance Abuse During Pregnancy

TO WHOM IT MAY CONCERN:

During your recent examination you tested positive for drugs. You have been counseled about the harmful effects of drugs to you and your baby and referred to Substance Abuse and Pre-Natal Care by the Medical University. By these referrals you are being afforded an opportunity to rehabilitate yourself for the good of yourself and your baby. Please understand that by using drugs during pregnancy you are risking death or at least severe long-term harmful effects to your baby. If you fail to attend Substance Abuse and Pre-Natal care you will be arrested by Charleston City Police and prosecuted by the Office of Solicitor.

Sincerely yours,

Charles Molony Condon
Solicitor
CMC/aom

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

I have read and received a copy of the above letter.

_____ _____

PATIENT WITNESS

DATE:_____ _____

WITNESS

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

POLICE DEPARTMENT

TO: Central Detectives
FROM: Captain R. H. Roberts
SUBJECT: Operational Guidelines
DATE: 12 October 1989

Pregnant women abusing illegal drugs is a growing problem that poses potentially fatal consequences for the unborn child. This threat to human life has necessitated police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

For the purpose of this memorandum, illegal drugs are defined as: heroin, crack/cocaine, amphetamines, and any other drug illegally ingested by the patient that medical authorities deem a threat to the life and safety of the unborn child.

Effective immediately, the operational guidelines listed below are to be followed when responding to complaints from MUSC personnel regarding drug abuse by pregnant women:

1. RECEIPT OF COMPLAINT

MUSC personnel will notify the Detective Division of drug abuse by pregnant women when:

a. the patient has tested positive for drug abuse and, after counseling and warning, has failed to keep scheduled appointments for pre-natal care and/or substance abuse therapy. In this instance a criminal report will be made and an arrest warrant issued for the accused. Depending upon circumstances, the arrest warrant may be delivered to Sgt. J. Doyle, Warrants Division, for service.

b. the patient has tested positive a second time for drug use. In this instance the subject will be taken into custody immediately upon her medical release. Time constraints may dictate an arrest without warrant.

c. the patient delivers a child that tests positive for illegal drugs. In this instance a criminal report will be made and the arrest warrant served on the patient immediately after her medical release. DSS will be notified to take the newborn child into protective custody.

Aggravated circumstances and/or refusal by the patient to agree to voluntary assistance may justify arrest at the first report (1a) of drug abuse.

2. EVIDENCE

Probable cause to arrest is not limited to the presence of medical test results indicating the presence of illegal drugs in the patient's system. Written or oral statements made by the patient to third parties admitting use of illegal drugs is sufficient to justify an arrest.

Detectives must obtain copies of all medical records pertinent to the criminal charges when receiving complaints from MUSC personnel. It is also beneficial to obtain written documentation that the patient's condition permits incarceration in a jail facility.

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

Page 11 of 12

3. CHARGES TO BE FILED

The following criminal charges will be filed against arrestees:

a. if the pregnancy is 27 weeks or less - Possession of _____ S.C. Code 44-53-370

b. if the pregnancy is 28 weeks or more - Possession of _____ S.C. Code 44-53-370

AND

Distribution to persons under eighteen
S.C. Code 44-53-440

Central Detectives
12 October 1989
Page Three

c. if the patient delivers while testing positive for illegal drugs and/or her newborn tests Unlawful neglect of a child S.C. code 20-7-50

4. QUESTIONING OF SUSPECT

As in the case of all arrests, the suspect shall be questioned concerning the charges against her and a written record made of same. Every effort should be made to ascertain the identity of the subject who provided the illegal drugs to the suspect.

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

5. MUSC CONTACT

Ms. Shirley B. Brown, R.N.

6. CASE ASSIGNMENT

Detective Geretha Waring will serve as the leas investigator in cases of this nature. Detectives I. Choice and Ruley Davis will assist her. MUSC personnel have been instructed to contact the police dispatcher and request a Crimes v. Persons detective for cases requiring immediate response after normal business hours.

cc: Chief Greenberg
Major Oliver
Sgt. Doyle
Solicitor Charles M. Condon
Ms. Shirley Brown, RN, MUSC

Date Originated:
Date Reviewed: 3/93
Date Revised:

Legal Review Date: 3/93

Date Effective: 3/93

MEDICAL DIRECTOR Date

***

JOINT EXHIBIT #15

Date: October 17, 1989
Subject: Policies concerning drug abusing pregnant women

On October 12, 1989 members of the Medical University of South Carolina, Charleston City Policy Department and the Solicitor's Office met to discuss forming a policy as it relates to dealing with pregnant women who abuse illegal drugs. In the past, officials as the Medical University tried to deal with this problem in-house through counseling and referrals to substance abuse and pre-natal care. Because it is a problem of enormous proportion the Medical University of South Caroline has enlisted assistance of the Solicitor's Office and Charleston City Policy Department.

As a result of the October 12th meeting we established the following guidelines of proposals:

1. That the Medical University of South Carolina will screen various obstetric admissions if they feel that the patient is in a risk category for abuse of illegal drugs.

2. That if the urine screen comes up positive for illegal drugs the patient will be counseled of the harmful effects of drugs to her baby, referred to substance abuse and scheduled for pre-natal care. If the patient attends substance abuse and pre-natal care and successfully completes same, there will be no arrest on said patient. On the other hand, if said patient does not attend and successfully complete substance abuse counseling and pre-natal care that patient will be arrested by Charleston City Police Department and prosecuted by the Solicitor's Office.

3. That if a patient comes into the Medical University of South Carolina and tests positive for a second time, the Medical University of South Carolina will contact the Charleston City Police Department and the Charleston

City Police Department will as soon as possible arrest said patient.

4. That if a patient delivers a child and the mother and/or child tests positive for illegal drugs the Medical University will contact the Charleston City Police Department and they will as soon as medically possible arrest said patient.

5. That the following criminal charges could apply:

   A. If the baby is yet unborn and not medically viable the mother could be charged with:

      1. Possession of controlled substance S.C. Code 44-53-370

   B. If the baby is yet unborn but medially viable the mother could be charged with:

      1. Possession of controlled substance S.C. Code 44-53-370

      2. Distribution to persons under eighteen S.C. Code 20-7-50

      3. Unlawful neglect of a child S.C. Code 20-7-50

   C. If the mother delivers and she and/or the newborn tests positive for drugs the mother could be charged with:

      1. Possession of controlled substance S.C. Code 44-53-370

      2. Distribution to persons under eighteen S.C. Code 20-7-50

3. Unlawful neglect of a child S.C. Code 20-7-50

5. That this written policy prepared by the Solicitor's Office is just a working draft and not a final draft. The intention of this policy is to protect children from their drug abusing mothers.

cc: Chief Greenberg Dr. Newman Ms. Shirley Brown
Captain Roberts Dr. Horger Joe Goode, Esquire
Solicitor Charles M. Condon

***

PLAINTIFF'S EXHIBIT #2

OFFICE OF THE GENERAL COUNSEL
(803) 792-4063

MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina 29425-1015

August 23, 1989

The Honorable Charles Condon
Solicitor, Ninth Judicial Circuit
2 Courthouse Square
Charleston, SC 29401

RE: Drug Positive Newborns

Dear Charles:

I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs. Evidently the solicitor is prosecuting under the abuse and neglect statute. As you can imagine, MUSC Medical Center has a substantial number of newborns who do test positive to drugs, especially cocaine and heroin. If a child is born dead, this death is immediately reported to our medical examiner who orders an autopsy. In other cases where the children survive, these cases are referred to DSS for home evaluation and assistance to the mother.

Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

Sincerely,
/s/
Joseph C. Good, Jr.
General Counsel

JCG,JR/mrr

Received
Aug 24, 1989
SOLICITOR
9TH CIRCUIT

***

PLAINTIFF'S EXHIBIT #6

State of South Carolina
NINTH JUDICIAL CIRCUIT
OFFICE OF THE SOLICITOR
CHARLES MOLONY CONDON
Solicitor

Charleston County
Courthouse
Post Office Box 58
Charleston, SC 29402
Phone: 803-723-5714

Berkeley County
Courthouse
300 California Avenue
Moncks Corner, SC 29461
Phone: 803-723-0269

August 31, 1989

The Honorable Reuben Greenberg
Chief, Charleston Police Department
180 Lockwood Boulevard
Charleston, South Carolina 29403

Dear Reuben:

Since both our schedules seem to be particularly demanding this week, I thought perhaps I would communicate my thoughts to you via this letter.

The attached letter concerns the forming of a task force to consider possible prosecution of the mothers of drug affected babies also known as "crack babies." What I would ask you to consider is the co-chairing of this group with me.

I am the process of making arrangements with the Medical University for a date and meeting space. In attendance, I anticipate a relatively small group of professionals representing the Department of Social Services, the Medical University, the Drug Rehabilitation Program, the City Police, and the Office of Solicitor. Specifically, I have thought of including Dr. James Edwards, President, Medical University of South Carolina, Dr. Charles Darby, Professor and Chairman of the Department of

Pediatrics, Dr. Abner Levkoff, Professor of Pediatrics, Dr. Sarah Schuh, Assistant Professor of Pediatrics, Dr. Sandra Conradi, Chief Medical Examiner, Ms. Lynn Fredericks, Director of Social Work, Medical University of South Carolina, Joseph C. Good, Jr., General Counsel, Medical University of South Carolina, Mr. Frank Johnson, Executive Director, Charleston County Substance Abuse Commission, Mr. William Knowles, Director, Department of Social Services, Ms. Nancy Worley, Program Director, Department

The Honorable Reuben Greenberg
August 31, 1989

page two continued

of Social Services, Francis Cornley, Assistant Solicitor for Child Abuse, and Ms. Cindy Legare, Investigator for Child Abuse, Ninth Judicial Circuit. Please feel free to add any individuals that you think would be pertinent to our topic or delete any names that possibly could be unnecessary. In such a meeting we can become aware of each organization's position and get their input in forming a policy regarding the prosecution of the mothers.

Please let me know if you are interested. The tentative date for the meeting is Wednesday, September 20th at 10:00 am in the Vice-President's Conference Room which I understand is adjacent to the President's offices. If it is agreeable and you wish to co-host this meeting, I will forward the letters to you by courier for your signature. It is my hope that we can get this going by mid-September.

I look forward to hearing your response. Since this is a particularly busy time, please do not feel that it is necessary to respond by letter. Just call my secretary and she will be glad to relay your decision to me.

With my very best regards, I remain

Sincerely yours,
/s/
Charles Molony Condon
Solicitor

CMC/gf

P.S. I would like to add my hearty congratulations on your most recent award. Certainly, it nice to be so honored and even nicer to have a tangible reward!

***

PLAINTIFF'S EXHIBIT #28

Office of the General Counsel

Medical University of South Carolina
171 Ashley Avenue
Charleston, South Carolina 29425-1015

December 19, 1989

Pat Hudson, Esq.
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

RE: MUSC - Policy on Management of Drug Abuse During Pregnancy

Dear Pat:

I hope this letter finds you and your family well and ready for an enjoyable Christmas and a very prosperous New Year.

I have taken the liberty of enclosing The Medical University of South Carolina's newly enacted policy for the management of drug abuse during pregnancy. As you know the numbers of expectant mothers giving birth to drug addicted babies has increased drastically within the last few years. Babies born to mothers who have taken or used cocaine or other type drugs during pregnancy are usually born premature and their chance of survival is quite slim. Those children that do survive are frequently, severely mentally or physically handicapped and many continue to be wards of the state.

Several months ago we were contacted by Solicitor Condon who wanted to meet with representatives of the medical profession, the drug abuse counsellors, social workers, and law enforcement to educate each other as to the seriousness and

severity of this problem and to plan a united action to address it. At the suggestion of law enforcement and the solicitor's office and armed with Section 20-7-510 of The South Carolina Code of Laws, The Medical University of South Carolina was asked to develop and implement a management program for expectant mothers who tested positive to cocaine or other similar drugs. This policy was not intended to be punitive and was not to be employed in a discriminatory matter.

"An equal opportunity m/f affirmative action employer"

Pat Hudson, Esq.
December 19, 1989
Page 2

Expectant mothers admitted to our facilities who met a certain profile based on our medical experience were determined to have given reasonable cause to medical officials to do a blood screen on the patient pursuant to the blanket consent form signed by that patient upon entry into our facilities. If the test returned positive for cocaine or similar drugs the mother was informed that she must attend prenatal counselling and an appointment was made for her at the Charleston County Substance Abuse facility. The patient is shown a videotape as to the dangers of cocaine use and its affect on unborn children and she signs a form verifying that she has viewed the video on substance abuse and has been advised as to the risk to her and her baby by medical personnel of The Medical University of South Carolina. She further signs an acknowledgement of when of when her appointment with the prenatal clinic will be and her appointment with the Charleston County Substance Abuse agency. She is further given a directive by Captain R. H. Roberts of the Charleston Police Department informing her of the criminal aspects of her cocaine use and a copy of the pertinent statute. She is also given and signs for a warning from Solicitor Condon as to the importance of her attending the prenatal and drug abuse facility and the danger to herself and her child should she not follow this preventative program.

If the woman refuses to attend the prenatal care and/or the Charleston County Drug Abuse classed such non-attendance is reported to the Charleston Police Department or the Charleston County Police Department and appropriate legal action is taken from that point.

This is not a perfect program and I would prefer to have the mother sign an informed consent for drug screen and for the same procedure to be used on her child. I would also prefer that DSS be notified rather than law enforcement but the reality is that DSS cannot, at this time, handle the volume of this type of case. Notices sent to DSS over the past twelve months have not been satisfactorily addressed.

The other weakness in this program is that although we do test children who are referred from other facilities as well as their mothers if they meet the profile, the main prosecutions have been against black indigent mothers in the Charleston area which, to the uneducated observer would appear to be discriminatory.

Pat Hudson, Esq.
December 19, 1989
Page 3

I am aware that Greenville Memorial Hospital has a similar program and I would be curious to know whether they have encountered any objections to their program.

Sincerely,
/s/
Joseph C. Good, Jr.
General Counsel

JCG,JR/mrr
Enclosures

***

EXCERPT FROM PLAINTIFFS' EXHIBIT #105

Welcome To The
MUSC Medical Center

Patient Information
Handbook

***

PATIENT'S RIGHTS AND RESPONSIBILITIES (PAGE 21)

***

[excerpt from page 22]

RIGHT TO PRIVACY

You can expect consideration for your right to privacy and confidentiality concerning medical care. Medical records and all communication pertaining to your care are also treated as confidential. Access to your medical records is available to you and can be requested from your attending physician.

***

EXCERPTS FROM TESTIMONY OF SHIRLEY BROWN, R.N.

[BROWN 4]

A. NO, IT'S NOT.
Q. YOU ARE, HOWEVER, A REGISTERED NURSE, ARE YOU NOT?
A. YES, I AM.
Q. IN THE FALL OF '89, YOU HAD BEEN EMPLOYED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA FOR HOW LONG?
A. I STARTED TO WORK FOR THE MEDICAL UNIVERSITY IN 1985.
Q. SO YOU HAVE BEEN THERE APPROXIMATELY FOUR YEARS?
A. I WAS AT THE COLLEGE OF NURSING FIRST AND THEN MOVED INTO THE HOSPITAL.
Q. MS. BROWN, SOMETIME IN THE LATE SUMMER OR EARLY FALL OF '89 YOU HEARD A RADIO BROADCAST, DIDN'T YOU, ABOUT A PARTICULAR POLICY TAKING PLACE IN ANOTHER LOCATION IN SOUTH CAROLINA?
A. YES, I DID.
Q. AND THAT POLICY EFFECTIVELY IN SUMMARY WAS USING THE PROSECUTORIAL PROCESS TO ADDRESS SUBSTANCE ABUSE AMONG PREGNANT WOMEN?
A. THE NEWS I HEARD IS THAT ACCORDING TO THE SOUTH CAROLINA LAW, THAT WOMEN WERE BEING ARRESTED FOR CHILD ABUSE.
Q. IN WHERE?
A. IN GREENVILLE, SOUTH CAROLINA.

Q. HAVING HEARD THAT, WHILE DRIVING INTO WORK, MS. BROWN, YOU WENT TO THE OFFICE OF MR. GOOD, WHO IS THE GENERAL COUNSEL OF THE UNIVERSITY, DIDN'T YOU?
A. NO, I DID NOT.

[BROWN 5]

Q. YOU WROTE TO HIM? YOU CALLED HIM?
A. MR. GOOD AND I JUST HAPPENED TO BE WALKING IN TOGETHER THAT MORNING.
Q. EXCUSE ME, MY MISSTATEMENT. BUT YOU HAD THAT MORNING A CONVERSATION WITH GENERAL COUNSEL FOR THE MEDICAL UNIVERSITY OF SOUTH CAROLINA CONCERNING THAT POLICY, DIDN'T YOU?
A. YES, I DID.
Q. AS A RESULT OF THAT MEETING OR THAT CONVERSATION WITH MR. GOOD, THERE WAS EVENTUALLY, BUT NOT TOO LONG OFF, A MEETING SCHEDULED AMONG, AMONG OTHERS, THAT IS I DON'T MEAN TO BE ALL INCLUSIVE, MR. GOOD, COUNTY SOLICITOR CONDON, CHARLESTON POLICE CHIEF RUEBEN GREENBERG AND SOME MEMBERS OF THE OBSTETRICAL STAFF, MEDICAL STAFF OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA TO DISCUSS THIS ISSUE? FAIR?
A. THERE WAS ONLY ONE PERSON THERE FROM OB. THERE WERE MORE PEOPLE FROM NEONATOLOGY AND THE DEPARTMENT OF SOCIAL SERVICES AND THE CHARLESTON COUNTY SUBSTANCE ABUSE.

Q. AND THE OTHER PEOPLE I MENTIONED, SOLICITOR CONDON, CHIEF GREENBERG, MR. GOOD, YOURSELF?
A. RIGHT.
Q. FROM THAT MEETING -- AND BY THE WAY, APPROXIMATELY WHEN WAS THAT MEETING?
A. IT OCCURRED THE MONDAY BEFORE HUGO.
Q. I APOLOGIZE TO YOU, BUT I DON'T LIVE IN SOUTH CAROLINA, YOU'LL HAVE TO REFRESH ME AS TO WHEN THAT WAS?

***

[BROWN 28]

WITNESS WHAT HAS BEEN MARKED AS EXHIBIT 106. PLAINTIFF'S 106 FOR TRIAL FOR IDENTIFICATION ONLY. I'M SHOWING MY ADVERSARY
(PAUSE IN PROCEEDINGS.)
MR. HOOD: YOUR HONOR, AS TO THIS EXHIBIT WE HAVE AN OBJECTION TO ITS RELEVANCY.
THE COURT: LET ME SEE IT.
MR. WHERRY: I'M NOT OFFERING IT YET.
THE COURT: IF YOU'RE NOT OFFERING IT.
MR. WHERRY: NO, SIR, I'M NOT. I WANT TO SHOW IT TO THE WITNESS TO SEE IF SHE CAN MAKE IT RELEVANT.
Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, YOU REFERRED TO EARLIER IN YOUR TESTIMONY A WRITING OF FIRST DRAFT OF A POLICY.
MS. BROWN, LET ME WITHDRAW THAT QUESTION AND I'LL

LEAVE THE DOCUMENT THERE WITH YOU FOR A MOMENT. IT'S NOT WHAT I THOUGHT IT WAS.

DID THERE COME A POINT IN TIME, MS. BROWN, AT WHICH -- AT WHICH YOU ATTENDED OR PARTICIPATED IN ANOTHER MEETING, A FURTHER DEVELOPMENT OF WHAT I WILL CALL THE INTERAGENCY POLICY?

A. YES IT WAS.

Q. WITH RESPECT TO THE ONE THAT WAS ADOPTED IN OCTOBER OF '89, WERE THERE A LIST OF CRITERIA THAT WOULD LEAD TO THE HOSPITAL OBTAINING A UDS, URINE DRUG SCREEN?

A. YES, IT WAS.

[BROWN 29]

Q. AND WOULD YOU TELL THE JURY, PLEASE, WHAT THOSE CRITERIA WERE THAT WOULD LEAD TO THE HOSPITAL RUNNING A UDS, A URI DRUG SCREEN?

A. A PERSON HAD NO PRENATAL CARE.

Q. NO PRENATAL CARE?

A. CORRECT. IF THEY HAD LATE PRENATAL CARE, THAT AFTER 24 WEEKS GESTATION.

Q. LATE PRENATAL CARE?

A. IF THEY HAD INCOMPLETE PRENATAL CARE, I.E., THEY CAME ONE VISIT AND THEN DIDN'T COME BACK UNTIL JUST BEFORE THE DELIVERED.

Q. INCOMPLETE PRENATAL CARE.

A. IF THEY CAME IN WITH AN ABRUPTIO PLACENTAE, THAT IS WHENEVER THE PLACENTAE SEPARATES FROM THE INSIDE OF THE UTERUS WHICH CAN CAUSE THE BABY TO DIE AND OR PUT THE MOTHER'S HEALTH IN SERIOUS JEOPARDY.
IF SHE CAME IN AND HER BABY HAD DIED INSIDE OF HER KNOWN AS INTRAUTERINE FETAL DEATH.
Q. MS. BROWN, I PROMISE YOU I'M GOING TO LET YOU CONTINUE WITH THAT. WITH THE INTRAUTERINE FETAL DEATH THAT WOULD TRIGGER A UDS?
A. YES, IT WOULD
Q. IF THE IF THERE WAS INTRAUTERINE FETAL DEATH, THE HOSPITAL, I TAKE IT THE HEALTH CARE PROFESSIONALS HAD NO FURTHER INTEREST IN PROTECTION OF THE FETUS, DID THEY? THE

[BROWN 30]

BABY'S DEAD, THEY HAD NOTHING LEFT TO PROTECT, RIGHT?
A. BUT OUR URINE DRUG SCREENS WERE DONE TO LOOK FOR REASONS.
Q. I UNDERSTAND. CONTINUE WITH YOUR LIST AND THEN LET US RETURN TO THAT.
A. IF THEY WERE IN PRETERM LABOR.
Q. PRETERM LABOR.
A. IF -- AND OF NO OBVIOUS CAUSE. IF A LADY HAD TWINS, TRIPLETS, A LONG HISTORY OF CERVICAL INCOMPETENCE OR SOMETHING LIKE THAT, SHE MIGHT NOT BE SCREENED.

INTRAUTERINE GROWTH RETARDATION. THAT'S WHEN THE
BABY IS NOT THE SIZE THAT IT SHOULD BE AND THERE WAS NO
OBVIOUS CAUSE FOR THAT.
AND UNEXPLAINED CONGENITAL ANOMALIES.
WHICH I TAKE IT MEANS A BIRTH DEFECT?
A BIRTH DEFECT.
OKAY. NOW, MS. BROWN, LET'S GO BACK TO THAT INTRAUTERINE
FETAL DEATH. AND IN CONJUNCTION WITH THAT THE INTENT OF THE
POLICY, THE REASON THAT WE DECIDED ON THIS POLICY, AT THE
FIRST MEETING, WAS BECAUSE OF OUR CONCERN, AND AS MR. HOOD
SAID IN HIS OPENING, FOR THE HEALTH AND SAFETY AND CARE OF
THESE FETUSES AND SOON TO BE CHILDREN; FAIR?
A. THAT IS CORRECT.
Q. SO, HOW DID A TAKING A URINE SAMPLE FROM THE MOTHER OF A
CHILD WHO WAS ALREADY DEAD, HOW DID THAT PROTECT UNBORN
CHILDREN? IT DIDN'T, DID IT?

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EXCERPTS FROM TESTIMONY OF IRA J. CHASNOFF

[CHASNOFF 13]

A. THOSE OUTCOMES, YOU KNOW, SUPPOSEDLY WAS TO IMPROVE THE HEALTH AND WELL-BEING OF THE CHILD.

Q. ARE THERE ANY MEDICAL LISTS INVOLVED IN JUST FOCUSING ON COCAINE TO THE EXCLUSION OF PERHAPS OTHER SUBSTANCES THAT MIGHT CAUSE HARM BY PRENATAL EXPOSURE?

A. JUST PURELY FROM A BIOLOGICAL ASPECT, LOOKING AT THE HEALTH ASPECT, WE HAVE DONE STUDIES, EXTENSIVE NUMBERS OF WOMEN WHO ARE USING COCAINE NOW. AND WHAT OUR STUDY SHOW, FOR INSTANCE IF YOU LOOK AT ALL OF THE DIFFERENT DRUGS THAT WOMEN MIGHT TAKE, TOBACCO AND CIGARETTE SMOKING HAS THREE TIMES A GREATER IMPACT ON PRODUCING LOW BIRTH WEIGHT THAN DOES COCAINE.

WE KNOW LOW BIRTH WEIGHT, A BABY BEING BORN WEIGHING LESS THAN FIVE POUNDS EIGHT OUNCES, PUTS THAT BABY AT GREAT RISK FOR DEATH AND FOR ILLNESS. SO THAT IF YOU REALLY WANT TO IMPROVE THE OUTCOME OF THE CHILD, YOU WOULD DEVELOP PROGRAMS TO HELP WOMEN STOP SMOKING DURING PREGNANCY IF YOU WERE GOING TO FOCUS ON ONLY ONE DRUG. FROM PURELY A MEDICAL PROSPECTIVE YOU WOULD FOCUS ON TOBACCO AND NOT COCAINE.

Q. IS THERE ANYTHING UNIQUELY HARMFUL ABOUT COCAINE IN TERMS OF PRENATAL EXPOSURE?
A. COCAINE IS UNIQUE IN THAT IT HAS A VERY DIRECT EFFECT AND SUDDEN EFFECT. BUT IT IS NOT UNIQUE IN THE FACT THAT THERE ARE OTHER DRUGS THAT ACT IN ALMOST EXACTLY THE SAME WAY. AN EXAMPLE IS AMPHETAMINES, IF A WOMEN USES AMPHETAMINES DURING

[CHASNOFF 14]

PREGNANCY SHE GETS SOME OF THE EXACT SAME OUTCOMES IN THE SAME TIME SEQUENCE, SO THAT AGAIN JUST FOCUSING ON COCAINE IS NOT POLICY THAT MOVES YOU TOWARD WHAT WAS THE STATED OUTCOME, IMPROVING THE HEALTH OF THE CHILD.
WHAT IS AN AMPHETAMINE?
A. OH, AMPHETAMINES, ON THE STREET THEY'RE CALLED SPEED. BACK IN THE FIFTIES WHEN WOMEN WERE GIVEN DIET PILLS, THOSE WERE AMPHETAMINES. AMPHETAMINES, ANOTHER FORM OF AMPHETAMINE IS RITALIN, SO THEY CAN BE USED MEDICALLY AS PRESCRIPTIONS BUT ABUSE OF AMPHETAMINES AND THE CURRENT RAGE ACROSS THE COUNTRY IS CALLED ICE. PEOPLE ARE COOKING AMPHETAMINES, MAKING HOMEMADE AMPHETAMINES. THEY HAVE A DEVASTATING EFFECT ON PREGNANCY OUTCOME.
Q. AND WHAT WOULD THAT BE?

A. WELL, AMPHETAMINES CAN CAUSE MANY OF THE SAME THINGS THAT COCAINE DOES, ABRUPTIONS, SUDDEN SEPARATION OF THE PLACENTA FROM THE WALL OF THE UTERUS SO THE BABY CAN BLEED OR MOTH CAN BLEED TO DEATH. AMPHETAMINES CAUSE PREMATURITY, THEY CAN BE RELATED TO -- MANY OF THE SAME KIND OF THINGS THAT ARE ASSOCIATED WITH COCAINE.
THE DIFFICULTY AGAIN WITH AMPHETAMINES, JUST LIKE WITH COCAINE, YOU CAN'T SPECIFICALLY DIFFERENTIATE, YOU CAN'T SAY THIS IS DUE TO AMPHETAMINES AND COCAINE CAUSES THIS. IT'S PEOPLE WHO USE DRUGS, USE MULTIPLE DRUGS. YOU DON'T FIND ANYBODY USING ONE DRUG.

[CHASNOFF 15]

Q. IS THE PRENATAL EXPOSURE TO A FETUS OF AN ILLEGAL DRUG THE SAME THING AS THE HARM FROM THAT? IS THERE A DISTINCTION BETWEEN THOSE THINGS?
A. WELL, AGAIN THERE IS NO ONE-TO-ONE BASIS. IN FACT IN OUR STUDIES, AGAIN LOOKING AT LOTS AND LOTS OF BABIES, IF YOU LOOK AT PURELY JUST THE MEDICAL OUTCOME NOW OF ALL OF THE BABIES WE HAVE STUDIED WHOSE MOTHERS USED COCAINE DURING THE PREGNANCY, ABOUT 25 PERCENT OF THE BABIES HAVE SOME KIND OF EFFECT. 70

PERCENT OF THE BABIES THERE DOES NOT APPEAR TO BE ANY IMMEDIATE EFFECT.

SO AGAIN IF YOU'RE LOOKING AT THE IMMEDIATE OUTCOME AT THE TIME OF BIRTH IT'S 25, 75 SPLIT. SO THE MAJORITY OF BABIES DON'T SHOW IMMEDIATE OUTCOMES.

Q. FROM THE EXPOSURE TO COCAINE?

A. FROM EXPOSURE TO COCAINE.

Q. WERE YOU FAMILIAR WITH THE MEDICAL CRITERIA THAT WERE USED IN THE POLICY TO INSTIGATE THE INITIAL UDS?

A. I'M FAMILIAR WITH THE CRITERIA THAT WERE ESTABLISHED. AS I RECALL THOSE CRITERIA CHANGED A LITTLE BIT OVER THE YEARS, BUT I AM FAMILIAR WITH THEM.

AND HOW DID THOSE CRITERIA RELATE TO THE STATED GOAL OF MATERNAL AND FETAL HEALTH?

A. WELL, IF YOU LOOK PURELY AT THE MEDICAL, THERE WERE A LIST OF, I THINK IT WAS ABOUT 7 CRITERIA IF I RECALL. IF YOU LOOK AT THE PURELY MEDICAL PERSPECTIVES, FOR INSTANCE ONE OF

[CHASNOFF 16]

THE CRITERIA WAS PREMATURE DELIVERY. ANOTHER WAS ABRUPTION. SO, IF A WOMEN HAS ONE OF THOSE OUTCOMES, THAT COULD BE AN INDICATION THAT SHE USED COCAINE.

BUT, TOBACCO ALSO CAUSES ABRUPTION. TOBACCO ALSO

CAUSES PREMATURITY. SO THAT SETTING UP CRITERIA THAT CAN BE
RELATED TO A WIDE RANGE OF PROBLEMS, INCLUDING TOBACCO USE.
BUT THEN NARROWING IT DOWN AND SAYING THIS IS WHAT -- THIS IS
DUE TO COCAINE, YOU JUST CAN'T DO THAT. I MEAN, IT DOESN'T
MAKE MEDICAL SENSE.
THEN THERE WERE SOME CRITERIA IN -- THAT WERE SET UP
THAT REALLY SET UP A VERY BIASED PICTURE. WHEN YOU USE
SOMETHING LIKE NO PRENATAL CARE OR INADEQUATE PRENATAL CARE
AND SAY THAT'S WHAT WE'RE GOING TO BASE THIS POLICY ON, WHAT
YOU HAVE DONE IS SET UP A CERTAIN POPULATION OF WOMEN TO BEAR
THE BRUNT OF THAT POLICY, BECAUSE WHEN A WOMEN RECEIVES NO
PRENATAL CARE --
WELL, LET'S GO-AT IT FROM THE OTHER DIRECTION.
POVERTY PLACES A WOMEN ON THE EDGE OF THE HEALTH CARE SYSTEM
WE KNOW THAT. WOMEN WHO ARE POOR HAVE VERY LITTLE ACCESS TO
PRENATAL CARE. SO THAT IF YOU SAY, WELL, YOU DIDN'T GET
PRENATAL CARE AND SO WE'RE GOING TO TEST YOUR URINE FOR DRUGS
WHAT YOU'RE ALSO SAYING IS, YOU'RE POOR, WE'RE GOING TO TEST
YOUR URINE FOR DRUGS. BECAUSE THE POORER YOU ARE THE MORE
LIKELY IT IS YOU'RE NOT GOING TO HAVE ACCESS TO PRENATAL

CARE. SO YOU GET INTO THIS CYCLE WHERE YOU'RE SELECTING OUT

[CHASNOFF 17]

SPECIFIC GROUP OF WOMEN TO BE TESTED. NOW, THAT -- THAT IS -- THAT'S KIND OF THE STARTING POINT. BUT THEN WE HAVE DONE STUDIES AND FOLLOWING UP TO THAT THAT HAVE SHOWN THAT WHEN YOU SET UP THESE KIND OF PUNITIVE POLICIES, YOU DO SELECT OUT WOMEN WHO ARE POOR AND MINORITY WOMEN AND THE IMPLEMENTATION OF THOSE POLICIES.

Q. COULD YOU BEEN MORE SPECIFIC ABOUT WHAT YOU'RE TALKING ABOUT IN TERMS OF RESEARCH?

A. YEAH. WE PUBLISHED AN ARTICLE IN 1990 IN THE NEW ENGLAND JOURNAL OF MEDICINE, WE WERE ASKED TO COME DO A STUDY IN THE STATE OF FLORIDA IN THE PLACE CALLED PINELLAS COUNTY ON THE WEST COAST OF FLORIDA. BECAUSE THEY, ALTHOUGH THEY SAW THEMSELVES AS A VERY STABLE, MIDDLE-CLASS POPULATION, THEY WERE SEEING A NUMBER OF INFANTS WHO THEY THOUGHT MET THE CRITERIA OF HAVING BEEN EXPOSED TO DRUGS DURING PREGNANCY. SO THEY ASKED US TO DO A STUDY OF THE SITUATION.

SO, THE STUDY WAS SET UP TWO PARTS. THE FIRST PART OF IT WAS EVERY WOMEN IN PINELLAS COUNTY WHO WENT FOR HER

FIRST PRENATAL VISIT GOT A URINE TOXICOLOGY. THOSE URINES WERE SENT TO US IN CENTRAL LABS AND TESTED WITHOUT ANY NAMES, IT IS WHAT WE CALL BLINDED, YOU COULDN'T TELL WHOSE URINE WAS WHOSE BUT WE FOUND THAT THE RATE -- WE FOUND AN OVERALL RATE OF POSITIVE URINES FOR ILLEGAL DRUGS OF ABOUT 14 TO 15 PERCENT. WHEN WE LOOKED AT THE WOMEN IN THE PRIVATE HEALTH

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[CHASNOFF 42]

MAY NOT BE THE DRUG USE ITSELF, IS WHAT I AM TRYING TO SAY.

Q. IN ONE OF YOUR ARTICLES DID YOU DESCRIBE ONE OF THE SIGNS THAT A PREGNANT WOMEN MAY BE USING SUBSTANCE ABUSE TO BE THAT SHE DELAYED GETTING PRENATAL CARE?

A. THAT IS A RETROSPECTIVE STUDY, YES.

Q. DR. CHASNOFF, IN 1989 YOU TESTIFIED BEFORE CONGRESS ABOUT THE MEDICAL CRISES POSED BY COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. I DID TESTIFY BEFORE CONGRESS. I'M NOT -- I DON'T RECALL I SAID MEDICAL CRISES, BUT ---

Q. YOU DID SAY ---

A. I --

Q. I'M SORRY.

A. I DON'T REMEMBER WORDS.

Q. YOU DID SAY THAT THERE WAS AN URGENT NEED TO ESTABLISH PROTOCOLS FOR EARLY RECOGNITION OF SUBSTANCE-ABUSING WOMEN AND PROVIDING TREATMENT AND INTERVENTION PROGRAMS?

A. I DID SAY THAT, YES.

Q. YOU ALSO TESTIFIED THAT THERE HAD BEEN A RAPID RISE IN REPORTED INSTANCES OF COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. YES.

Q. AND THAT IN 1989 SUBSTANCE ABUSE WAS ASSOCIATED WITH APPROXIMATELY 64 PERCENT OF ALL REPORTED CHILD ABUSE CASES?

A. THAT'S RIGHT.

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EXCERPTS FROM TESTIMONY OF FRANCIS J. CORNELY

[CORNELY 321]

MS. DUNN: OBJECTION AGAIN.
THE COURT: AGAIN, I DON'T THINK YOU HAVE LAID A PROPER FOUNDATION. JUST BECAUSE HE WENT OVER THERE ONE TIME, I DON'T THINK THAT'S ENOUGH.
Q. (BY MS. COMPANION, CONTINUING) INVOLVEMENT, MR. CORNELY?
A. I OBVIOUSLY WROTE SOME MEMOS AND A LETTER, BUT I DON'T HAVE ANY INDEPENDENT RECOLLECTION OF ANYTHING ELSE THAT I DID TOWARD THAT BECAUSE, AGAIN, I LEFT SHORTLY THEREAFTER.
Q. IS IT FAIR TO SAY THAT YOU WERE INVOLVED WITH THE -- SOME ASPECT OF THE FORMULATION OF THE POLICY?
A. YES.
Q. AND FROM THAT DID YOU GAIN AN UNDERSTANDING OF WHAT THE GOAL OF THE POLICY WAS TO BE?
A. YES.
Q. AND WHAT WAS THAT UNDERSTANDING?
A. WE -- THE WAY I UNDERSTOOD IT WAS THAT IT WAS AN ATTEMPT TO INTERVENE ON BEHALF OF THE UNBORN CHILDREN AND OFFER THE MOTHERS SOME SUBSTANCE ABUSE COUNSELING OR SOMETHING ELSE IN AN EFFORT TO KEEP THEM OFF OF CRACK COCAINE, BECAUSE I BELIEVE THAT IT WAS BECOMING A PROBLEM AT THE MEDICAL UNIVERSITY THE

NUMBER OF BABIES WHO WERE BORN WITH HEALTH PROBLEMS AS A RESULT OF THEIR MOTHERS INGESTING DRUGS WHILE THEY WERE PREGNANT.

Q. WAS IT YOUR UNDERSTANDING THIS WAS TO BE A

[CORNELY 322]

MULTIDISCIPLINARY APPROACH?

A. YES, MA'AM.

Q. CAN YOU EXPLAIN WHAT MULTIDISCIPLINARY APPROACH MEANS?

A. WELL DIFFERENT AGENCIES, A NUMBER OF DIFFERENT AGENCIES I BELIEVE THE CITY OF CHARLESTON WAS INVOLVED DSS WAS INVOLVED, THE SOLICITOR'S OFFICE WAS INVOLVED, SOME REPRESENTATIVES OF THE MEDICAL UNIVERSITY WERE INVOLVED SO THAT IS WHY IT WAS CALLED MULTIDISCIPLINARY.

Q. AND IN YOUR POSITION IN THE SOLICITOR'S OFFICE HAD YOU EVER BEEN INVOLVED -- WITH YOUR POSITION IN THE SOLICITOR'S OFFICE AS PROSECUTOR FOR CHILD -- EXCUSE ME, FOR CHILD ABUSE AND NEGLECT CASES, HAD YOU EVER BEEN INVOLVED IN ANY OTHER MULTIDISCIPLINARY FORCES ADDRESSING CHILD ABUSE?

MS. DUNN: OBJECTION, YOUR HONOR, I DON'T KNOW WHAT THAT'S RELEVANT TO, AND CERTAINLY BEYOND THE SCOPE.

THE COURT: GO AHEAD. IT.

Q. (BY MS. COMPANION, CONTINUING) DID YOU DO THIS WITH ANY OTHER HOSPITAL OR ANY OTHER AGENCY?
A. YES, I WAS.
Q. AND CAN YOU EXPLAIN THAT TO ME, PLEASE.
A. JUST PRIOR TO LEAVING THE SOLICITOR'S OFFICE I WAS INVOLVED IN A TASK FORCE TO ESTABLISH A MULTIDISCIPLINARY APPROACH TO THE PROSECUTION OF CHILD ABUSE AND NEGLECT CASES. I WENT WITH A NUMBER OF DIFFERENT PEOPLE TO ALABAMA TO VIEW A FACILITY THEY HAD THERE. AND AFTERWARD WE ESTABLISHED THE LAW.

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EXCERPTS FROM TESTIMONY OF ROGER NEWMAN, M.D.

[NEWMAN 180]

Q. AND THE QUESTIONS WERE CONCERNING THE INTERAGENCY POLICY WE HAVE COME TO KNOW AS M-7?
A. YES, SIR.
Q. NOW, DOCTOR, ONE OF THE CONCERNS THAT WERE EXPRESSED AND THAT YOU DEALT WITH IN THIS MEMO, WAS A PERCEPTION THAT THE POLICY, A, WAS PUNITIVE, FAIR?
A. COULD YOU DIRECT ME TO THE POINT IN THE LETTER THAT YOU'RE REFERRING TO? JUST TO SAVE ME TIME FROM READING IT ALL OVER AGAIN.
Q. I WILL TRY. YES, I CAN. IF YOU WILL GO TO PAGE 3 OF THE LETTER THE LAST PARAGRAPH I BELIEVE ON PAGE 3. YOU TALK ABOUT THE GOALS OF THE DEPARTMENT; IS THAT CORRECT?
A. YES, SIR.
Q. AND THE GOALS OF THE DEPARTMENT BEING NOT ONLY THE UNIVERSITY GOALS, THE OBSTETRICAL AND GYNECOLOGICAL GOALS I'M COMING TO THE PUNITIVE PART, BUT THEY'RE JOINT GOALS WITH THE POLICE DEPARTMENT AND SOLICITOR'S OFFICE, DON'T YOU?
A. YES, SIR.'
Q. SO YOU WERE EXPLAINING TO THE RESIDENTS THAT THIS WAS A UNIFIED PROGRAM, IT WAS A PROGRAM THAT RESULTED FROM

AGREEMENT OF THREE ENTITIES, IF YOU WILL? THE HOSPITAL?
THE COURT: I THINK THE-LETTER SPEAKS FOR ITSELF
THINK YOU'RE ARGUING THE LETTER. THE LETTER SPEAKS FOR
ITSELF. AND WHAT IT SAYS TO THE RESIDENTS IT SAYS TO THE
RESIDENTS. YOU WANT TO PUBLISH IT, YOU CAN PUBLISH IT

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[NEWMAN 220]

A. NO. NO, SIR AS I SAID, WE SPECIFICALLY PUT THE LIST OF
INDICATORS TOGETHER AND INSISTED THAT LIST OF INDICATORS BE
PART OF THE POLICY TO INSURE THAT PEOPLE WERE TESTED FOR
MEDICAL INDICATIONS AND NOT FOR OTHER EXTRANEOUS INDICATIONS.
Q. NOW I HAVE GOT A BLOWUP OF THE MEDICAL INDICATIONS, I
THINK IT'S AN EXHIBIT, LETTER FORM, THAT I WOULD LIKE TO GO
OVER WITH YOU.
THE COURT: SHOW IT TO COUNSEL..
MR. WHERRY: I HAVE SEEN IT, JUDGE.
Q. (BY MR. HOOD, CONTINUING) DOCTOR, COME DOWN AND STAND ON
THIS SIDE OF THIS POSTER FOR ME, PLEASE. MAYBE THIS WILL HELP
SO THE LAST JURY CAN SEE.
A. WELL THE INDICATIONS THAT WE USED, THESE ARE THE
INDICATIONS THAT WERE DEVELOPED FOR THE POLICY THE M-7

POLICY. THE INDICATION THAT WERE USED PRIOR TO THE M-7 POLICY BASICALLY ARE THESE ONES LISTED UNDER "A" WHICH WERE THE OBSTETRICAL INDICATORS. AND THEN FOR THE PURPOSES OF THE POLICY WE ADDED THESE DOWN HERE WHICH WERE THE INVOLVEMENT OF THE PEDIATRICIANS AND NEONATOLOGISTS.

THE PATIENTS THAT WE FELT REQUIRED SCREENING WOULD BE THE PATIENTS THAT PRESENTED FOR LABOR -- IN LABOR OR TO OUR DELIVERY SUITE WHO DID NOT AVAIL THEMSELVESTO ANY PRENATAL CARE AT ANY POINT DURING THAT PREGNANCY.

THEN THESE TWO HERE WOULD REALLY BE SOMEWHAT ANALOGOUS TO THAT. THESE WERE PATIENTS WHO EITHER HAD WHAT IS

[NEWMAN 221]

CALLED LATE PRENATAL CARE, WHICH FOR OUR PURPOSES WERE WOMEN WHO DID NOT COME FOR PRENATAL CARE UNTIL AFTER 24 WEEKS OF GESTATION, SO THIS IS REALLY THE LAST THIRD OF THEIR PREGNANCY, AND THEN PATIENTS WHO HAD INCOMPLETE PRENATAL CARE. AND WE-USED THE CRITERIA OF PATIENTS WHO MAY HAVE COME FOR PRENATAL CARE EARLY BUT THAT HAD HAD LESS THAN SIX PRENATAL CARE VISITS.

Q. LET ME STOP YOU. US MEN SOMETIMES DON'T UNDERSTAND

THIS. HOW MANY WEEKS IS NORMAL PREGNANCY?
A. PREGNANCY LASTS 42 WEEKS. TYPICALLY DIVIDED INTO TRIMESTERS, FIRST, SECOND, THIRD. FIRST WOULD BE UP TO 13 WEEKS AND SECOND UP TO 26 WEEKS, AND THE THIRD TRIMESTER WAS DELIVERY.
Q. AND WHEN IS A CHILD CONSIDERED VIABLE AS TO THE FETUS?
A. FOR THE PURPOSES OF THIS POLICY WE USED 27 WEEKS. BABIES ARE CERTAINLY VIABLE AS EARLY AS 26 AND SOMETIMES 25 WEEKS, ALTHOUGH AT THAT POINT IT'S MUCH MORE RISKY TO BE BORN AND MOST OF THOSE BABIES WILL PROBABLY DIE AT 24 TO 25 WEEKS. BUT BY 27 WEEKS THERE IS AN EXCELLENT CHANCE OF SURVIVAL. I THINK THE MEDICAL UNIVERSITY HAS ABOUT 80 PLUS OR 80 PERCENT FOR SURVIVAL AT 27 WEEKS, WHICH WOULD BE ROUGHLY A LITTLE OVER TWO POUNDS.
Q. TWO POUNDS?
A. YES.
Q. THE FOURTH INDICATION IS PROBABLY THE MOST COMMON

[NEWMAN 222]

COMPLICATION OF COCAINE ABUSE IN PREGNANCY, WHICH IS ABRUPTIO PLACENTA. THE PLACENTA IS AN ORGAN THAT PROVIDES THE EXCHANGE OF OXYGEN AND NUTRIENTS FOR THE BABY AND THE MOM. AND UNDER

THE INFLUENCE OF COCAINE, FOR INSTANCE, THAT CAUSES AN INTENSE HYPERTENSIVE EPISODE IN THE USE OF COCAINE. BLOOD PRESSURE GOES UP DRAMATICALLY WHEN YOU TAKE COCAINE. AND THAT BLOOD PRESSURE CAN CAUSE A SEPARATION FROM THE PLACENTA, FROM THE UTERUS. BLEEDING BEGINS AND AS THE BLEEDING CONTINUES IT FORMS A CLOT THAT JUST GRADUALLY SEPARATES THE PLACENTA. SOMETIMES IT CAN BE SMALL AND THE BABY WILL SURVIVE IT AND THEN USUALLY IF THE ABRUPTION INVOLVES HALF OF THE PLACENTA OR MORE, IT WILL BE FATAL.

Q. IS THAT A MEDICAL CRISES?

A. OH, YES. I MEAN, AGAIN HALF THE TIME OR MORE IT CAN BE FATAL TO THE INFANT, THAT IS SEVERE ABRUPTION. AND IT'S ASSOCIATED WITH HEMORRHAGE AND SHOCK AND COAGULATING PROBLEMS IN THE MOTHER. SO, IT'S POTENTIALLY LIFE-THREATENING TO THE MOTHER AS WELL.

Q. AND CAN THAT BE CAUSED BY ONE USE OF COCAINE DURING PREGNANCY?

A. YES. YES. IT DOESN'T RELATE TO CHRONIC OR HOW MUCH YOU USED IT OR HOW YOU TOOK IT, IT'S AN INDIVIDUAL RESPONSE THAT CAN BE CAUSED BY A SINGLE USE OF COCAINE.

Q. LET'S TALK ABOUT COCAINE FOR A MINUTE. FOR A CHILD IN UTERO, WHEN THE MOTHER INGESTED IT, WHAT DOES THAT DO TO THE

[NEWMAN 223]

LIFE SUPPORT FOR THAT BABY?
A. WELL, THE DRUG IS -- CAUSES CONSTRICTION OF BLOOD VESSELS. IT'S A VASAL CONSTRICTOR. WHEN YOUR BLOOD VESSEL CONSTRICTS YOUR BLOOD PRESSURE GOES UP, SO TWO THINGS ARE HAPPENING TO THE FETUS. FIRST OF ALL THE BLOOD SUPPLY TO THE PLACENTA AND TO THE BABY IS GOING TO BE REDUCED BECAUSE OF THE CONSTRICTION OF THE BLOOD VESSELS. ONE OF THE OTHER THINGS THAT IS ASSOCIATED WITH COCAINE USED IN PREGNANCY IS GROWTH RETARDATION, WHICH IS MORE OF A CHRONIC EFFECT, IT'S A BABY THAT HAS HAD RESTRICTIONS TO ITS BLOOD SUPPLY ON MULTIPLE OCCASIONS THROUGHOUT THE PREGNANCY.
Q. AND IF THAT HAPPENS WHEN THE CHILD'S ARM IS DEVELOPING OR HAND IS DEVELOPING, THE MOTHER USES COCAINE, WHAT CAN HAPPEN TO THE ARM?
MR. WHERRY: OBJECTION TO THE LEADING NATURE OF THE QUESTION.
Q. (BY MR. HOOD, CONTINUING) WHAT CAN HAPPEN TO THE ARM OR THE HAND?
A. WELL, IT'S REPORTED BY SOME INVESTIGATORS THAT CONGENITAL ANOMALIES CAN BE ASSOCIATED WITH COCAINE INGESTION. AND THE PROPOSED MECHANISM IS AT THE TIME OF FETAL DEVELOPMENT, THE

FIRST 13 -- 12 OR 13 WEEKS OF PREGNANCY, IF AT THAT TIME THERE IS INTERRUPTION OF THE OXYGEN SUPPLY, IT INTERFERES WITH THE DEVELOPMENT OF THAT PARTICULAR ORGAN SYSTEM. AND THE EXAMPLE WAS AN ARM OR A LEG, BUT THERE ARE MANY -- IT COULD HAPPEN TO

[NEWMAN 224]

ANY ORGAN SYSTEM.
AND PROBABLY THE ONE THAT I HAVE SEEN MOST FREQUENTLY RELATED TO COCAINE USE IS A DISRUPTION OF THE URINARY TRACT. THE DEVELOPMENT OF THE URINARY TRACT. SO THAT BLOCKAGE TO ESCAPE URINE AND WHATEVER ABNORMALITIES AND HOW THE KIDNEYS DEVELOP. SO, GOING BACK TO, THE QUESTION WAS, THE TWO EFFECTS THAT COCAINE HAS ON PREGNANCY IS TO CONSTRICT THE BLOOD VESSELS AND REDUCE SUPPLY OF OXYGEN AND NUTRIENTS TO THE BABY.

AND ALSO SECONDARY TO THAT, BLOOD PRESSURE GOES UP, AND THE PLACENTA IS REALLY A HUGE VASCULAR ORGAN, IT'S AN INTERMINGLING OF SMALL BLOOD VESSELS BETWEEN THE MOTHER AND BABY'S CIRCULATION. THE BLOOD DOESN'T ACTUALLY CROSS, BUT THE BABY'S VESSELS ARE VERY THIN WALLS, AND BLOOD AND OXYGEN AND NUTRIENTS AND THINGS DIFFUSE CIRCULATION BY THE MOTHER. IF

ONE OF THOSE SMALL VESSELS RUPTURES AND BLEEDING OCCURS, THAT CLOT, THAT BLEEDING WILL DISRUPT OTHER VESSELS AND CAUSE MORE BLEEDING AND LEAD TO THE PLACENTAE ABRUPTION THAT I MENTIONED EARLIER.

Q. OTHER CRITERIA UNDER THE POLICY WHICH WOULD MEAN THE MOTHER WOULD GET TESTED.

A. INTRAUTERINE FETAL DEATH OR STILLBIRTH, PREMATURE LABOR WHEN WE COULD FIND NO OTHER OBVIOUS CAUSE. FIRST INSTANCE, WOMEN WITH TWINS, HUGE RISK FACTOR. IF THAT PATIENT WOULD HAVE AN OBVIOUS CAUSE, URINARY TRACT INFECTION, IF THEY HAD

[NEWMAN 225]

BEEN IN A CAR ACCIDENT, THAT PATIENT WOULDN'T HAVE BEEN SCREENED...BUT SOMEBODY WHO HAD NO OTHER APPARENT REASON TO BE IN LABOR WOULD BE SOMEBODY THAT WE WOULD SCREEN. COCAINE HAS BEEN SHOWN TO STIMULATE UTERINE CONTRACTIONS, AND THE EXACT MECHANISM I DON'T THINK I CAN EXPLAIN.

Q. DEFINE THIS WORD PRE-TERM. PRE-TERM LABOR?

A. PRE-TERM LABOR IS ENTERING LABOR PRIOR TO 37 WEEKS GESTATION.. WE SAY-PREGNANCY LASTS 40 -- WOMEN ARE CONSIDERED TO BE AT TERM BETWEEN -- BETWEEN 37 AND 42 WEEKS. ANYTHING

LESS THAN 37 IS CONSIDERED PRE-TERM. OBVIOUSLY THE MORE PRE-TERM YOU ARE THE GREATER RISK OF BEING --

Q. IN OTHER WORDS, IF THE BABY COMES BEFORE IT WAS 37 WEEKS?

A. YES, SIR.

Q. WHAT ARE WE DEALING WITH MEDICALLY?

A. WELL, IT WOULD DEPEND ON THE TIME AND GESTATION. A BABY BORN AT 36 WEARS IS GOING TO DO VIRTUALLY AS WELL AS A BABY BORN AT TERM. THEY MAY HAVE A LITTLE JAUNDICE, THEY MAY HAVE A LITTLE FEEDING PROBLEM, DIFFICULTY WITH TEMPERATURE REGULATION, BUT THEY'RE NOT GOING TO HAVE MAJOR COMPLICATIONS A BABY BORN AT 24 WEEKS IS GOING TO DIE. MAYBE AFTER A LONG PERIOD OF TIME IN THE NURSERY, BUT IT'S VERY UNLIKELY TO SURVIVE. WE SEE MORE PRE-TERM LABOR IN WOMEN BETWEEN 29 AND 31 WEEKS. IF YOU GRAPHED IT OUT, THAT'S WHEN MOST PRE-TERM LABOR SEEMS TO OCCUR. AND A BABY THAT IS DELIVERED AT 30 WEEKS GESTATION HAS AN 85 PERCENT CHANCE OF

[NEWMAN 226]

SURVIVAL. BUT THE MAJORITY OF THOSE BABIES WOULD GO TO THE INTENSIVE CARE UNIT, THE MAJORITY WOULD PROBABLY REQUIRE BEING

ON A VENTILATOR FOR A VARIABLE PERIOD OF TIME. AND THEY WOULD BE AT RISK FOR OTHER COMPLICATIONS, WHICH ARE LESS FREQUENT BUT VERY SEVERE, SUCH AS INTRACRANIAL HEMORRHAGE, A BOWEL THAT BECOMES ISCHEMIC AND HAS TO BE REMOVED. INFECTION, JAUNDICE AND PROBLEMS SUCH AS THAT.

SO A BABY BORN AT 30 -WEEKS GESTATIONAL, A RULE OF THUMB THAT WE USE WHEN WE ADVISE MOMS IS THE BABY WILL PROBABLY STAY IN THE HOSPITAL AS LONG AS IT WOULD HAVE NEEDED TO STAY IN YOUR TUMMY BEFORE IT GOES HOME. SO 30-WEEK BABY YOU'RE LOOKING-AT PROBABLY SEVEN TO EIGHT-MONTHS --

MR. WHERRY: OBJECTION, YOUR HONOR, ON RELEVANCE. THIS HAS NOTHING TO DO WITH THE LAWSUIT. THE LAWSUIT HAS TO DEAL WITH THE POLICY. NOT WHETHER COCAINE IS GOOD FOR PREGNANT WOMEN TO USE OR NOT.

THE COURT: WHETHER COCAINE IS WHAT?

MR. WHERRY: GOOD FOR PREGNANT WOMEN TO USE OR NOT IT HAS TO DO WITH THE POLICY AND THE WAY THEY FRAMED IT RATHER THAN NARROWLY TAILORING IT. SO RATHER THAN GOING THROUGH ALL THE CRITERIA AND TELLING US ALL- THE THINGS THAT GO WRONG, THE ONLY PURPOSE IS 403 AND I SUGGEST THAT THIS JUST SIMPLY ISN'T RELEVANT.

THE COURT: I DON'T KNOW THAT IT'S APPROPRIATE OR NECESSARY TO GO DOWN THIS CHART WITH EACH WITNESS. BUT WE DO

[NEWMAN 227]

HAVE A NUMBER OF DEFENDANTS AND THEY ARE CHARGED WITH CERTAIN ACTS THAT ALLEGEDLY DAMAGED THE PLAINTIFFS.

MR. WHERRY: YES, SIR.

THE COURT: AND I THINK THEY HAVE A RIGHT TO EXPLAIN WHY THEY DID WHAT THEY DID, AND THAT INCLUDES EXPLAINING WHY THEY TOOK THEIR ACTIONS OR WHY THEY ACTED OR WHAT KNOWLEDGE THEY HAD OR WHAT THEY HAVE BEEN TOLD. BASICALLY TO PUT IT SHORT, WHAT WAS IN THEIR HEAD. AND SO I THINK HE HAS A RIGHT TO DO THAT. I THINK ALL OF THE DEFENDANTS HAVE THE RIGHT TO DO THAT. WHETHER I'LL PERMIT COUNSEL TO DO IT IN THE MANNER HE IS-DOING IT WITH ALL DEFENDANTS REMAINS TO BE SEEN. BUT, FOR THE TIME BEING, I THINK THE QUESTION WAS APPROPRIATE AND I OVERRULE YOUR OBJECTION.

Q. (BY MR. HOOD, CONTINUING) DR. NEWMAN, YOU TALKED ABOUT THE BABIES GOING TO THE NICU, WHICH IS BASICALLY THE INTENSIVE CARE UNIT FOR BABIES. AS Y'ALL WERE FORMULATING THESE CRITERIA TO DETERMINE WHETHER OR NOT TO TEST WOMEN, WOMENS'

URINE, WAS COST A CONSIDERATION? THE COST?

MR. WHERRY: OBJECTION. YOU ALREADY RULED ON THAT.

THE COURT: NO.

MR. WHERRY: MAY I BE HEARD AT SIDEBAR.

THE COURT: SIR?

MR. WHERRY: MAY I BE HEARD AT SIDEBAR.

THE COURT: ABSOLUTELY.

(SIDEBAR AS FOLLOWS:)

***

EXCERPTS FROM TESTIMONY OF JOHN M. SANDERS

[SANDERS 102]

PATIENTS TAKING THEM OUT AND HOW THEY WERE HANDCUFFED. THAT WAS NOT UNDER OUR CONTROL.

Q. MR. SANDERS, I'M GOING TO SHOW YOU WHAT IS PLAINTIFFS, EXHIBIT 224, A COPY OF A -- A VERSION OF THE HOSPITAL POLICY THAT YOU IDENTIFIED AND AUTHENTICATED IN A DEPOSITION THAT IS NOW IN EVIDENCE. I WOULD LIKE TO ASK YOU TO PUBLISH A PORTION OF THAT, AND THAT WOULD BE THE PARAGRAPH UNDER THE WORDS POLICY?

A. PUBLISH MEAN READ IT?

Q. YES.

A. I'M SORRY.

MR. HOOD: CAN I SEE WHAT HE HAS GOT?

MS. PALTROW: YES, OF COURSE.

MR. HOOD: IS IT IN EVIDENCE?

MS. PALTROW: YES, IT IS.

Q. (BY MS. PALTROW, CONTINUING) IF YOU WOULD READ THAT PARAGRAPH, PLEASE.

A. "THE MUSC MEDICAL CENTER WILL COOPERATE WITH THE CITY OF CHARLESTON POLICE DEPARTMENT AND COURT OF LAW IN REPORTING PREGNANT WOMEN WHO HAVE TESTED POSITIVE FOR ILLEGAL DRUGS. THE FOLLOWING CRITERIA WILL BE USED TO DETERMINE WHO WILL BE SCREENED FOR URINE DRUG TESTING."

Q. SO IN FACT THE CITY OF CHARLESTON POLICE DEPARTMENT COULD

MAKE ARRESTS BECAUSE THE MEDICAL UNIVERSITY DECIDED TO
COOPERATE WITH THEM IN TERMS OF REPORTING COCAINE POSITIVE

[SANDERS 103]

WOMEN; ISN'T THAT CORRECT?
A. WE REPORTED POSITIVE DRUG TESTS IN REGARD TO THE
DISPOSITION OF THE BABY BECAUSE ALL HEALTH CARE PROVIDERS ARE
REQUIRED TO PROVIDE INFORMATION TO OUTSIDE AGENCIES IF THEY'RE
SUSPICIOUS OF CHILD ABUSE.
Q. YOU DIDN'T ANSWER MY QUESTION. ISN'T IT CORRECT THAT
THEY WERE ABLE TO MAKE THE ARRESTS BECAUSE YOU DECIDED TO
COOPERATE FOR WHATEVER REASON?
A. SURE WE COOPERATED, YES, MA'AM.
Q. AND ISN'T IT CORRECT, MR. SANDERS, THAT BEFORE THIS
POLICY WAS PUT INTO PLACE, THAT IF THERE WAS A POSITIVE DRUG
TEST ON A WOMAN ON A NEWBORN OR ALCOHOL TEST, THE HOSPITAL
POLICY WAS ONLY TO REPORT IT TO DSS?
A. THAT'S CORRECT.
Q. SO THIS WAS A CHANGE FROM THAT POLICY THAT EXISTED ALL OF
THE WAY UP UNTIL OCTOBER OF 1989; ISN'T THAT CORRECT?
A. YES, IT WAS.
Q. . AND THERE WAS NO CHANGE IN THE STATE LAW AS OF OCTOBER
1989 THAT ANYBODY TOLD YOU ABOUT; ISN'T THAT CORRECT?
A. NOT THAT I'M AWARE OF.

Q. SO THIS POLICY CHANGED -- THIS POLICY THAT MUSC ADOPTED WITH THE POLICE AND THE SOLICITOR'S OFFICE, CHANGED WHAT HAD BEEN HAPPENING FROM THE NORM BEFORE THE POLICY; ISN'T THAT CORRECT?

A. IT WAS A NEW POLICY, YES, MA'AM.

***

EXCERPTS FROM TESTIMONY OF MARTIN SHAPIRO

[SHAPIRO 125]

DETERMINING HOW YOU MAKE YOUR STATISTICAL CONCLUSIONS. AND I THOUGHT THAT I KNEW THE NUMBERS,- BUT I THINK THEY SHOULD BE IN THE RECORD.

MR. HOOD: I WOULD LIKE THE COURT TO HAVE THE TABLE AS WE GO THROUGH THIS, BECAUSE I DON'T BELIEVE THAT THE NUMBER IS IN THE TABLE.

THE COURT: YOU'LL HAVE AN OPPORTUNITY TO CROSS-EXAMINE, MR. HOOD. THAT WILL BE THE APPROPRIATE TIME. IF YOU WANT TO GIVE ME SOMETHING TO LOOK AT I'LL BE HAPPY TO LOOK AT IT.

MR. HOOD: ALL RIGHT. I'LL OBJECT TO THE QUESTION NOW GETTING READY TO BE ASKED, IT'S NOT BASED UPON WHAT HE IS CLAIMING TO RELY HIS OPINION FROM.

THE COURT: I HAVEN'T HEARD THE QUESTION.

MR. HOOD: HE IS GIVEN YOU A NUMBER NOT SUPPORTED BY THE TABLE.

THE COURT: WELL THAT'S SOMETHING FOR TO YOU BRING OUT BY CROSS-EXAMINATION, NOT BY RANDOM ARGUMENT. YOU MAY PROCEED.

MR. WHERRY: THANK YOU, SIR.

Q. (BY MR. WHERRY, CONTINUING) JUST BY THE WAY, DOCTOR, THE

PRIOR OPINION THAT YOU GAVE US, DID YOU USE THE BINOMIAL DISTRIBUTION METHOD OF MAKING THE ANALYSIS THAT YOU MADE?

A. WELL, THAT PARTICULAR NUMBER IS JUST -- JUST THE NUMBERS FROM WHICH I WILL DO THE BINOMIAL ANALYSIS.

[SHAPIRO 126]

Q. OKAY.

A. BECAUSE IF YOU LOOK AT THE TOTAL NUMBER OF PEOPLE, THE TOTAL NUMBER OF WOMEN WHO TESTED EITHER POSITIVE OR NEGATIVE OR WHO WERE NOT TESTED, JUST THE TOTAL NUMBER OF MATERNITY CASES, IT WOULD BE IT WOULD BE 14,330, OF WHICH 67 PERCENT OF THEM ARE BLACK.

Q. DOCTOR, DID YOU COMPARE THE NUMBER OF MATERNITY PATIENTS WHO TESTED POSITIVE --

MR. HOOD: THE COURT PLEASE, THE LAST NUMBER, I HAVE NO IDEA WHERE IT CAME FROM.

THE COURT: I HAVE NO IDEA WHAT HE WAS SAYING BECAUSE I WASN'T PAYING ATTENTION.

MR. HOOD: I WOULD LIKE TO KNOW THE SOURCE OF THE NUMBER.

THE COURT: YOU'RE GOING TO HAVE AN OPPORTUNITY TO CROSS-EXAMINE HIM. YOU HAVE AN OPPORTUNITY TO TAKE HIS DEPOSITION.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, DID YOU COMPARE THE NUMBER OF WOMEN POS -- WHO TESTED POSITIVE FOR DRUGS AT MUSC DURING THE OPERATIVE TIME PERIOD, THAT'S '89 THROUGH '93 OR 4, TO THE MATERNITY POPULATION AS A WHOLE AT MUSC?

A. YES. IF I CAN JUST REPEAT IT, BECAUSE WE HAVE LOST THE CHAIN HERE. WITHIN THE DRUG POSITIVE WOMEN, 68 PERCENT OF THEM WERE BLACK. WITHIN THE ENTIRE MATERNITY POPULATION, 67 PERCENT ARE BLACK. THAT IS, WE'RE WITHIN 1 PERCENT.

[SHAPIRO 127]

OBVIOUSLY THERE IS NO STATISTICALLY SIGNIFICANT DIFFERENCE BETWEEN THOSE TWO GROUPS. THAT IS THE WOMEN WHO TESTED POSITIVE FOR DRUGS IN GENERAL COULD JUST AS WELL HAVE BEEN JUST A RANDOM SAMPLE FROM ALL OF THE MATERNITY PATIENTS BECAUSE THEY ARE PROPORTIONATELY WHITE AND BLACK.

MR. HOOD: MOVE TO STRIKE HIS TESTIMONY AS GOING BEYOND THE SCOPE OF THE QUESTION.

THE COURT: OVERRULED, GO AHEAD.

A. THEY ARE PROPORTIONATELY WHITE AND BLACK IN THE SAME PROPORTIONS, THE SAME RATIO, THE SAME RELATIONSHIP AS THE GENERAL MATERNITY POPULATION.

Q. THANK YOU.

DOCTOR, DID YOU PERFORM A COMPARISON, RACIALLY -- OR BY RACE, OF THOSE MATERNITY PATIENTS WHO TESTED POSITIVE FOR COCAINE AS OPPOSED TO THE MATERNITY PATIENTS AS A WHOLE AT MUSC DURING THE OPERATIVE TIME PERIOD?

A. YES.

MR. HOOD: A CONTINUING OBJECTION ON THE GROUND STATED, PLEASE.

THE COURT: YES, SIR.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, WOULD YOU ADVISE THE JURY OF WHAT THAT COMPARISON IS?

A. YES. THERE WERE 134 WOMEN TOTAL WHO TESTED POSITIVE FOR COCAINE. OF THOSE 134, 133 ARE RACIALLY IDENTIFIABLE. AGAIN THERE IS ONE PERSON WHO IS NOT. OF THOSE 133, 120 WERE BLACK

[SHAPIRO 128]

AND 13 WERE WHITE. THAT IS, LOOKING AT JUST THE WOMEN WHO TESTED POSITIVE FOR COCAINE, 90 PERCENT OF THEM WERE BLACK.

THE COURT: DOES THAT MEAN 10 PERCENT WERE WHITE?

THE WITNESS: THAT'S CORRECT. AND THE ONE STRAY PERSON, BUT THE NUMBERS ARE LARGE ENOUGH THAT IT DOESN'T REALLY AFFECT THE PERCENTAGE.

(BY MR. WHERRY, CONTINUING) WERE YOU ABLE TO FORM AN OPINION, TO A REASONABLE DEGREE OF STATISTICAL PROBABILITY, AS

TO THE EXISTENCE OR NONEXISTENCE OF THE STATISTICALLY SIGNIFICANT IMPACT OF THESE COMPARISONS THAT YOU HAVE JUST MADE ON ANY GROUP OF WOMEN OR MATERNITY PATIENTS?

A. YES. IF YOU USE THE BINOMIAL DISTRIBUTION, AND YOU USE THE UNDERLYING PERCENT BLACK, AS LET'S SAY .68 YOU COULD USE .67. I MEAN, IT DOESN'T MATTER WHICH GROUP YOU COMPARE IT TO, ALL OF THE MATERNITIES OR THE DRUG POSITIVE MATERNITIES, BECAUSE IT'S ESSENTIALLY THE SAME. IF YOU USE THAT NUMBER AND DO THE BINOMIAL DISTRIBUTION, LOOKING AT THE FACT THAT THERE ARE 133 RACIALLY IDENTIFIABLE WOMEN, YOU GET A RESULT THAT IS DIFFERENT FROM WHAT YOU EXPECT. THAT IS, YOU GET A DIFFERENCE BETWEEN 68 PERCENT AND 90 PERCENT, WHICH IS 22 PERCENT. WHICH BY THE STATISTICAL TEST TELLS YOU THAT IT IS 5.44 STANDARD DEVIATIONS FROM WHAT YOU WOULD EXPECT BY CHANCE. AND IF I CAN TRANSLATE THAT

Q. WELL, LET ME STOP YOU. I'M GOING TO ASK YOU TO. BUT BEFORE YOU TRANSLATE THAT, WOULD YOU TRANSLATE BINOMIAL

[SHAPIRO 129]

DISTRIBUTION FOR US?

A. YES. BINOMIAL DISTRIBUTION IS REALLY VERY SIMPLE. IT'S

JUST FLIPPING A COIN. IN THIS INSTANCE AND WE HAVE GOT A COIN THAT IS HEAVIER ON THE BLACK SIDE THAN IT IS ON THE WHITE SIDE. THAT IS, WE'RE STARTING WITH A' COIN THAT IS TWO-THIRDS BLACK, BECAUSE THAT'S THE PERCENTAGE OF BLACK AND WHITE IN THE MATERNITY GROUP. TWO OUT OF EVERY THREE MATERNITY PATIENTS IS BLACK, SO WE HAVE GOT A COIN THAT IS GOING TO TURN UP TWO OUT OF EVERY THREE TIMES BLACK. WE FLIP THIS COIN AND WE DO IT A 133 TIMES, BECAUSE THAT'S HOW MANY COCAINE POSITIVE WOMEN WE'RE LOOKING AT. WE FLIP THIS COIN 133 TIMES AND IF THE COIN WERE DOING WHAT WE WOULD EXPECT IT TO DO, TWO-THIRDS WHITE –

I'M SORRY. EXCUSE ME. TWO-THIRDS BLACK, ONE-THIRD WHITE, WE WOULD EXPECT THAT WE WOULD FIND THAT THERE WERE 89 BLACK WOMEN. AND THE OTHER TIMES, 44 TIMES THE COIN CAME UP WHITE. THAT'S WHAT WE WOULD EXPECT. EIGHTY-NINE BLACK TOSSES, 44 WHITE TOSSES.

Q. AND THAT'S BINOMIAL DISTRIBUTION?

A. THAT'S WHAT THE BINOMIAL DISTRIBUTION WOULD TELL US. BUT THAT IN FACT WHAT HAPPENED –

WHAT HAPPENED?

A. THIS SOUNDS DRAMATIC. WE DIDN'T GET 89 AND 44, WE GOT 120 AND 13.

Q. AND YOU HAVE INDICATED THAT WAS EQUAL TO A STANDARD –

MR. HOOD: COURT PLEASE, HE IS LEADING.

[SHAPIRO 130]

MR. WHERRY: JUDGE, IT'S PRELIMINARY.
THE COURT: YOU STILL CAN'T LEAD HIM. YOU HAVE INDICATED THAT WAS WHAT WHATEVER.
Q. (BY MR. WHERRY, CONTINUING) WHAT WAS THE STANDARD DEVIATION?
A. IT WAS 5.44 STANDARD DEVIATION. ACTUALLY 5.4390.
Q. WHAT IS A STANDARD DEVIATION?
A. A STANDARD DEVIATION IS A MEASURE OF VARIABILITY. THAT IS, IT'S A MEASURE OF HOW MUCH FLUCTUATION YOU WOULD EXPECT BY CHANCE.
NOW, AS I SAID, YOU WOULD EXPECT 89 BLACK COCAINE POSITIVES AND 44 WHITE COCAINE POSITIVES. BUT AS WE ALL KNOW, YOU WOULDN'T GET EXACTLY 89 AND EXACTLY 44. I MEAN, MAYBE YOU WOULD HAVE 90 OR 85 OR WHAT HAVE YOU. SO THE QUESTION IS: HOW DIFFERENT IS THE OBSERVED 120 FROM WHAT YOU WOULD HAVE EXPECTED, 89. AND THE WAY WE MEASURE THAT DIFFERENCE IS NOT JUST IN THE NUMBER OR INCHES OR SOME OTHER MEASURE, WE HAVE THIS MEASURING STICK WE CALL STANDARD DEVIATION. I COULD EXPLAIN WHY WE HAVE THAT MEASURING STICK, BUT SOMETHING TELLS ME IT'S MORE BORING THAN USEFUL.
Q. IT WOULD BE BORING TO ME.

A. AND WHAT WE FIND HERE IS THAT WE'RE -- WE'RE ALMOST FIVE AND A HALF UNITS, FIVE AND A HALF STANDARD DEVIATIONS OFF OF WHAT WE WOULD HAVE EXPECTED. NOW, YOU CAN CONVERT THAT INTO PROBABILITY TERMS.

[SHAPIRO 131]

DOING PROBABILITIES, THE PROBABILITY OF BY CHANCE BEING FIVE AND A HALF STANDARD DEVIATIONS DIFFERENT THAN WHAT YOU WOULD EXPECT BY CHANCE WITH THE BINOMIAL DISTRIBUTION, THE PROBABILITY IS ABOUT ONE IN A HUNDRED THOUSAND. ALMOST ONE IN A MILLION THAT BY CHANCE YOU WOULD MISS IT BY THAT MUCH.

Q. BY HOW MUCH?

A. BY THE DIFFERENCE BETWEEN 89 AND 120. THAT IS, THAT YOU WOULD HAVE BEEN OFF BY 31 PEOPLE. THE PROBABILITY OF THAT HAPPENING PURELY BY CHANCE IS VERY SMALL. IT'S SOMETHING THAT I'M ESTIMATING BETWEEN ONE IN A HUNDRED THOUSAND, ONE IN A MILLION.

Q. MOVING ON, DID YOU, SIR, COMPARE THE RACIAL COMPOSITION OF WOMEN ARRESTED PURSUANT TO THE INTERAGENCY POLICY WITH THE RACIAL COMPOSITION OF THE MATERNITY POPULATION IN THE HOSPITAL AS A WHOLE STATISTICALLY?

A. YES.

MR. HOOD: COURT PLEASE, THERE IS NO FOUNDATION FOR THAT QUESTION. OBJECT TO THAT.

THE COURT: I'M NOT SURE EXACTLY WHAT YOU MEAN BY FOUNDATION. THE STATISTICS THAT WE DISCUSSED AT THE BREAK?

MR. HOOD: YES, SIR. HE IS TALKING ABOUT ARRESTS NOW.

THE COURT: I UNDERSTAND.

MR. HOOD: IT HAS NOTHING TO DO WITH ARRESTS, THE STATISTICS THAT WE TALKED ABOUT AT THE BREAK.

***

[SHAPIRO 139]

MR. HOOD: YOU WANT ME TO DO IT?

THE COURT: I WANT HIM TO DO IT. YOU CAN ASK HIM WHATEVER QUESTION YOU WANT.

VOIR DIRE EXAMINATION

BY MR. WHERRY:

Q. DID YOU, SIR, COMPARE THE RACIAL COMPOSITION OF THE WOMEN ARRESTED PURSUANT TO THE INTERAGENCY POLICY AND THE OPERATIVE TIME PERIOD WITH THE RACIAL COMPOSITION OF THE MATERNITY POPULATION OF THE HOSPITAL AS A WHOLE?

A. YES.

Q. AND WHAT DID THAT COMPARISON DISCLOSE?

A. THAT THE WOMEN ARRESTED WERE SIGNIFICANTLY MORE BLACK IN PROPORTION THAN THE MATERNITY PATIENTS IN THE HOSPITAL.

Q. WHAT WERE THE PERCENTAGES?

A. THERE WERE 30 WOMEN. OF THOSE 30, 28 WERE BLACK. OF THOSE 30, 28 WERE BLACK. HOWEVER, OF THE -- OF THE TWO WOMEN THAT WERE NOT BLACK, THE NOTES WHICH I READ MYSELF, THE NOTES OF NURSE SHIRLEY BROWN, NOTED THAT THE PATIENTS, I THINK I'M SAYING THIS RIGHT, YES, THE PATIENTS LIVED WITH A BOYFRIEND.

THE COURT: I'M FAMILIAR WITH THAT.

THE WITNESS: OKAY. SO IF YOU COUNT IN TERMS OF THE RACE OF THE BABY, IT'S ACTUALLY -- THE BABIES OF THE WOMEN, IT'S ACTUALLY 30 OUT OF 30. IF YOU COUNT JUST THE RACE OF THE WOMEN, IT'S 28 OUT OF 30, WHICH WOULD BE 93 PERCENT.

Q. AS COMPARED TO?

[SHAPIRO 140]

A. 67 PERCENT.

Q. WHICH IS THE PERCENTAGE OF BLACK WOMEN WHO WERE IN THE BLACK MATERNITY PATIENTS AT MUSC DURING THE OPERATIVE TIME PERIOD?

A. THAT'S CORRECT.

Q. DOCTOR, IN YOUR OPINION IS THAT A STATISTICALLY SIGNIFICANT DIFFERENCE?

A. YES. IF YOU TAKE .67 AS YOUR UNDERLYING PROBABILITY, AND YOU WERE ASKED WHAT IS THE PROBABILITY OF GETTING 30 IN A ROW WHO ARE BLACK OR BABIES ARE BLACK, THE PROBABILITY IS POINT

ZERO AND FIVE ZEROS. .00006 THAT THAT RESULT WOULD HAPPEN BY CHANCE. THAT WOULD CORRESPOND TO, AGAIN, ABOUT FIVE STANDARD DEVIATIONS.

Q. AND TRANSLATING THAT STANDARD DEVIATION, THE CHANCE OF THAT HAPPENING IS ONE IN HOW MANY?-

A. WELL, AS I SAID, IT WOULD BE ABOUT ABOVE FIVE SERIES, IT'S ONE IN A 165,103 TO BE EXACT.

Q. DID YOU COMPARE, DOCTOR, THE NUMBER OF WHITE AND NON-WHITE DELIVERING MOTHERS TESTED FOR DRUGS DURING THREE DIFFERENT TIME PERIODS?

A. YES.

Q. TIME PERIOD. NUMBER ONE WAS WHAT TIME PERIOD? OR TIME PERIOD A OR THE FIRST TIME PERIOD?

A. OCTOBER 1, 1988, TO MARCH 31, 1989.

Q. AND SECOND TIME PERIOD?

[SHAPIRO 141]

A. APRIL 1, 1989, TO SEPTEMBER 30, 1989.

Q. AND THE THIRD TIME PERIOD?

A. OCTOBER 1, 1989, TO DECEMBER 31, 1992.

Q. WHAT WAS THE RESULT THAT YOU ARRIVED AT DURING THOSE COMPARISONS?

A. THE RESULT IS THAT IF YOU LOOK AT EITHER OF THE TWO EARLIER TIME PERIODS, EITHER THE ONE LEADING UP TO THE END OF MARCH OF 1989, OR THE PERIOD FROM APRIL THROUGH SEPTEMBER OF 1989, THAT THE PROPORTION OF WHITE AND BLACK, WHEN TESTED,

MATCHES THE PROPORTION OF BLACK AND WHITE WITHIN THE MATERNITY POPULATION.

IF YOU LOOK AT THE TIME PERIOD AFTER OCTOBER 1, 1989, THROUGH DECEMBER 31, 1989, (SIC) THAT PROPORTION OF WOMEN TESTED IS -- IS STATISTICALLY SIGNIFICANTLY MORE, I'LL SAY BLACK, TO USE A EUPHEMISM -- IS MORE BLACK THAN A MATERNITY POPULATION IN GENERAL.

Q. AND USING THE BINOMIAL DISTRIBUTION METHOD OF STATISTICS, DID YOU ARRIVE AT A STANDARD DEVIATION FOR THAT STATISTICALLY SIGNIFICANT DIFFERENCE? HAVE I WORDED THAT QUESTION CORRECTLY?

A. YES. IT IS APPROXIMATELY 10 AND A HALF STANDARD DEVIATIONS.

Q. WHAT DOES THAT TRANSLATE TO FOR 10 AND A HALF STANDARD DEVIATIONS?

A. OH, I DON'T KNOW. IT'S TOO BIG A NUMBER TO COME UP WITH

***

EXCERPTS FROM TESTIMONY OF MARTHA J. COOPER WILLIAMS

[WILLIAMS 127]

A. WELL, AT THIS POINT IT WAS THE DIVISION OF SOCIAL WORK.
THE DIVISION OF SOCIAL WORK WHERE?
A. AT MUSC.
Q. OKAY.
A. AND CERTAIN MEMBERS OF A COMMITTEE OVER AT THE SUBSTANCE ABUSE COMMISSION.
Q. THE CHARLESTON COUNTY?
A. HERE IN CHARLESTON, YES.
Q. THAT'S THE "WE" THAT YOU'RE TALKING ABOUT?
A. YES. WE HAD BEEN TALKING ABOUT PROVIDING SPACES AT MUSC IN ORDER TO DO THE ASSESSMENTS, THE REFERRALS, ETCETERA, OF THOSE WOMEN WHO WERE FOUND OR WHOSE BABIES WERE FOUND TO BE COCAINE POSITIVE. AND IT WASN'T JUST COCAINE.
IF IT WASN'T JUST COCAINE?
WE WEREN'T FOCUSING ON JUST COCAINE, NO. WE WERE LOOKING AT ANY KIND OF SUBSTANCE ABUSE ISSUE THAT MIGHT ARISE, BE IT ALCOHOL ABUSE, AND OTHER TYPES OF DRUG ABUSE.
Q. DID THE REFERRAL PROCESS THAT YOU ARE TALKING ABOUT NOW INVOLVE ANY ARRESTS IN THAT PROCESS?
A. CERTAINLY NOT. IF I MAY, ONE OF THE THINGS IN THE AREA OF SUBSTANCE ABUSE AS A RULE, CRIMINALIZATION IS THE VERY LAST

RESORT AND IS ONLY RECOMMENDED BY TREATMENT EXPERTS.

MS. SHOWERS: I'LL OBJECT FOR LACK OF FOUNDATION FOR THIS WITNESS TO GIVE OPINION TESTIMONY. SHE IS NOT LISTED AS AN EXPERT.

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Supreme Court, U.S.
FILED
JAN 14 2000
CLERK

No. 99-936

In the

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,
Petitioners,

v.

THE CITY OF CHARLESTON,
SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for A Writ of Certiorari To The
United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment special needs doctrine was properly applied to drug tests performed by the MUSC Medical Center for treatment of prenatal substance abuse by their maternity patients?

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STATEMENT OF THE CASE

I. Introduction

This case involves a constitutional challenge to a policy established by the Medical University of South Carolina Medical Center for "Management of Drug Abuse During Pregnancy." Pursuant to the Policy, the medical staff performed urine drug screens on pregnant patients who presented certain specified medical symptoms and criteria indicative of drug abuse.

The Petitioners are ten women who sought treatment at the Medical Center during their pregnancies and were identified as potential drug abusers. With their consent, the medical staff conducted urine tests as part of their medical care and treatment that ultimately revealed evidence of cocaine use. Thereafter, the Petitioners brought this Section 1983 claim asserting that the urine test performed for medical purposes was a warrantless search in violation of the Fourth Amendment.

The Petitioners' claims were rejected by the trial jury and by the Court of Appeals on different grounds, each of which is fully justified by the law and the evidence. The trial jury found that the Petitioners consented to the tests. Without questioning the sufficiency of the evidence to support the trial jury's finding of consent, the Court of Appeals correctly ruled that the searches were reasonable under the special needs doctrine as enunciated by this Court. 186 F.2d 469 (4th Cir. 1999).

The Medical Center presented evidence that the urine drug screens were medically necessary for management of pregnancy patients and the newborns. The Medical Center also presented documented evidence of an epidemic of cocaine use among its maternity patient base and the

consequent public health problems and associated fiscal costs. The clinical necessity for the drug screens, the health problems associated with maternal cocaine use, and the astronomical economic costs of caring for infants suffering from the effects of cocaine use by their mothers all created special needs beyond normal law enforcement goals. On the other hand, the urine testing policy was a minor intrusion of the Petitioners' privacy expectations inasmuch as their urine was collected and tested in the regular course of medical treatment to which they had consented. In the balance, the Medical Center's special interest in protecting the health of its pregnant patients and their children significantly outweighed the minimal intrusion suffered by the Petitioners. Therefore, the searches conducted were reasonable and did not violate the Fourth Amendment.

Accordingly, there are no compelling reasons for this Court to grant the petition for a writ of certiorari. The special needs doctrine has been well-defined in a number of decisions and the application of that doctrine in this case is not in conflict with the controlling precedent of this Court or any relevant decision of any other court of appeals.

II. Development of the MUSC Medical Center Policy

The Petitioners have misstated the facts regarding the purpose and goal behind development of the Policy. It was not, as the Petitioners assert, designed and implemented to gather evidence to prosecute the Petitioners. The Policy was developed and implemented to promote the health and well being of maternity patients and their unborn children.

A. Evidence of a Medical Epidemic

The Petitioners cannot dispute that there was a documented problem with prenatal drug abuse. In the late 1980s, research studies and medical literature were published showing that there was a national epidemic of illegal drug abuse with staggering associated social and economic costs.

Each year in South Carolina, alone, approximately 15,000 babies suffered from prenatal exposure to illegal drugs. [App. 73] Of those, as many as 3,221 pregnant women, were using cocaine. [App. 74] The medical staff at MUSC observed the effects of the epidemic through their own clinical observations. [App. 34, 46]

The use of cocaine can have serious consequences for maternal and infant health. Effects on the mothers include, increased risk of premature delivery, premature separation of the placenta (abruptio placentae), and spontaneous abortion. [App. 76] Cocaine use during pregnancy can affect infants in a number of ways, including an increased risk of sudden death syndrome, low birth weight, seizures, strokes, heart attacks, lack of bonding, emotional disorders, behavioral problems, and learning disabilities. [App. 75] Other medical problems suffered by these infants include: brain damage, prune belly syndrome, limb reduction defects, kidney damage, and damage to the genitourinary and reproductive systems. [App. 4-6] In some cases, even a single dose of cocaine can kill the baby and the mother too. [App. 10]

The potential complications with the pregnancy and delivery make it clinically necessary for the obstetrical staff to know whether the mother has used cocaine. [App. 47] The pediatric staff also need to know if a newborn has tested positive for drug use because their management of newborns

can be affected by possible withdrawal or other manifestations of prenatal drug abuse. [App. 3-4, 49]

In addition to the potentially devastating harm suffered by the pregnant women and their children, prenatal cocaine use also produces staggering societal costs – increased need for neonatal intensive care at birth, increased needs for social services, foster care, and special education services, lower levels of achievement of educational and occupational goals, increased family stress, and reduced maternal bonding. [App. 76] The national costs to care for cocaine exposed infants were estimated to rise as high as $3 billion annually. [App. 28-29] The medical costs for each infant can exceed $50,000 for the first year alone. Severe exposure can result in lifetime economic costs in excess of $ 1 million per infant. [App. 77]

B. Development of the Policy

When the MUSC medical staff observed that the national epidemic had reached Charleston, they established a protocol in April 1989 for the routine diagnosis of their patients. Because of concerns about the degree of discretion in allowing individual physicians to order urine drug tests, they established six criteria to control the discretion. Any MUSC maternity patient presenting one or more of these criteria was automatically tested. If a patient tested positive, she was referred to the county substance abuse commission for counseling and treatment. However, this protocol proved to be ineffective when virtually none of the patients referred followed through with treatment. [App. 36-37, 67]

Faced with a crisis and lack of success with the voluntary referral protocol, the Medical Center was still in need of an effective policy. After hearing media publicity about a

policy being implemented in the upstate, the case manager for the obstetrics department mentioned it to the Medical Center's General Counsel who in turn contacted the Charleston County Solicitor.

In the fall of 1989, a multidisciplinary task force was formed, consisting of members of the MUSC medical staff, the Solicitor's Office, the Charleston County Police Department, the Department of Social Services, and the Charleston County Substance Abuse Commission. [App. 29-30] Every person involved in that task force had one overriding objective – to develop an effective policy that would discourage prenatal cocaine abuse and protect infant and maternal health: "This was not supposed to be a punitive policy where we went out and punished people for doing something, even though we knew the activity was illegal. What we were trying to do is give those babies a change to be born normal." [App. 33]

Since the voluntary referral protocol had proven ineffective, the task force determined that any chance of success would depend on some coercive factor. The substance abuse representative on the task force supported the "carrot and stick" method of coercive treatment as a last resort in dealing with the problem. He explained that most addicts are in such a state of denial that they will not voluntarily seek help unless there is some leverage to get their attention. [App. 39-43] The Policy ultimately established provided a three-step process for dealing with pregnant patients that tested positive. The first two steps paralleled the prior protocol, but the addition of a third step – threat of law enforcement intervention – provided the necessary "leverage" to make the Policy effective.

III. The Policy for Management of Drug Abuse During Pregnancy

The first step in the implementation of the Policy was the identification of pregnant patients suspected of drug abuse. The Policy contained a list of medical symptoms and indicia of drug abuse to identify which patients were to be screened by urine testing, to wit: 1. No prenatal care; 2. Late prenatal care after 24 weeks gestation; 3. Incomplete prenatal care; 4. Abruptio placentae; 5. Intrauterine fetal death; 6. Preterm labor of "no obvious cause"; 7. IUGR of "no obvious cause"; 8. Previously known drug or alcohol abuse; or 9. Unexplained congenital anomalies.[1] [PA 53-54[2].]

Like all MUSC patients, the maternity patients signed consent forms permitting the medical staff to conduct necessary testing – including urine tests.[3] In addition, all maternity patients were provided with educational information about the harmful effects of prenatal drug abuse and each patient also signed a statement acknowledging that she had received counseling.

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[1] This list was not "medically senseless" as the Petitioners contend. Rather, the list was compiled by the Medical Center physicians from the medical literature available at the time. Nor was the list targeted to discriminate against African-American pregnant women. To the contrary, the list was developed to remove any discretion for testing. [App. 46, 49]

[2] References to the Appendix submitted by the Petitioner's will be designated as "PA."

[3] See forms, App. 60-65. The Petitioners claim that they did not give consent for their urine to be tested for drugs. The jury, however, found that they did consent. See discussion, infra.

If a patient tested positive, the second step included providing the patient with the same educational information and referring her to substance abuse counseling. If the patient failed to follow-up with substance abuse treatment or prenatal medical visits, or if she tested positive a second time, the Solicitor's office was notified and arrests were made.[4] This new third step proved to the pivotal factor in making this an effective policy.

IV. Effectiveness of the Policy

Contrary to the Petitioners' broad assertions, the record establishes that the Policy was highly effective in educating women of the dangers and in discouraging cocaine use during their pregnancies.[5] After implementation of the Policy, the medical staff experienced a decline in the number of positive drug screens and fewer medical complications previously attributed to cocaine abuse. [App. 38, 67-68] The substance abuse counselors reported that many of the patients referred by MUSC benefited from and successfully completed the treatment. [App. 11] Even many of the Petitioners themselves admitted that the Policy helped them successfully complete treatment and fight their addictions. [App. 1-3]

Of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested. Of

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[4] During a short period of time when the Policy was first initiated, a positive test was immediately reported and the patient was arrested. In early 1990, the Policy was amended to provide the patients a chance to obtain substance abuse treatment and avoid arrest. Even after arrest, the patient could avoid prosecution by completing a drug treatment program.

[5] The Policy has been discontinued since this litigation was initiated.

those thirty, most were processed through pretrial intervention upon voluntary completion of substance abuse treatment. Only two – neither of whom is a Petitioner – failed to complete treatment and were prosecuted, but even they were ordered to complete treatment as a condition of probation rather than sentenced to an active jail term. [App. 79-80]

Contrary to the Petitioners' supposition, there was no evidence that the Policy discouraged pregnant women from seeking treatment at the Medical Center. [App. 67]

V. Procedural History

In addition to the Fourth Amendment claim, the Petitioners asserted a number of federal and state law claims, each of which was properly rejected by the District Court, the trial jury, and the Court of Appeals after a six-week trial.[6]

The District Court submitted the Fourth Amendment claim to the jury on the question of whether the Petitioners consented to the urine drug tests, and judgment was entered

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[6] In addition to the Fourth Amendment challenge, the Petitioners asserted a constitutional challenge to the disclosure of medical information to law enforcement personnel as a violation of their Fourteenth Amendment right to privacy and a statutory claim for racial discrimination in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d - 2000d-6; the Petitioners also asserted a state-law tort claim against the MUSC medical staff for abuse of process. The District Court granted judgment as a matter to law to the Defendants on the claims of abuse of process and right to privacy. The jury found that the Defendants had not intentionally discriminated against the Plaintiffs based on their race, and the District Court ruled for the Defendants on the Title VI disparate impact claim. The Court of Appeals affirmed the District Court findings on abuse of process, right to privacy, and disparate impact.

for the Defendants on the jury's finding that the Petitioners had consented to the searches. On appeal, rather than address the sufficiency of the evidence to support the jury's finding of consent to the urine tests, the Court of Appeals found that the searches were reasonable under the special needs doctrine and affirmed the judgment for the Defendants.

REASONS FOR DENYING THE WRIT

This Court has clearly established the guiding principles and parameters of the special needs doctrine in a number of opinions. The Court has recognized that in certain cases, the government may have "special needs," beyond normal law enforcement goals, which make the usual warrant and probable-cause requirement impracticable. In those special needs cases, the reasonableness of the search is measured by balancing the government's interest against the individual's privacy expectations.

The application of the special needs doctrine to the MUSC Medical Center Policy is not, as the Petitioners contend, a radical extension of the special needs doctrine. The Policy is clearly sustainable as a reasonable search under the special needs doctrine as enunciated by this Court's precedent.

The Court of Appeals recognized that the special needs doctrine only applies where there is a compelling or important special need founded on a concrete – not symbolic or hypothetical – danger. The Court of Appeals also acknowledged that the ultimate reasonableness of the search must be evaluated by balancing the public interest and the effectiveness of the search in advancing that interest against the individual privacy expectations and the degree of intrusion suffered by the individuals.

In upholding the MUSC Policy, the Court of Appeals correctly applied the principles and adhered to the parameters set by this Court. The evidence demonstrated that the drug screens were medically necessary for the treatment of the maternity patients and their children and that the epidemic of cocaine use by pregnant women and the attendant public health problems created a special need beyond normal law enforcement goals. The evidence also established that the MUSC urine testing policy was effective in addressing that special need and that the intrusion on the Petitioners' privacy expectations was minimal. Therefore, the Court of Appeals properly found that the searches were reasonable.

I. The Basic Tenet of the Fourth Amendment is Reasonableness.

The Fourth Amendment does not require that all searches be conducted pursuant to a warrant supported by probable cause.[7] Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search ... in certain limited circumstances neither is required.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (quoting *Almeida Sanchez v. United States*, 413 U.S. 266, 277 (1973)).

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[7] The Fourth Amendment only imposes strictures on government action. The Respondents have maintained through the litigation that the Medical Center and its staff were not state actors in conducting clinically necessary drug screens. See discussion infra.

The touchstone of Fourth Amendment analysis is reasonableness and "what is reasonable depends on the context within which a search takes place:"

> The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

Id. at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)). The special needs doctrine comprises one such category of searches, which are valid notwithstanding the lack of a warrant or probable cause.

II. The Principles and Parameters of the Special Needs Doctrine are Clearly Established by Supreme Court Precedent.

The genesis of the special needs doctrine is found in the decision of *New Jersey v. T.L.O.*, supra, in which the Court addressed the proper standard for assessing the legality of searches conducted by public school officials. In that case, a school principal discovered marijuana and other paraphernalia while searching a student's purse for cigarettes. When the principal turned the evidence over to the police and the state brought delinquency proceedings, the student moved to suppress the evidence, contending that the principal had violated her Fourth Amendment rights.

In upholding the search, the Court found that the warrant requirement was unsuited to the school environment and

concluded that the school officials did not need to obtain a warrant before searching students under their authority. The Court also concluded that the school officials did not need probable cause to believe a violation of law has occurred; but rather, that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. *Id.* at 341.

Justice Blackmun concurred in the judgment of the Court, but wrote separately to emphasize the predicate justification for a warrantless search without probable cause: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351.

The Court adopted Justice Blackmun's special needs analysis in *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), in holding that a state's operation of a probation system constitutes "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." [8] Pertinent to the Court's analysis was the fact that the probation officer who conducted the search was not a law enforcement officer; but rather, a government employee charged with supervising his client with the goal of assuring that the probation served as a period of genuine rehabilitation.

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[8] The Petitioners attempt to categorize this case and the other probation/parole cases separate from "special needs" cases on the grounds that probationers/parolees have lesser liberty rights. However, a fair reading of the Court's opinion shows that the decision was based squarely on the special needs doctrine.

The Court further refined the special needs doctrine in the companion cases of *Skinner v. Railway Labor Executives'* Association, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), which presented two different drug test policies for review under the special needs doctrine.

At issue in *Skinner* were railroad company policies that required blood, breath and urine testing of its employees under certain circumstances as required or permitted by regulations of the Federal Railroad Administration.[9] The Court found that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, ... 'likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, supra at 873-74).

In *Von Raab*, the Court upheld a policy of the United States Customs Service requiring a urinalysis test from all employee applicants for transfer or promotions to certain positions. In so holding the Court succinctly articulated the following two-step analysis for application of the special needs doctrine: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U.S. at 665-66.

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[9] The regulations had been promulgated after the FRA gathered and evaluated evidence that on-the-job intoxication was a significant problem in the railroad industry and that alcohol and drug abuse by railroad employees posed a serious threat to safety.

In applying the special needs test, the Court found that the warrant requirement is as unsuited to the employment situation as it is to the school environment at issue in the *New Jersey v. T.L.O.* case and that imposing a warrant requirement "would only serve to divert valuable agency resources from the Service's primary mission." *Von Raab*, 489 U.S. at 666-67. The Court further found that "a warrant would provide little or nothing in the way of additional protection of personal privacy," *id.* at 667, because the circumstances under which the testing would be conducted and the permissible limits of the search were narrowly defined and the employees were well aware of the policy and its procedures. The Court also found that the compelling governmental interests justified the urine testing even in the absence of probable cause or any individualized suspicions of drug use.

In evaluating the public interest component of the balancing test, the Court noted that the smuggling of illicit narcotics has created a national crisis, and that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668. In light of such, the Court found that the Government has "a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. On the other side of the balancing scale, the Court found that the Customs employees "have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test." *Id.* at 672.

The Court ultimately held that the warrantless and suspicionless testing policy was reasonable because the Government's "compelling interest in safeguarding our

borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm." *Id.* at 677.

The Court revisited the application of the special needs doctrine to a drug testing policy in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). After observing a sharp increase in drug use among the student population and that athletes were the leaders of the drug culture, the school district adopted a Student Athlete Drug Policy that authorized random drug testing of students who participated in school athletic programs. The express purpose of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650.

Relying on its previous decision in *New Jersey v. T.L.O.*, the Court again found that special needs exist in the public school context which make the warrant and probable-cause requirement impracticable. *Id.* at 653. Turning then to the evaluation of the privacy interests, the Court found that the students' legitimate expectations of privacy were diminished because of the supervisory role of the school and the voluntary participation in extracurricular athletic activities. On the other side of the equation, the Court found that, with the clear evidence of an immediate crisis of great proportions,[10] deterring drug use by schoolchildren is an important governmental concern and it was "self-evident"

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[10] The District Court had found that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," and that "[d]isciplinary actions had reached epidemic proportions," and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F.Supp. 1354, 1357 (Ore. 1992).

the problem was effectively addressed by preventing drug use by student athletes. Taking all these factors into consideration, the Court concluded that the policy was reasonable.

The only case in which the Supreme Court has struck down a drug testing policy under a special needs analysis is *Chandler v. Miller*, 520 U.S. 305 (1997). At issue there was a Georgia statute which required that all candidates for certain state offices submit to a urinalysis for illegal drug use and test negative as a precondition to qualifying for a place on the ballot.

In addressing the espoused justification of the statute under the special needs doctrine, the Court reviewed and summarized its decisions in *Skinner*, *Von Raab*, and *Vernonia*: "Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. The Court found that the State of Georgia had failed to demonstrate any such special need. The key to the Court's decision appears to be a lack of evidence of a concrete danger that state officeholders in Georgia have drug problems; rather, Georgia merely presented a "symbolic" need to project its commitment to the fights against drugs.

While the Court has not addressed the exact same type of drug testing policy as presented in this case, it has clearly enunciated the guiding principles and parameters of the special needs doctrine. The Court of Appeals' application of that doctrine in sustaining the MUSC Medical Center policy on Management of Drug Abuse During Pregnancy is not in

conflict with the controlling precedent of this Court or any relevant decision of any other court of appeals. Accordingly, there is no compelling reason to grant the petition for a writ of certiorari.

III. The Special Needs Doctrine was Properly Applied to the MUSC Medical Center Maternity Policy.

A. There was a Well-Documented Special Need to Protect Pregnant Patients and their Children.

The first step in the special needs analysis is the determination of whether the search serves a special governmental need beyond normal law enforcement needs. Contrary to the Petitioners' assertions, the Court of Appeals faithfully applied this Court's precedent in holding that the MUSC Medical Center demonstrated a special need in preventing cocaine use by pregnant women.

The incontrovertible evidence is that both the obstetrical and neonatal medical staff had a clinically-based need for the information in order to manage the pregnancy and treat the newborns. It is also indisputable that medical communities in the City of Charleston, other areas of the State of South Carolina, and across this Nation were experiencing serious maternal and neonatal health problems as a result of the epidemic of prenatal drug abuse.

Since the "special need" was uniquely medical in nature, it was appropriately addressed on the frontline by medical personnel that could best identify the at-risk patients and most effectively implement a policy to prevent or treat prenatal drug abuse. Notably, the Petitioners' own expert, Dr. Chasnoff, urged the medical community to take

immediate action to stem the epidemic of prenatal cocaine abuse. [App. 26]

The words of Justice Powell in his concurrence in *New Jersey v. T.L.O.*, supra, illustrate how special relationships -- such as that between healthcare providers and their patients -- can establish a basis for recognizing special needs exceptions to the warrant/probable cause requirement:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

469 U.S. at 349. The Court in *Griffin v. Wisconsin* also found it pertinent that the primary role of a probation officer was not to investigate criminal activity, but to supervise his client with the goal of assuring that the probation served as a period of genuine rehabilitation.

By the same token, healthcare providers and patients do not stand in an adversarial relationship to each other. Instead, there is a commonality of interests between medical personnel and their patients. In maternity cases, the medical personnel and the patients share common interests in the health of both the mother and her child.

The medical staff does not conduct the drug screens for the purpose of investigating criminal activity. The purpose is to provide proper medical treatment to their patients. During pregnancy, so many factors effect the health of the mother, the course of the labor and delivery, and the health of the child, that the medical staff cannot adequately treat the pregnant patient or manage the pregnancy without such critical information as the patient's use of illegal drugs.

The opinion of the Court of Appeals cannot fairly be read, as the Petitioners assert, to establish any dangerous precedent that would permit law enforcement to engage in warrantless searches for just any and every health or safety reason. The Court of Appeals adhered to this Court's decisions in *Vernonia* and *Chandler*, in stressing that the governmental need must be "compelling" and that "the hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one." 186 F.3d at 477. The Court of Appeals correctly found that: "In light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women." 189 F.3d at 478.

The Court has recognized in *Von Raab* that "drug abuse is one of the most serious problems confronting our society today." 489 U.S. at 674. However, the Court has drawn parameters for how far that problem will justify warrantless searches. In *Vernonia,* the special need for the school's random drug testing policy was justified by documented evidence of a sharp rise in drug use by student athletes and attendant injuries and disciplinary problems. On the other hand, in *Chandler v. Miller*, the State of Georgia could not produce any evidence of drug problems among state

officeholders to establish a special need sufficient to justify its mandatory drug testing for political candidates.

The Court of Appeals decision is not a radical departure from the parameters set by the Court. To the contrary, it squarely fits within those parameters as a clear case of a "special need" sufficient to sustain the MUSC Policy. In comparing the range of documentation and substantiation of the special needs, this case clearly aligns most closely with *Vernonia* where the school district presented solid evidence to document the existence and extent of the problem of drug abuse by its students and the harmful consequences to school discipline and the students' health. Unlike in *Chandler*, the special need to protect pregnant women and their children from prenatal cocaine abuse is not merely symbolic, but fully demonstrated by the evidence of an epidemic causing serious public health problems.

The Petitioners argue that any special needs search must be totally divorced from any law enforcement activity. However, this argument directly conflicts with the Court's repeated references to ""special needs' **beyond normal law enforcement**." *Griffin v. Wisconsin*, 483 U.S. at 873-74 (emphasis added.) The Court has never said that the "special need" must be to the exclusion of normal law enforcement goals. Nor do any of the special needs cases provide any foundation for the argument that involvement of the Solicitor or the Police Department in formation of the Policy somehow negated the well-documented "special need." Notably, in the case of *New Jersey v. T.L.O.* which came before the Court on appeal of the juvenile criminal case, the Court found no reason to invalidate the search because the fruits were ultimately turned over to the police.

This case does not present any evidence, direct or inferential, that the MUSC Medical Center's goal of protecting the health of its maternity patients and their children was merely a pretext to prosecute cocaine addicts. The record establishes that there was a very real medical epidemic and the Medical Center's only goal was to manage the pregnancies of its maternity patients and prevent maternal and infant injuries arising from prenatal cocaine abuse. The Medical Center had already attempted a protocol that proved ineffective and turned to other governmental agencies for help in formulating a Policy that would be more effective. It was the substance abuse counselors that supported the involvement of law enforcement to provide the coercive element necessary to make the Policy work. The purpose of the urine drug tests was not to prosecute the drug laws; rather, the threat of prosecution was but a tool in implementing a Policy that would prove to be effective in discouraging their patients from prenatal cocaine abuse.

B. MUSC's Interest in Protecting the Health of the Maternity Patients and their Children Outweighed the Minimal Intrusion on the Patients' Diminished Expectations of Privacy.

The second step in the special needs analysis is a balancing of the individual's privacy expectations against the government's interests. The balancing test of the special needs doctrine has been stated and applied in several variations.

In *Skinner*, the Court balanced the limited discretion exercised by the employers in determining which employees could be tested under the railroad policies, the "surpassing" interests in train safety, and the diminished expectation of privacy held by railway employees that participate in such a

heavy regulated industry. Similarly, in *Von Raab*, the Court balanced the government's compelling interest in preventing the promotion of drug users that might endanger the border security or public safety with the diminished expectation of privacy interests of the applicants for such security-sensitive positions. In *Vernonia*, the Court took into account the reduced expectation of privacy of school children, the relative insignificance of the intrusion, the important nature of the school's responsibilities and quasi-guardian relationship with its students, the documented immediacy of the drug problems; and the effectiveness of the policy.

The Court of Appeals properly evaluated the relevant factors. First, the court considered the extent of the documentation and the relative importance of the need in reducing cocaine use by pregnant women, finding ample evidence of the existence and magnitude of the epidemic of prenatal use of cocaine. 189 F.3d at 477-78. As to the effectiveness of the urine testing, the court found "little doubt that testing the urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use...." *Id.* at 478. Finally, the court found the degree of intrusion minimal in light of the fact that (1) the collection and testing of urine was a normal, routine and expected part of the medical treatment to which the Petitioners had consented[11] and (2) the urine tests were performed based on a non-discretionary application of the criteria delineated in the

[11] A urine test taken by a physician in a hospital environment pursuant to accepted medical practices is generally considered reasonable even without a warrant. *Schmerber v. California*, 384 U.S. 757, 771 (1966).

Policy.[12] In balancing these factors, the Court of Appeals correctly found that the searches were reasonable.

All of the special needs cases involved warrantless searches, but they also involved a range of levels of suspicion. The policies in *Von Raab, Vernonia,* and *Chandler* all called for drug testing without any level of individualized suspicion. In contrast, the policy is *Skinner* was based on specific factors that provided the basis for some level of individualized suspicion. Likewise, in *New Jersey v. T.L.O.*, the search was predicated on individualized suspicion.

The searches in this case were not suspicionless. The criteria for performing the test was medically-based, and provided amble suspicion to believe that the patients had been using cocaine.

IV. The Decision of the Court of Appeals is Not in Conflict with the Decisions of Other Circuits.

The decision of the Court of Appeals for the Fourth Circuit is not, as the Petitioners claim, in conflict with any decisions from other circuits. To the contrary, the Court of Appeals' decision is completely consistent with those of its sister circuits.

A number of the circuit court decisions closely tract this Court's special needs decisions, both factually and analytically, in upholding random and mandatory drug

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[12] The Petitioners argue that the Fourth Circuit improperly applied the balancing test enunciated in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). However, the Court itself relied upon *Sitz* in its opinion in *Vernonia School District v. Acton*, 515 U.S. at 654.

testing policies in a number of industries ranging from schools to nuclear power plants to horse racing.[13] Those few decisions where the circuits have struck down drug testing policies are also consistent with this Court's precedent and distinguishable from the case here.

For example, in *United Teachers of New Orleans v. Orleans Parish School Board*, 142 F.3d 853 (5th Cir. 1998), the court struck down a school policy that required any employee injured in the course of employment to submit to drug testing because there was no documented problem of drug use by teachers or their teachers' aids or clerical workers. In *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998), the court found that a city program for drug testing trash truck mechanics

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[13] *Aubrey v. School Bd. of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (random drug testing of safety sensitive employees); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir.), *cert. denied*, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998) (random drug testing of students as condition of participation in any extracurricular activities); *Stigile v. Clinton*, 110 F.3d 801 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998) (mandatory testing of all employees in certain sensitive positions); *International Bhd. of Elec. Workers, Local 1245 v. U.S. Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir. 1992) (random drug testing of employees of nuclear power plant); *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (random drug testing of horse race participants); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir.), *cert. denied*, 502 U.S. 1020 (1991) (mandatory drug testing of all applicants for positions as attorneys at Department of Justice); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (mandatory testing of firefighters and police officers); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991) (random drug testing of airline employees); *Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3rd Cir. 1989) (random drug testing of railroad employees in safety-sensitive positions); *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1989) (random drug testing of athletes and cheerleaders).

was not well-designed to detect drug use and lacked any deterrent effect.

The decision of the Court of Appeals in this case in no way conflicts with these decisions. Unlike in *Chandler v. Miller* or *United Teachers of New Orleans*, the problem of prenatal cocaine use, the consequent harm, and the medical necessity for the testing were well documented. And, in contrast to the *City of Albuquerque* program, the MUSC Medical Center the program was well designed to identify pregnant patients who were using cocaine and proved effective in deterring prenatal cocaine use and preventing the consequent harm to the health of the mothers and children alike.

The potential danger to students from drug use by a school custodian, as in *Aubrey v. School Board of Lafayette Parish*, supra, is much more attenuated that the immediate and direct risk to the unborn children of mothers who use cocaine during the pregnancy. If a school board can require random testing of a school custodian in order to protect the students, surely a public hospital can perform suspicion-based drug testing of pregnant mothers to protect the health of the unborn children and the mothers themselves.

The appropriate application of the special needs doctrine in this case perhaps is best seen and understood by comparing two decisions arising out of child abuse and neglect investigations. *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993); and *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993).

In *Franz*, a police officer investigating a case of possible sexual abuse conducted a warrantless inspection of the child's vaginal area and forcibly removed the child for

medical examination. The police officer argued that the "societal imperative to protect children" justified his actions under the special needs doctrine. While expressing a "deep concern for the safety and well-being of young children," the court rejected the special needs argument because the primary focus of the police officer's investigation was the potential criminal culpability of the parents:

> What the district court perceived, and what cannot be overlooked, is that defendant's focus was not so much on the child as it was on the potential criminal culpability of her parents. That focus is the hallmark of a criminal investigation. In contrast, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not part of the social worker's cachet.

997 F.2d at 791; *see also Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (possibility of criminal prosecution was contingency of only secondary importance to social worker).

In contrast, the Court of Appeals for the Fourth Circuit upheld a medical examination by a public health nurse that accompanied a social worker in the course of a child neglect investigation, finding that the state's interest in examining the neglected children outweighed any attenuated privacy interest.

These two cases illustrate two important distinguishing factors: (1) the official role of the person or entity conducting the search; and (2) the primary focus of the search. In this case, the searches in this case where conducted by medical personnel, not law enforcement officers, and the primary focus of the search was to manage

the pregnancy and protect the health of both the mother and the infant. Similarly, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not part of the social worker's cachet. Likewise, here, the principal focus of the MUSC medical staff was the welfare of the pregnant patient and her child, and while a criminal prosecution might emanate from the activity, that prospect is not part of the medical staff's "cachet."

V. There are Alternate Independent Grounds to Sustain the Finding of No Fourth Amendment Violation.

The petition for a writ of certiorari should be denied because there is no conflict with the established precedent of this Court or any decision of another circuit regarding the application of the special needs doctrine to the facts of this case. In addition, the petition should be denied because judgment for Defendants is otherwise sustainable under the alternate independent grounds that the Petitioner consented to the drug tests or that the MUSC medical staff were not state actors subject to the strictures of the Fourth Amendment.

A. The Petitioners consented to the drug tests.

"[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Each of the Petitioners signed one of the consent to treatment forms. In addition, evidence was presented to the jury that all patients were given a letter at the time of their initial visit which explained the urine drug testing policy and clearly put them

on notice that law enforcement would be contacted if they did not get treatment. [PA 56-57] Also, many of the Petitioners admitted seeing or hearing the public service announcements about the Policy. Several of the Petitioners admitted that they were aware of the Policy at the time they sought treatment at MUSC and provided urine specimens for testing. The jury's factual finding that the Petitioners consented to the drug testing is fully supportable by the evidence adduced during the six-week trial and stands as an independent ground for sustaining the judgment that there was no Fourth Amendment violation.

B. The MUSC Medical Center staff were not state actors subject to the strictures of the Fourth Amendment.

The MUSC Medical Center and its medical staff have maintained throughout this litigation that they are not state actors subject to the Fourth Amendment. No case has extended the application of the Fourth Amendment to medical personnel in a public hospital based solely on their status as government employees. However, to the contrary, the Court of Appeals for the Ninth Circuit has ruled that not all healthcare providers in public hospitals are acting as agents of the police subject to the Fourth Amendment in obtaining and testing bodily fluids in every case. *United States v. Attson*, 900 F.2d 1427, 1434 (9th Cir.), *cert. denied*, 498 U.S. 961 (1990).

The Fourth Amendment only applies if law enforcement instigated, encouraged or participated in the "search" and the healthcare provider engaged in the search with the intent of assisting the police in their investigative efforts. If there is a "dual purpose" – both medical and investigative – the search retains its private character, and if the search is "private" at

the inception, subsequent voluntary disclosure of the police does not implicate the Fourth Amendment.

Here, the medical purpose is undeniably a legitimate, independent motivation for performing the urine drug screens. Thus, at worst, there was arguably a "dual purpose." In this situation, the Fourth Amendment simply does not apply to the conduct of the MUSC Medical Center and its staff.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[Tr. 46, lines 2-7]

Q. NOW, SOME GOOD CAME FROM ALL OF THIS, DIDN'T IT? YOU GOT OFF OF COCAINE?

A. I RELAPSED.

Q. AND HAVE YOU RELAPSED SINCE WE TOOK YOUR DEPOSITION? YOU'RE OFF OF IT NOW?

A. OH, I'M OFF OF IT NOW, YES.

Testimony of Laverne Singleton
[Tr. 118, lines 18-24]

Q. (BY MR. HOOD, CONTINUING) YOU THEN WERE ASKED WHAT I ASKED YOU A MINUTE AGO ABOUT CHARLESTON COUNTY SUBSTANCE ABUSE WERE YOU HAD COUNSELING. EARLIER TODAY I ASKED YOU IF IT WAS HELPFUL AND YOU SAID NO. ON LINE 15 YOU WERE ASKED, "DID YOU FIND THEIR SESSIONS HELFUL?"

AND YOUR ANSWER?

A. "YES."

Testimony of Ellen Knight
[Tr. 147, lines 2-8]

Q. (BY MS. SHOWERS, CONTINUING) MS. KNIGHT, YOU GOT SUBSTANCE ABUSE TREATMENT AT CHARLESTON COUNTY SUBSTANCE ABUSE?

A. YES.

Q. AND YOU SUCCESSFULLY COMPLETED THAT TREATMENT AND YOU'RE OFF DRUGS; IS THAT RIGHT?

A. YES.

Testimony of Sandra Powell
[Tr. 178, lines 3-7]

Q. AFTER USING COCAINE FOR A SIGNIFICANT PERIOD OF TIME YOU GOT INTO SUBSTANCE ABUSE AND SUCCESSFULLY COMPLETED SUBSTANCES ABUSE. HAVE YOU EVER USED COCAINE SINCE YOUR ARREST, MS. POWELL?

A. NO.

Testimony of Crystal Ferguson
[Tr. 202, lines 7-15]

Q. AND WHEN I TOOK YOUR DEPOSITION, DO YOU RECALL TELLING ME THAT THE SUBSTANCE ABUSE TREATMENT THAT YOU GOT AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION WAS HELFUL AND EFFECTIVE?

A. YES, SIR. YES, MA'AM.

Q. AND, MS. FERGUSON, YOU'RE CURRENTLY PREGNANT NOW; ISN'T THAT TRUE?

A. YES, I AM.

Q. ARE YOU USING COCAINE DURING THIS PREGNANCY?

A. NO, MA'AM.

Testimony of Paula Hale
[Tr. 115, lines 10-11]

Q. AFTER YOU GOT OUT OF JAIL DID YOU USE ANY DRUGS?

A. NO.

Testimony of Theresa Joseph
[Tr. 20, lines 9 –12]

Q. AND YOULD YOU SAY CHARLESTON COUNTY SUBSTANCE ABUSE WAS A FACTOR IN YOUR GETTING SUCCESSFUL TREATMENT?

A. IT WAS SOME HELP, TOO, ALONG WITH ME AND MY FAMILY.

Testimony of David Annibale, M.D.
[Tr. 237, lines 18-24]

Q. (BY MS. SHOWERS, CONTINUING) SURE. COULD YOU EXPLAIN TO THE JURY THE MEDICAL NECESSITY OF TESTING OR EVEN KNOWING THAT A NEWBORN HAS TESTED POSITIVE FOR DRUGS?

A. THERE ARE CERTAIN MEDICAL CONDITIONS THAT ONE WOULD SEE IN NEWBORN -- IN A NEWER BORN INFANT THAT COULD BE THE RESULTS OF EXPOSURE TO DRUGS OR WITHDRAWAL FROM EXPOSURE TO DRUGS THAT COULD PRESENT IN THE FIRST SEVERAL DAYS OF LIFE.

Testimony of Stanley C. Baker, M.D.
[Tr. 608, lines 22-25]

Q. AS YOU UNDERSTAND IT, WHAT WAS THE GOAL THAT WAS HOPED TO OBTAINED BY THIS POLICY?

A. TO PROTECT THE MINDS OF THOSE UNBORN CHILDREN AND TO HOPEFULLY HELP THE MOTHERS KICK THE HABIT OF COCAINE.

Testimony of Judith A. Bays, M.D.
[Tr. 18, line 6 – tr. 24, line 12]

A. THEY CAN BE--THEY CAN BE SMALL IN LENGTH AND SMALL IN WEIGHT, TOO, BUT THERE'S OFTEN A DISPROPORTIONATE SMALL HEAD SIZE, MEANING ALTHOUGH THE BABY ITSELF IS SMALL, THE HEAD IS SMALLER THAN IT SHOULD BE EVEN FOR A SMALL BABY. AND THAT REFLECTS DAMAGE TO THE BRAIN OR POOR BRAIN GROWTH. AND THAT'S THE MOST CONCERNING THING WE SEE.

OTHER THINGS THAT WE SOMETIMES SEE ARE RELATED TO WHAT COCAINE DOES IN TERMS OF CUTTING OFF THE BLOOD SUPPLY. WE CALL IS VASOCONSTRICTION. VASO MEANS BLOOD VESSEL AND CONSTRICTION MEANS IT SHUTS IT DOWN. AND THAT'S THE WAY COCAINE AFFECTS PEOPLE, ADULTS AND BABIES, IS IT--IT CLOSES DOWN THESE SMALL BLOOD VESSELS AND THEN IT SHUTS OFF THE OXYGEN AND--OXYGEN SUPPLY, THE BLOOD SUPPLY, THE FOOD SUPPLY TO WHATEVER WAS BEYOND THE SHUTDOWN BLOOD VESSEL.

SO IN AN ADULT YOU WOULD CALL THAT STROKE. IF YOU HAD THAN HAPPEN IN YOUR BRAIN, THAT WOULD BE A STROKE. SO PART OF YOUR BRAIN COULD BE DAMAGED OR ACTUALLY DIE. IF IT HAPPENS IN YOUR HEART, IT'S CALLED A HEART ATTACK BECAUSE A PART OF THE MUSCLE IN YOUR HEART DIES. SO WE HAVE SEEN IT IN INFANTS WHERE IT HAPPENS IN THEIR BRAIN. AND THE BRAIN--BRAIN GROWTH IS AFFECTED OR PARTICULAR PARTS OF THE BRAIN ARE KNOCKED OUT.

IF IT--THERE ARE CASE REPORT--I HAVEN'T SEEN THIS PERSONALLY, BUT THERE ARE CASE REPORTS OF SEVERAL INFANTS WITH HEART ATTACKS RELATED TO MATERNAL USE OF COCAINE. THEN IF IT HAPPENS TO THE GUT, PORTIONS OF THE GUT CAN DIE BEFORE BIRTH. IF IT HAPPENS TO THE DEVELOPING FINGERS AND TOES OF THE FETUS, THEN THE FINGERS AND TOES WON'T DEVELOP BECAUSE THE BLOOD SUPPLY IS CUT OFF TO THEM. AND THAT'S WHY WE THINK

WE GET--WE SEE THESE--WHAT WE CALL LIMB REDUCTION DEFECTS WHERE THEY'RE MISSING FINGERS, TOES OR ACTUALLY PART OF THE ARM OR LEG. IF IT HAPPENS TO THE KIDNEYS, YOU CAN BE--YOU CAN HAVE KIDNEY DAMAGE OR MISSING KIDNEY. IF IT HAPPENS TO THE GENITOURINARY SYSTEM, THEIR REPRODUCTIVE SYSTEM, THEN PART OF THAT CAN BE DAMAGED, TOO.

BUT THOSE ARE THE MOST CONCERNING EFFECTS WE SEEN WHEN THE--THE BLOOD AND OXYGEN SUPPLY IS CUT OFF TO A PART OF THE DEVELOPING BABY. THE MOST CONCERNING, OF COURSE, WOULD BE THE HEART OR THE BRAIN. LATER ON, WE SEE SOME BEHAVIORAL AND NEUROLOGIC EFFECTS WHICH ARE VERY CONCERNING TOO.

Q. AND ALL OF THESE EFFECTS THAT YOU HAVE DESCRIBED DR. BAYS, IN YOUR OPINION, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY MOST PROBABLY, ARE THEY A RESULT OF COCAINE EXPOSURE IN UTERO?

A. YES.

MS. SMITH: OBJECTION, IRRELEVANT, PREJUDICIAL. LACK OF FOUNDATION.

Q. WHAT OTHER RISKS DO CHILDREN WHO ARE PRENATALLY EXPOSED TO COCAINE FACE AS THEY GROW AND DEVELOP, DOCTOR?

A. WELL, THEIR—THEY HAVE PARTICULAR LEARNING DISABILITIES. SOME OF THEM, NOT

ALL OF THEM. THERE'S A WHOLE SPECTRUM. SOME BABIES MAY APPEAR TO BE NOT AFFECTED AT ALL AND THEN SOME BABIES ARE MORE MILDLY AFFECTED, MORE MODERATELY AFFECTED AND THEN SOME BABIES SEVERELY AFFECTED. SO WE SEE THE WHOLE SPECTRUM. SO I'M GOING TO GIVE YOU WHAT WE HAVE SEEN ON THE MORE WORRISOME END OF THINGS.

WE SEE BABIES THAT ARE--AS THEY GROW ARE HYPERACTIVE AND HAVE ATTENTION DEFICIT DISORDER. THEY HAVE DIFFICULTY FOCUSING ON A TASK AND PAYING ATTENTION TO THE TASK. THEY HAVE DIFFICULTY WITH ORGANIZED PLAY, MEANING, LET'S SAY YOU'RE GOING TO PLAY HOUSE. THEY DON'T UNDERSTAND HOW TO PLAY HOUSE, HOW TO HAVE THE, YOU KNOW, THE DADDY COME HOME AND MOMMY FIX DINNER AND SO ON. THEY CAN'T SEQUENCE. SEQUENCING IS A PROBLEM, PUTTING THINGS IN ORDER. SO THIS IS FIRST, THIS IS SECOND, THIS IS THIRD. SO SOCIAL PLAY, INTERACTIVE PLAY.

EARLY ON, ONE OF THE TWO THINGS THAT ARE SEEN IN--AND CAN CONTINUE LATER IN LIFE ARE DIFFICULTIES WITH-AND THIS IS PART OF FOCUSING-DIFFICULTY WITH FOCUSING ON THE GAZE. IT'S CALLED GAZE AVERSION WHERE BABIES WON'T LOOK AND HOLD A LOOK, A GLANCE. AND THIS CONCERNS US BECAUSE THIS IS PART OF THE BONDING PROCESS BETWEEN THE MOTHER AND THE INFANT IS FOR THE MOTHER TO LOOK IN THE BABY'S FACE AND THE BABY TO LOOK BACK. AND SOME OF THESE INFANTS DON'T WANT--DON'T SEEM TO WANT TO LOOK AT A

FACE, AND WILL LOOK AWAY, WHEREAS NORMAL BABIES WILL PREFER TO LOOK AT A FACE. AND THAT'S PART OF THE NORMAL BONDING PROCESS. SO WE'RE CONCERNED IT MAKES BABIES MORE DIFFICULT TO REAR WHEN THEY'RE NOT LOOK AND SMILING AT THE ADULT CARETAKER AND MAKES THEM AT HIGHER RISK OF ABUSE.

I THINK THE MOST CONSISTENT PATTERN THAT PEOPLE ARE SEEING IS EFFECT ON LANGUAGE. LANGUAGE--AND THIS--THIS IS BOTH LANGUAGE PROCESSING SO THIS IS THE INPUT OF LANGUAGE, THIS IS, A CHILD UNDERSTANDING WHAT YOU'RE ASKING THEM TO DO. SOMETIMES DON'T SEEM TO BE ABLE TO PROCESS THE VERBAL INFORMATION COMING IN WELL.

THEN THERE'S ALSO A PRODUCTION DEFECT THAT SOME OF THEM DON'T SEEM TO BE ABLE TO PRODUCE LANGUAGE WELL. AND PART OF IT IS A MOTOR DIFFICULTY WITH MOVEMENTS OF THE MOUTH AND THE TONGUE, BUT PART OF IT IS WHAT WE CALL A CENTRAL PROCESSING DEFECT, LIKE THE CENTRAL COMPUTER OF THE BRAIN IS NOT PRODUCING--PROCESSING AND PRODUCING LANGUAGE NORMALLY. SO WHEN--IN ITS MOST SEVERE FORM, WE SEE WHAT WE CALLED PARROTING WHERE A CHILD SEEMS TO SPEAK FLUENTLY, BUT THEN IF YOU EXAMINE THEM A LITTLE MORE CAREFULLY AND QUESTION THEM A LITTLE MORE CAREFULLY, IT TURNS OUT THEY'RE JUST RECITING BACK WHAT THEY'VE HEARD.

I'LL GIVE YOU AN EXAMPLE. I SAW A CHILD, A COCAINE AFFECTED CHILD IN THE

OUTPATIENT CLINIC A FEW YEARS AGO AND SHE WAS ABOUT THREE. AND WHEN I WALKED IN THE ROOM I SAID, "HI, HOW ARE YOU?" AND SHE SAID, "HI, HOW ARE YOU?" AND I SAID, "WHAT'S YOUR NAME?" AND SHE SAID "WHAT'S YOUR NAME?" AND UP TO THERE--UP TO THAT POINT, I THOUGHT SHE WAS DOING PRETTY WELL FOR A THREE YEAR OLD BECAUSE SHE COULD PRODUCE FULL SENTENCES. BUT THEN IT TURNED OUT SHE COULDN'T SPEAK SPONTANEOUSLY. SHE COULD ONLY PARROT BACK OR RECITE BACK WHAT SHE HAD HEARD FROM ME. SO SHE HAD NO GOOD SPONTANEOUS SPEECH OF HER OWN WHICH IS VERY, VERY WORRISOME PROBLEM.

AND SO IN TALKING TO PEOPLE AROUND THE COUNTRY WHO ARE WORKING WITH COCAINE AFFECTED INFANTS AND FOLLOWING THEM LONG TERM, LANGUAGE IS ONE OF THE CONSISTENT THINGS THAT WE'RE SEEING. AGAIN, NOT IN EVERY CHILD, BUT IN MANY CHILDREN.

Q. WHAT ABOUT IN THE HOME, DOCTOR, HAVE YOU LOOKED AT THE RISK OF CHILD ABUSE AND NEGLECT TO CHILDREN THAT HAVE BEEN EXPOSED TO COCAINE IN UTERO?

MS. SMITH: AGAIN, I OBJECT TO HIS LINE OF QUESTIONING AS IRRELEVANT AND PREJUDICIAL. IT'S SIMPLY NOT AT ISSUE IN THIS CASE.

Q. GO AHEAD, DOCTOR.

A. I LOOKED AT THIS IS A STUDY THAT WE DID

AND THAT WE'RE STILL DOING AND THEN THERE IS SOME LITERATURE THAT EXISTS FROM OTHER PARTS OF THE COUNTRY ON THIS ISSUE. THE RISK OF ABUSE AND NEGLECT TO CHILDREN WHO ARE BEING RAISED IN SUBSTANCE ABUSING FAMILIES IS DEFINITELY HIGHER, SOMEWHERE BETWEEN TWO AND FIVE TIMES HIGHER DEPENDING ON THE STUDY. ABOUT THREE TIMES HIGHER.

Q. WHAT ABOUT THE PARENTING BY THESE CHILDREN IN TERMS OF FOLLOW-UP MEDICALLY, IS THERE ANY CORRELATION THERE?

A. YES.

MS. SMITH: SAME OBJECTION. ALSO OBJECT AS TO VAGUE.

A. YES.

Q. GO AHEAD, DOCTOR.

A. THERE--THERE IS SOME INFORMATION IN THE MEDICAL LITERATURE INDICATING THAT MEDICAL FOLLOW UP IS POORER IN TERMS OF NUMBERS OF IMMUNIZATIONS OR MISSED MEDICAL APPOINTMENTS.

Q. DOCTOR, CAN A SINGLE DOSE OF COCAINE BY HARMFUL TO A DEVELOPING FETUS?

A. YES.

Q. CAN IT ACTUALLY KILL EITHER THE BABY OR THE MOTHER OR BOTH?

A. YES.

[Tr.25, lines 9-12]

A. THE APPROACH IS SIMILAR TO ONE THAT MANY HOSPITALS AROUND THE COUNTY, INCLUDING OURS, HAVE USED. SOME—THERE ARE SPECIFIC DIFFERENCES, BUT IT'S BASICALLY VERY SIMILAR.

Testimony of Shirley J. Beckett
[Tr. 270, lines 11-15]

Q. (BY MS. COMPANION, CONTINUING) I'LL REPEAT MY QUESTION. SOME OF THE INDIVIDUALS REFERRED FROM THE MEDICAL UNIVERSITY DID SUCCESSFULLY COMPLETE SUBSTANCE ABUSE TREATMENT, DIDN'T THEY?

A. YES, THEY DID.

Testimony of Shirley Brown, R.N.
[Tr. 30, lines 16-22]

Q. OKAY, NOW, MS. BROWN, LET'S GO BACK TO THAT INTRAUTERINE. FETAL DEATH. AND IN CONJUNCTION WITH THAT THE INTENT OF THE POLICY , THE REASON WE DECIDED ON THIS POLICY, AT THE FIRST MEETING, WAS BECAUSE OF OUR CONCERN AND AS MR. HOOD SAID IN HIS OPENING, FOR THE HEALTH AND SAFETY AND

CARE OF THESE FETUSES AND SOON TO BE CHILDREN; FAIR?

A. THAT IS CORRECT.

[Tr. 160, line 25 – tr. 161, line 20]

Q. WITH RESPECT TO THE LIST OF THE IDENTIFYING CHARACTERISTICS FOR URINE SCREENS, WOULD YOU TELL ME WHY NO PRENATAL CARE WAS IMPORTANT AS AN IDENTIFYING CHARACTER?

A. BECAUSE OF THE LITERATURE WHICH SUGGESTS THAT WOMEN WHO DID NOT SEEK PRENATAL CARE WERE AT RISK FOR COCAINE ABUSE.

Q. WHAT LITERATURE WAS THAT THAT SUGGESTED PEOPLE WHO DIDN'T GET PRENATAL CARE USED COCAINE?

A. SOME OF IT WAS PUBLISHED BY DOCTOR IRA CHASNOFF.

Q. AND IS THAT THE LITERATURE THAT YOU RELIED UPON, THE CHASNOFF LITERATURE TO MAKE THAT ONE OF THE CRITERIAS?

A. I DO NOT RECALL ALL OF THE LITERATURE THAT WAS REVIEWED AT THAT POINT IN TIME.

Q. LATE PRENATAL CARE AFTER 24 WEEKS, CHASNOFF AGAIN?

A. I DON'T RECALL THE REFERENCES ON THAT.

Q. INCOMPLETE PRENATAL CARE. CHASNOFF AGAIN?

A. I DO NOT RECALL THE REFERENCE.

Q. ABRUPTIO PLACENTAE?

A. THAT WAS OUT OF SOME OF DR. CHASNOFF'S WORK.

Q. INTRAUTERINE FETAL DEATH, CHASNOFF? THE BABY DIED IN UTERO WAS CAUSED BY COCAINE?

A. I CAN'T REMEMBER WHOSE ARTICLE THAT WAS FROM.

Testimony of Ira J. Chasnoff
[Tr. 13, lines 20-23]

Q. IS THERE ANYTHING UNIQUELY HARMFUL ABOUT COCAINE IN TERMS OF PRENATAL EXPOSURE?

A. COCAINE IS UNIQUE IN THAT IT HAS A VERY DIRECT EFFECT AND SUDDEN EFFECT.

[Tr.32, line 12 – tr. 43, line 22]

Q. YOU HAVE SPENT THE LAST 20 YEARS OF YOUR CAREER DOCUMENTING THE ADVERSE

EFFECTS OF COCAINE USE ON PREGNANCY AND THE EFFECTS IN UTERO? TRUE?

A. TRUE.

Q. YOU BEGAN DOCUMENTING THE ADVERSE EFFECTS OF COCAINE ON FETUSES IN UTERO IN THE LATE 1970'S, TRUE?

A. NO, ACTUALLY IT STARTED IN THE EARLY '80'S AND PUBLISHED IN '85.

Q. AND YOU AGREE WITH ME THAT COCAINE USE DURING PREGNANCY SHOULD BE DISCOURAGED?

A. I AGREE WITH THAT, YES.

Q. AND THAT DRUGS TAKEN DURING PREGNANCY WILL CROSS THE PLACENTA BARRIER AND REACH THE BABY?

A. YES, THESE SUBSTANCES INCLUDING TOBACCO AND ALCOHOL.

Q. MY QUESTION WAS JUST COCAINE.

A. NO, YOU SAID DRUGS.

Q. COCAINE WILL CROSS THE BARRIER ALSO.

WOULD YOU EXPLAIN TO THE JURY WHAT YOU MEAN BY THAT THE PLACENTAL BARRIER?

A. YES, THE PLACENTA IS THE TISSUE THAT BASICALLY TRANSFERS BLOOD AND NUTRIENTS FROM THE MOTHER TO THE BABY THOUGH ITS VASCULAR SYSTEM AND THE UMBILICAL CORD TO THE BABY. AND IT, RATHER THAT ACTING AS ANY KIND OF BARRIER OR PROTECTING THE BABY, RATHER IT'S MORE LIKE A SIEVE. THAT ANY--ANYTHING THAT THE MOTHER INGESTS WILL CROSS FROM THE MOTHER TO THE BABIES.

Q. IN YOUR EARLY ARTICLES ON COCAINE USE DURING PREGNANCY, YOU NOTED THAT THERE WAS AN INCREASED RATE OF PLACENTAL ABRUPTIONS ASSOCIATED WITH COCAINE USE DURING PREGNANCY?

A. YES, THAT CAN BE ASSOCIATED WITH ABRUPTIONS.

Q. CAN YOU EXPLAIN TO THE JURY WHAT ABRUPTION IS?

A. WHEN A WOMEN GOES INTO LABOR THE UTERUS STARTS CONTRACTING AND THE BABY WILL DELIVER. AND AFTER THAT THE PLACENTA WILL THEN SEPARATE FROM THE WALL OF THE UTERUS AND BE DELIVERED. AND THAT'S AFTERBIRTH. IN ABRUPTION THERE ARE CERTAIN CONDITIONS LIKE THE WOMEN HAS HYPERTENSION, HIGH BLOOD PRESSURE, IT CAN LEAD TO ABRUPTION. IF A WOMEN SMOKES TOBACCO OR USES COCAINE OR AMPHETAMINES, THOSE ARE ALL RISK FACTORS FOR INCREASING THE RISK OF ABRUPTION.

Q. AND THE PLACENTA SEPARATES AND THE WOMEN BLEEDS?

A. THE PLACENTA SEPARATES THE WOMEN CAN BLEED AND THE BABY CAN LOSE OXYGEN

Q. AND DIE?

A. THAT'S A POSSIBILITY.

Q. AND IN 1989, YOU DOCUMENT THE HARMS OF COCAINE USE ON THE FETUS TO INCLUDE CONGENITAL ANOMALIES?

A. YES, THERE IS AN INCREASED RATE OF CONGENITAL ANOMALIES.

Q. CAN YOU EXPLAIN TO THE JURY WHAT A CONGENITAL ANOMALY IS?

A. WELL CONGENITAL ANOMALY IS WHEN THE BABY IS BORN WITH SOME TYPE OF MALFORMATION IS THE WAY TO THINK OF IT. CAN RESULT AGAIN FROM A VARIETY OF FACTORS INCLUDING ALCOHOL, THAT'S PROBABLY THE MOST COMMON DRUG THAT CAUSES THESE KINDS OF ANOMALIES. COCAINE, ALSO.

Q. COCAINE USE ON A FETUS HAS ALSO BEEN DOCUMENTED TO CAUSE WITHDRAWAL?

A. NO. COCAINE HAS NEVER BEEN SHOWN TO HAVE AN EFFECT OF WITHDRAWAL. THE ONLY DRUG HAS BEEN HEROIN.

Q. I SHOULD HAVE CHARACTERIZE THAT, DOCTOR. IN 1989 YOU DOCUMENTED THAT COCAINE USE DURING PREGNANCY COULD CAUSE WITHDRAWAL?

A. NO, WE NEVER SAID THAT IT CAUSED WITHDRAWAL. IT WAS--WE SHOWED THAT IT CAUSED NEURO--NEUROLOGICAL CHANGES IN THE BABY, BUT A CLEAR SYNDROME OF WITHDRAWAL FROM COCAINE HAS NEVER BEEN CLEARLY DOCUMENTED.

Q. PAGE 19, LINE 6.

MS. DUNN: WHICH DEPOSITION?

Q. (BY MS. SHOWERS, CONTINUING) DO YOU REMEMBER WHEN I TOOK YOUR DEPOSITION, DR. CHASNOFF?

A. YES. OH, YES I DO.

Q. WE WERE IN THE AIRPORT IN CHICAGO, AS I RECALL, CORRECT?

A. YES

Q. OKAY. AND AT LINE 6 ON PAGE 19, I SAID:

AND THE DOCUMENTED EFFECTS OF COCAINE USE ON FETUS IN 1989 INCLUDED CONGENITAL ANOMALIES?

AND YOUR ANSWER WAS: YES

AND THEN AT LINE 6: FETAL DEPENDENCE ON DRUG RESULTING IN WITHDRAWAL, IRRITABILITY, RELENTLESSNESS, POOR FEEDING, CRYING, IMPAIRED NEUROBEHAVIORAL ABILITIES TREMULOUSNESS, INCREASE IN THE COMPLICATIONS IN LABOR AND DELIVERY, ABRUPTIO PLACENTAE, AND FETAL MONITOR ABNORMALITIES FETAL MECONIUM STAINING.

AND YOUR ANSWER WAS: YOU SAID DRUG. YOU JUMPED FROM COCAINE TO DRUG.

MY QUESTION WAS: I'M TALKING ABOUT COCAINE SPECIFICALLY.

AND YOUR ANSWER WAS, DOCTOR, AT LINE 18, COULD YOU READ THAT PLEASE.

A. COCAINE SPECIFICALLY WAS RELATED TO ALL THOSE EXCEPT FOR THE USE OF THE WORD DEPENDENCE.

Q. ALL RIGHT SIR.

SO WITHDRAWAL WAS IN THAT LIST OF COMPLICATIONS, WAS IT NOT?

A. WELL IN READING IT, YES.

Q. OKAY. THANK YOU. IRRITABILITY AS WELL, WAS DOCUMENTED IN 1989, CORRECT?

A. YEAH.

Q. OKAY, RESTLESSNESS, POOR FEEDING AND CRYING AS WELL?

A. YEAH.

Q. AND IMPAIRED NEUROBEHAVIORAL ABILITIES. CAN YOU EXPLAIN TO THE JURY WHAT IMPAIRED NEUROBEHAVIORAL ABILITIES IS?

A. SURE, WHEN A BABY IS FIRST BORN THE BABY COMES WITH CERTAIN CAPABILITIES TO INTERACT WITH THE ENVIRONMENT, TO RESPOND. SO EVEN A BABY WHO IS ONE OR TWO DAYS OLD, WHEN YOU PICK THAT BABY UP AND LOOK THE BABY IN THE EYE, THAT BABY WILL RETURN YOUR GAZE. I'LL INTERACT WITH YOU.

IF THE BABY STARTS GETTING IRRITABLE AND IS CRYING, THE BABY THAT IS ONE, TWO DAYS OF AGE, HAVE THE ABILITY TO COMFORT THEMSELVES. THEY, IF YOU WATCH THEM, THEY TRY TO SUCK ON THEIR HAND. THEY WILL TRY TO BRING THEIR ARMS AND LEGS IN. THOSE ARE NEUROBEHAVIORAL ABILITIES, THE ABILITY TO CALM ONE'S SELF. THE ABILITY TO INTERACT WITH THE ENVIRONMENT AND RESPOND TO THE CARETAKER, THOSE ARE NEUROBEHAVIORS.

Q. AND COCAINE USE DURING PREGNANCY IMPAIRS THE NEUROBEHAVIORAL ABILITIES?

A. YES. COCAINE USE IS ONE OF THE DRUGS THAT CAN DO THAT.

Q. AND IT ALSO CAUSES TREMULOUSNESS IN A NEONATE?

A. IT CAN BE ASSOCIATED WITH TREMULOUSNESS, YES.

Q. AND COCAINE ALSO IS ASSOCIATED WITH INCREASED LABOR AND DELIVERY COMPLICATIONS?

A. YES.

Q. AND CAN YOU TELL THE JURY WHAT THOSE COMPLICATIONS ARE?

A. WELL, WE HAVE TALKED ABOUT SOME OF THE ABRUPTIONS, THE--COCAINE IS ONE OF THE DRUGS ALSO THAT CAN LEAD TO PREMATURITY, PUT A WOMEN INTO LABOR EARLY. TOBACCO CAN DO THAT. AMPHETAMINES. PRECIPITOUS DELIVERY, MEANING THE BABY IS DELIVERED TOO QUICKLY AND CAN SUFFER LOSS OF OXYGEN. SUDDEN RAPID DELIVERY, AMPHETAMINES CAN ALSO DO THAT. THE BABY CAN BE BORN WITH LOW BIRTH WEIGHT, MEANING NOT HAVING GROWN WELL WITHIN—WITHIN THE WOMB. AND COCAINE IS ONE OF THE SUBSTANCES THAT CAN BE ASSOCIATED WITH THAT.

Q. AND FETAL MONITOR ABNORMALITIES, YOU DOCUMENTED THAT THERE WAS AN ADVERSE EFFECT ON FETAL MONITOR ABNORMALITIES CAUSED BY COCAINE USE IN UTERO. CAN YOU EXPLAIN THAT TO THE JURY, PLEASE?

A. THE FETAL MONITOR TRACKS A BABY'S HEART RATE IN UTERO. AND JUST LIKE AN ADULT, WHEN AN ADULT SMOKES A CIGARETTE, HEART RATE CHANGES CAN OCCUR. WHEN AN ADULT USES COCAINE OR AMPHETAMINES, HEART RATE CHANGES CAN OCCUR. SO IF A BABY IS EXPOSED IN UTERO TO THE MOTHER'S--WELL THERE ARE VARIETY OF OTHER REASONS, TOO, BUT IN THE CONTEXT OF SUBSTANCES, IF THE BABY IS EXPOSED IN UTERO TO ANY OF THOSE KIND OF SUBSTANCES THERE CAN BE HEART RATE CHANGES AND FETAL MONITOR ABNORMALITIES.

Q. YOU ALSO DOCUMENTED IN 1989 THAT USE OF COCAINE DURING PREGNANCY AND THE EFFECTS OPEN THE FETUS CAUSE FETAL MECONIUM STAINING. CAN YOU EXPLAIN THAT?

A. MECONIUM IS THE WASTE MATERIAL THAT A BABY COLLECTS IN HIS BOWEL. HE DOES NOT HAVE A BOWEL MOVEMENT IN UTERO EXCEPT UNDER DIRE CIRCUMSTANCES WE WILL GET TO IN A MINUTE, BUT RATHER THE MECONIUM WHICH IS MADE UP OF SWALLOWED AMNIOTIC FLUIDS AND BLOOD AND LINING OF THE BABY'S GUT THAT'S PASSED AFTER, IT'S A BLACK TARRY, STICKY SUBSTANCE THAT IS PASSED WITHIN THE FIRST 24 HOURS AFTER BIRTH. IF A BABY IS NOT GETTING ENOUGH OXYGEN IN THE WOMB, THEN HE LITERALLY WILL START GASPING FOR OXYGEN IN UTERO. AND IF HE BECOMES STRESSED ENOUGH HE WILL THEN PASS THE STOOL, THE MECONIUM IN THE WOMB. AND THERE ARE A NUMBER OF FACTORS AGAIN THAT CAN LEAD TO THAT, COCAINE BEING ONE OF MANY.

Q. LOWER GESTATIONAL AGE AND LOWER NEONATAL BIRTH WEIGHT. YOU TALKED ABOUT THAT A LITTLE BIT EARLIER, BUT THAT IS ALSO ASSOCIATED WITH COCAINE USE DURING PREGNANCY AND ITS SUBSEQUENT EFFECTS ON THE NEONATE, TRUE?

A. LOWER GESTATION AGE IS THE SAME THING AS WE TALKED ABOUT EARLIER, THE PREMATURITY AND THE LOWER NEONATE WEIGHT IS WHAT WE REFER TO AS LOW BIRTH WEIGHT. SO A NUMBER OF FACTORS.

Q. SMALLER BABIES?

A. IN GENERAL, A FULL TERM BABY LESS THAT FIVE POUNDS EIGHT OUNCES.

Q. SPECIFICALLY THE HEAD CIRCUMFERENCE HAVE ALSO BEEN NOTED TO BE SMALLER IN BABIES EXPOSED TO COCAINE IN UTERO?

A. YES. SMALL HEAD CIRCUMFERENCE HAS BEEN SHOWN TO OCCUR MORE COMMONLY IN BABIES WHOSE MOTHERS USED ALCOHOL OR COCAINE OR AMPHETAMINES OR HEROIN DURING PREGNANCY.

Q. COCAINE USE DURING PREGNANCY AND ITS EFFECTS ON THE BABY HAS ALSO BEEN ASSOCIATED WITH SOMETHING CALLED PRUNE BELLY SYNDROME IN 1989, IS THAT TRUE?

A. YES.

Q. COULD YOU EXPLAIN TO THE JURY WHAT PRUNE BELLY SYNDROME IS?

A. THIS IS NOT A VERY PLEASANT--PRUNE BELLY IS, BABIES WHO ARE BORN WITH KIDNEY--A KIND OF KIDNEY PROBLEM THAT THE KIDNEY IS SWOLLEN, IT CAUSES THE BELLY TO SWELL ALSO. THE MUSCLES IN THE ABDOMEN DON'T DEVELOP NORMALLY SO THAT WHEN THE BABY IS BORN THERE IS A LACK OF MUSCLE IN THE ABDOMEN SO THAT THE ABDOMEN IS WRINKLED AND LOOKS LIKE A PRUNE, AND IT'S CALLED PRUNE BELLY SYNDROME.

Q. THAT'S A PRETTY SERIOUS COMPLICATION?

A. THE MOST SERIOUS ASPECT OF IT IS THAT IT CAN BE ASSOCIATED WITH KIDNEY PROBLEMS THAT CAN RESULT IN KIDNEY FAILURE, NEED FOR A TRANSPLANT. PRUNE BELL SYNDROME MOST COMMONLY OCCURS FOR UNKNOWN REASONS, BUT BABIES WHOSE MOTHERS HAVE USED AMPHETAMINES OR COCAINE, CAN--DO HAVE A SLIGHTLY INCREASED RISK OVER THE GENERAL POPULATION.

Q. YOU ALSO, IN 1989, DOCUMENTED THAT COCAINE EXPOSURE IN UTERO WAS ASSOCIATED WITH LIMB REDUCTION DEFORMITIES; IS THAT TRUE?

A. YEAH. A LIMB REDUCTION DEFORMITY IS WHEN A BABY IS BORN MISSING A LIMB. AN ARM OR A LEG OR A TOE OR FINGERS. AND THAT

SPECIFICALLY OCCURS IN THE KIND OF DRUGS THAT CUT OFF BLOOD SUPPLY FOR THE BABY. AGAIN, AMPHETAMINES, COCAINE, MAYBE A SLIGHTLY INCREASED RATE WITH TOBACCO USE.

Q. IN 1989 YOU ALSO DOCUMENTED THAT COCAINE USE DURING PREGNANCY, WHEN THE BABY WAS BORN, THE EFFECTS OF COCAINE OR THE BREAKDOWN OF COCAINE IN THE BLOOD STREAM REMAINED IN THE CHILD'S BLOOD STREAM FOR HOW MANY DAYS, DOCTOR?

A. WELL, THOSE STUDIES WE WERE ACTUALLY LOOKING AT URINE. WE DID NOT MEASURE IN THE BLOOD. YOU HAVE TO BE VERY SPECIFIC HERE. BUT BABIES THAT APPEAR--WE KNOW THEY HAVE MORE IMMATURE LIVERS, SO THEY DON'T BREAK DOWN COCAINE AS RAPIDLY AS AN ADULT WOULD, SO THAT IT APPEARS THAT YOU CAN ACTUALLY FIND LEVELS OF THE BREAKDOWN MATERIALS FROM COCAINE IN THE BABY FOR ABOUT FIVE DAYS AFTER THE BABY WAS BORN.

Q. DR. CHASNOFF, ONE LAST QUESTION ON THE EFFECTS OF THE COCAINE USE IN UTERO.

YOU ALSO REPORTED THAT A ONE-TIME USE OF COCAINE COULD RESULT IN A STROKE TO THE BABY OR THE FETUS, TRUE?

A. YEAH. THERE ARE--AT THAT TIME THERE WERE BEGINNING REPORTS, THE FACT THAT A SINGLE USE OF COCAINE ON A SINGLE OCCASION COULD RESULT IN FAIRLY DIRE CONSEQUENCES,

AS WAS SHOWN ALSO FOR AGAIN OTHER DRUGS LIKE AMPHETAMINES.

Q. IN GENERAL, DOCTOR, SUBSTANCE-ABUSING PREGNANT WOMEN AVOID GETTING PRENATAL CARE; ISN'T THAT TRUE?

A. NO, I CAN'T SAY THAT HAS BEEN SHOWN THROUGH RESEARCH.

Q. THERE IS NO DIFFERENCE BETWEEN AN AVERAGE PREGNANT WOMEN GETTING PRENATAL CARE AND A SUBSTANCE-ABUSING PREGNANT WOMAN?

A. WELL, THE DIFFICULTY IS, YOU ARE GETTING INTO SCIENTIFIC METHODOLOGY. THERE ARE STUDIES THAT SHOW IF YOU TAKE A LARGE GROUP OF WOMEN WHO GET NO PRENATAL CARE, A SIGNIFICANT NUMBER OF THOSE WOMEN HAVE USED DRUGS DURING PREGNANCY. BUT THERE IS NO STUDY--THAT'S CALLED A RETROSPECTIVE STUDY. SCIENTIFICALLY IT IS NOT AS VALID, SEEN AS VALID, THOUGH, AS A PROSPECTIVE STUDY WHERE YOU TAKE A POPULATION OF WOMEN, DRUG USERS AND NON DRUG USERS, AND STUDY THEM PROSPECTIVELY. YOU FIND NO ONE HAS EVER DONE THAT TO KNOW IF TRULY THAT THE DECREASED RATES OF PRENATAL CARE ARE ASSOCIATED WITH THE DRUG USE OR THERE ARE OTHER FACTORS THAT--THAT ARE LEADING TO IT. BUT IT'S--IN GENERAL, ONE OF THE FACTORS THAT MAY IMPEDE PRENATAL CARE IS IF THE

WOMEN IS USING DRUGS. BUT IT MAY NOT BE THE DRUG USE ITSELF, IS WHAT I AM TRYING TO SAY.

Q. IN ONE OF YOUR ARTICLES DID YOU DESCRIBE ONE OF THE SIGNS THAT A PREGNANT WOMEN MAY BE USING SUBSTANCE ABUSE TO BE THAT SHE DELAYED GETTING PRENATAL CARE?

A. THAT IS A RETROSPECTIVE STUDY, YES.

Q. DR. CHASNOFF, IN 1989 YOU TESTIFIED BEFORE CONGRESS ABOUT THE MEDICAL CRISES POSED BY COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. I DID TESTIFY BEFORE CONGRESS. I'M NOT-- I DON'T RECALL I SAID MEDICAL CRISED, BUT --

Q. YOU DID SAY--

A. I—

Q. I'M SORRY.

A. I DON'T REMEMBER THOSE WORDS.

Q. YOU DID SAY THAT THERE WAS AN URGENT NEED TO ESTABLISH PROTOCOLS FOR EARLY RECOGNITION OF SUBSTANCE-ABUSING WOMEN AND PROVIDING TREATMENT AND INTERVENTION PROGRAMS?

A. I DID SAY THAT, YES.

Q. YOU ALSO TESTIFIED THAT THERE HAD BEEN A RAPID RISE IN REPORTED INSTANCES OF COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. YES.

Q. AND THAT IN 1989 SUBSTANCE ABUSE WAS ASSOCIATED WITH APPROXIMATELY 64 PERCENT OF ALL REPORTED CHILD ABUSE CASES?

A. THAT'S RIGHT.

Q. AND YOU ADVOCATED IN THE LATE 1980'S THAT SOMETHING NEED TO BE DONE IMMEDIATELY ABOUT THE PROBLEM OF COCAINE USE DURING PREGNANCY?

A. YES.

Q. AND YOU AGREE WITH ME THAT IT WAS ESSENTIAL FOR MEDICAL PROFESSIONALS TO DEVELOP PROTOCOLS AND CRITERIA TO TEST PREGNANT WOMEN FOR COCAINE USE DURING PREGNANCY?

A. YES.

Q. AND YOU ARE NOT AN ALARMIST IN THE 1980'S ABOUT THE PROBLEMS OF COCAINE USE DURING PREGNANCY?

A. YOU ASKED THAT DIFFERENTLY THAN YOU DID LAST TIME. YES, I AM NOT AN ALARMIST.

Q. AND YOUR RESEARCH WAS NOT FAULTY?

A. OH, NO ONE HAS DONE ANYTHING TO SHOW THAT OUR RESEARCH WAS FAULTY.

Q. AND THE GOAL OF THE INTERAGENCY POLICY, AS YOU UNDERSTAND IT, WAS TO ENHANCE OUTCOMES IN PREGNANCY, TRUE?

A. THAT'S TRUE, I HAVE NO ARGUMENT WITH THE GOAL OF THE POLICY.

Q. IT WAS NOT TO PUT WOMEN IN JAIL?

A. THE STATED GOAL OF THE POLICY WAS TO ENHANCE THE OUTCOMES OF WOMEN AND CHILDREN.

[Tr. 49, line 18 – tr. 50, line 17]

Q. (BY MS. SHOWERS, CONTINUING) DR. CHASNOFF, IN 1989 WHEN YOU TESTIFIED BEFORE CONGRESS THAT YOU ESTIMATED THAT THE NATIONAL COST TO CARE FOR COCAINE EXPOSED INFANTS WOULD BE SOMEWHERE BETWEEN THREE HUNDRED EIGHT-FIVE MILLION AND THREE BILLIONS DOLLARS, ANNUALLY?

MS. DUNN: OBJECTION, YOU HONOR. I DON'T BELIEVE THIS IS RELEVANT.

THE COURT: AS I STATED AT THE SIDEBAR, WE'LL JUST HAVE TO WAIT AND SEE. I'M GOING TO LET THE TESTIMONY COME IN AND THEN SOME LATER DATE IF IT APPEARS THAT IT'S NOT

RELEVANT TO THIS CASE, I'LL INSTRUCT YOU TO DISREGARD IT. BUT FOR THE TIME BEING IT'S IN AND YOU MAY CONSIDER IT TO SUCH EXTENT AS YOU THINK HAS RELEVANCE IN THE CASE. YOU MAY PROCEED.

Q. (BY MS. SHOWERS, CONTINUING) AND THOSE FIGURES WERE BASED ON FIGURES THAT YOU OBTAINED FROM THE GOVERNMENT ACCOUNTING OFFICE?

A. YES.

Q. AND AT THAT TIME YOU FELT THAT THE THREE BILLION DOLLAR FIGURE MAY BE A LOW ESTIMATE AS ONLY ONE-THIRD TO ONE-FOURTH OF THE DRUG EXPOSURES WERE PICKED UP THROUGH DRUG SCREENING?

A. YES

Q. AND THE HYPOTHESIS IN 1989 WAS THAT THE FIGURES FOR CARING FOR THESE INFANTS WAS GOING TO BE ASTRONOMICAL, TRUE?

A. TRUE.

Testimony of Charles Condon
[Tr. 7, line 23 – tr. 8, line 5]

A. SO WHAT I DID WITH THAT INFORMATION IS CONTACTED EVERYONE THAT I COULD THINK OF THAT WOULD HAVE A ROLE IN HELPING TO SOLVE THE PROBLEM. CONTACTED THE POLICE CHIEF, CONTACTED THE PEOPLE WHO RAN THE

DEPARTMENT OF SOCIAL SERVICES, CONTACTED THE PEOPLE AT SUBSTANCE ABUSE, CONTACT MEDICAL UNIVERSITY OFFICIALS, AND WE HAD A MEETING WITH THE INTENTION OF DEVELOPING A MULTIDISCIPLINARY APPROACH TO THIS PROBLEM TO HELP SOLVE IT.

[Tr. 10, line 9 – tr. 11, line 22]

A. PROBLEM PRESENTED TO US AT THAT TIME WOULD BE IS, HOW TO HELP THESE BABIES AND HOW TO STOP THE TOTALLY PREVENTABLE DAMAGE BEING DONE TO THESE INNOCENT LITTLE CHILDREN.

SO, WE MET. AND THE FORCEFUL PEOPLE IN TERMS OF TALKING IN TERMS OF LEGAL INTERVENTION WERE THE DRUG TREATMENT PEOPLE. THE IDEA FROM THEIR PERSPECTIVE, IN FACT THEY SORT OF MOCKED US, WHY DO YOU EXPECT THEM TO DO ANYTHING HAVING SOME SORT OF CONSEQUENCE TO THEIR ACTION, MUCH LIKE AA WOULD HAVE IN TERMS OF BEING RESPONSIBLE FOR WHAT YOU DO.

SO WE DEVELOPED AT THAT TIME, WE GOT INVOLVED AT THE REQUEST OF THE MEDICAL UNIVERSITY WITH A MULTIDISCIPLINARY APPROACH TO SOLVING THIS CRISES. AND IT WENT FROM THERE.

Q. ALL RIGHT, SIR. AND AS THE POLICY EVOLVED, HOW WOULD YOU CHARACTERIZE THE POLICY ITSELF? WHAT WAS GOING TO HAPPEN TO THESE WOMEN?

A. THE POLICY FROM ITS INCEPTION WAS AMNESTY-BASED. I MEAN THE IDEA HERE WAS THAT IF YOU LIVED UP TO SOME VERY BASIC REQUIREMENTS, NUMBER ONE BEING DRUG FREE, DON'T TAKE THE ILLEGAL COCAINE, AND, NUMBER TWO, IF YOU WOULD GO TO FREE DRUG TREATMENT, NOT A THING WOULD HAPPEN TO YOU.

NOW, INITIALLY THE WAY WE DEVELOPED THE POLICY IS THAT WE WANTED TO GET INVOLVED AS EARLY AS POSSIBLE TO PREVENT HARM TO THE CHILDREN.

AS A COROLLARY TO THAT OR THE OPPOSITE TO THAT THINKING WAS INITIALLY IS IF THE DAMAGE IS ALREADY DONE, THAT IS IF THE BABY IS BORN DAMAGED BY COCAINE, SINCE THE DAMAGE IS ALREADY DONE AND THAT COULDN'T BE PREVENTED, TO TREAT THAT SEPARATELY WITH NORMAL CRIMINAL ARREST PROCESS.

THERE IS A STATUTE THAT REQUIRES HEALTH CARE PROFESSIONALS TO REPORT CHILD ABUSE. AND THE INITIAL THINKING THE FIRST COUPLE OF MONTHS WAS THAT THERE WOULD BE A DISTINCTION. WHEN IT WAS IN UTERO, THE CHILD IN UTERO, IF YOU COULD PREVENT THE HARM, IT WAS A TOTALLY AMNESTY-BASED PROGRAM. AFTER THAT IF THE CHILD WAS BORN WITH CRACK COCAINE, USE THE NORMAL ARREST FUNCTIONS OF THE CRIMINAL JUSTICE SYSTEM AND TREAT IT LIKE A REGULAR CRIMINAL CASE.

WE QUICKLY CHANGED THAT POLICY AT THE REQUEST OF THE DOCTORS, PRIMARILY THE NEONATOLOGISTS AT MUSC BECAUSE THEY THOUGHT THERE WAS ADDICTION THERE.

Testimony of James B. Edwards
[Tr. 578, lines 15-20]

Q. (BY MR. HOOD, CONTINUING) WOULD YOU PLEASE TELL US, DON'T GIVE US THE NUMBER, WHAT THE FACTORS WERE, FROM YOUR PERSPECTIVE OF THE MEDICAL UNIVERSITY FOR THIS POLICY?

A. WELL, THE EXPENSE OF THE CARE OF THESE BABIES WAS ONE OF THE FACTORS THAT I TOOK INTO CONSIDERATION WHEN WE WERE TALKING ABOUT THE DEVELOPMENT OF THIS POLICY.

[Tr. 579, lines 14-17]

Q. WHAT IS THE GOAL OF THIS POLICY? WHAT IS HOPED TO BE ACHIEVED BY AND WHAT WAS HOPED TO BE ACHIEVED BY THIS POLICY?

A. TO PROTECT THESE INNOCENT UNBORN CHILDREN WAS THE GOAL OF THIS POLICY.

Testimony of Joseph C. Good
[Tr. 188, line 16 – tr. 189, line 10]

Q. AND WHEN THEY WERE REFERRED TO CHARLESTON COUNTY SUBSTANCE ABUSE, WHAT WAS THE REASON FOR THAT?

A. WELL, THAT WAS THE CARROT AND STICK. WHAT OUR CONCERN WAS, THIS IS NOT SUPPOSED TO BE A PUNITIVE POLICY WHERE WE WENT OUT AND PUNISHED PEOPLE FOR DOING SOMETHING, EVEN THOUGH WE KNEW THE ACTIVITY WAS ILLEGAL. WHAT WE WERE TRYING TO DO IS GIVE THOSE BABIES A CHANGE TO BE BORN NORMAL.

AND WHAT WE WERE TELLING THE MAMAS IS THAT, LOOK, WE'RE GOING TO TRY TO HELP YOU, BUT OUR MAIN CONCERN FRANKLY IS THAT UNBORN BABY. IF YOU WILL GO TO CHARLESTON SUBSTANCE ABUSE, YOU WILL LET THEM HELP YOU, YOU CAN'T KICK THIS ON YOUR OWN YOU NEED PROFESSIONAL HELP, IF YOU MAKE APPOINTMENTS THERE, IF YOU GO TO PRENATAL CARE AND GIVE THAT BABY A CHANCE TO BE BORN HEALTHY, WE ARE GOING TO FORGET ABOUT ALL OF THIS OTHER STUFF. THAT WAS THE CARROT. YOU KNOW, IF YOU GIVE YOUR BABY A CHANCE, LET'S WIPE THE SLATE CLEAN AND FORGET ABOUT IT. ON THE OTHER HAND IF YOU PERSIST IN DOING THAT, WE GOT TO TAKE SOME ACTION, WE GOT TO FORCE YOU INTO TREATMENT OR WE GO TO, LORD FORBID ME, PUT YOU IN JAIL WHERE YOU CAN'T HAVE THOSE DRUGS UNTIL THAT BABY IS BORN.

Testimony of Edgar O. Horger, M.D.
[Tr. 4, line 13 – tr. 5, line 17]

Q. DURING THE COURSE OF YOUR WORK AT THE MEDICAL UNIVERSITY WAS THERE A TIME PERIOD IN WHICH YOU BECAME AWARE OR STARTED NOTICING WITHIN THE POPULATION THAT YOU WERE SERVING AN INCREASE IN THE USE OF COCAINE?

A. YES I THINK SO.

Q. AND ABOUT WHEN WAS THAT?

A. PROBABLY IN SOMETIME IN 1988. IT MAY HAVE BEGUN IN 1987. WE WERE NOTICING NATIONWIDE WHAT WAS ULTIMATELY CLAIMED TO BE A CRISES IN TERMS OF COCAINE AND ITS PROBLEMS IN PREGNANCY. AND WE CAME TO REALIZE, GEE, WE HAVE THIS HERE ALSO.

Q. AND SO IS IT FAIR TO SAY THAT WHAT YOU BROUGHT IT TO YOUR ATTENTION INITIALLY WAS HEARING THE INFORMATION THAT OTHER PLACES WERE HAVING A PROBLEM WITH THIS?

A. I THINK THIS PROBABLY BROUGHT THE REALIZATION TO US THAT WE WERE DEALING WITH THE SAME TYPE OF PROBLEMS THAT WE WERE GOING OFF TO MEETINGS, READING IN JOURNALS, THAT WE GOT THESE SAME TYPES OF PROBLEMS INCREASING IN OUR HOSPITAL AND PERHAPS WE'RE DEALING WITH THE SAME COCAINE.

Q. SO YOU TOOK THAT INFORMATION BACK TO THE PEOPLE YOU WERE TRYING TO SERVE AND STARTED WATCHING PERHAPS MORE CAREFULLY

NOW FOR SOME OF THE SAME SIGNS, IS THAT FAIR?

A. I THINK THIS IS TRUE. I THINK PERHAPS THE VERY FIRST TIME IT CAME TO LIGHT WAS FOLLOWING A CASE OF AN ABRUPTIO PLACAENTA WITH A--I TRULY CAN'T RECALL WHETHER IT WAS A DEAD FETUS AS A RESULT OF THE ABRUPTION, BUT IT WAS A DEFINITE ABRUPTION OF THE PLACENTA. AND I MADE THE COMMENT THAT, GEE, I JUST HEARD SOMEONE AT SUCH AND SUCH A MEETING TALKING ABOUT THIS. AND SOMEONE SAID, WELL, MAYBE WE SHOULD SCREEN FOR COCAINE. WE SCREENED AND IT WAS POSITIVE.

[Tr. 6, line 2 – tr. 7, line 4]

A. I THINK IT WAS A PARTICULAR REVELATION TO ME THAT, GEE, WE HAVE THE SAME PROBLEMS THAT THEY HAVE UP IN NEW YORK AND CALIFORNIA.

Q. WAS THERE ANYTHING DURING THIS EARLY TIME THAT YOU'RE TALKING ABOUT, COMING TO BE AWARE OF A PROBLEM WITHIN THE COMMUNITY THAT YOU SERVED, FOR USING COCAINE, WAS THERE ANYTIME WHEN YOU DID UNIVERSAL TESTING TO ESTABLISH WHAT--WHAT THE FULL USE MIGHT HAVE BEEN?

A. NO, WE NEVER DID ANY UNIVERSAL TESTING?

Q. AND WHAT IS UNIVERSAL TESTING?

A. I WOULD ASSUME THAT YOU REFER TO TESTING EVERY PATIENT, SUCH AS THE DRUG PREVALENT STUDY, THAT WAS BROUGHT INTO EVIDENCE EARLIER.

Q. AND WOULD IT BE FAIR TO SAY THEN WHAT YOU BASE YOUR INFORMATION ON IN TERMS OF THERE BEING AN INCREASE IN USE OF COCAINE BY THE WOMEN THAT YOU WERE SERVING OR CLINICAL OBSERVATIONS?

A. I THINK THAT WE'RE GOING IN THE SAME DIRECTION. I BELIEVE IT WAS CLINICAL OBSERVATIONS THAT SAID PERHAPS THIS PROBLEM IS CAUSED BY COCAINE. PERHAPS WE SHOULD BE SCREENING FOR DRUG ABUSE. WE DID NOT KNOW THAT WE WERE DEALING WITH COCAINE. WE CAME TO THE REALIZATION AFTER HEARING OTHERS TALKING ABOUT IT, THAT WE DO SEEM TO HAVE HAD MORE ABRUPTIONS OF THE PLACENTA IN THE PAST SIX OR EIGHT OR TEN MONTHS. WE DO SEEM TO HAVE MORE PRE-TERM LABORS THAT WE ARE UNSUCCESSFUL IN STOPPING WITH OUR USUAL TREATMENT TO STOP PRE-TERM LABOR. PERHAPS THERE IS A REASON FOR IT, SOMETHING THAT IS DRIVING IT THAT WE HAD NOT BEEN SUSPICION OF PREVIOUSLY.

[Tr. 9, line 5 – tr. 10, line 4]

Q. AND IN APRIL OF 1989, DID YOU FORMALIZE SOME KIND OF PROTOCOL WITHIN YOUR DEPARTMENT FOR THE SCREENING OF UDS FOR SUSPECTED USE OF COCAINE BY PREGNANT WOMEN?

A. YES. I FEEL LIKE BY THAT TIME WE HAD SEEN THAT MORE AND MORE OF OUR SUSPICIONS OF POSITIVE--OF PATENTS WHO MAY HAVE BEEN POSITIVE FOR DRUG USE WERE BORNE OUT BY THE DRUG TESTING. BY THE URINE DRUG SCREENS. CONSEQUENTLY I FEARED THAT WE BETTER GET THIS THING ON A REGULAR STRAIGHTFORWARD, NO QUESTIONS PROTOCOL, LET'S SCREEN THESE PATIENTS WHO HAVE THESE INDICATIONS. I WANTED TO REMOVE ANY SUBJECTIVITY FROM IT. I HATED THE POSSIBILITY OF SOMEONE SAYING, WELL, SUSAN DUNN, TO USE AN EXAMPLE, LOOKS THIS SHE MIGHT HAVE USED A DRUG, LET'S SCREEN HER. WE WANTED TO AVOID THAT AND PUT IT STRICTLY ON A PROTOCOL BASIS.

Q. AND AT THE TIME IN APRIL OF 1989 WHEN THE PROTOCOL WAS ADOPTED--PROTOCOL IS JUST CONSISTED A LIST, THESE ARE THE THINGS THAT YOU SHOULD TEST FOR?

A. CORRECT. SIX INDICATORS.

Q. AND IF I READ THOSE SIX TO YOU WOULD YOU REMEMBER THEM?

A. I THINK I CAN REMEMBER THEM WITHOUT.

Q. LET ME LET YOU DO IT THEN.

A. I THINK IT WAS KNOWN SUBSTANCE ABUSE OR KNOWN HISTORY OF SUBSTANCE ABUSE. AND ABSENCE OF PRENATAL CARE. INTRAUTERINE

FETAL DEATH. INTRAUTERINE FETAL GROWTH RETARDATION. PRE-TERM LABOR AND ABRUPTIO PLACENTA.

[Tr. 61, lines 19-21]

Q. (BY MR. HOOD, CONTINUING) WHILE YOU WERE THERE AND THE POLICY WAS BEING FOLLOWED, WHAT WAS YOU OPINION AS TO THE SUCCESSFULNESS OF THE POLICY?

[Tr. 62, lines 9-13]

A. MY OPINION WAS THAT WE WERE ENCOUNTERING FEWER OF THE COMPLICATIONS THAT WE HAD PREVIOUSLY BEEN ATTRIBUTING TO DRUG USE AND WERE--WERE HAVING REPORTS OF FEWER POSITIVE DRUG SCREENS IN THE SIX OR SEVEN MONTHS THAT I WAS HERE AFTER THE DRUG--AFTER THE DRUG POLICY WENT INTO EFFECT.

[Tr. 67, line 1-11]

Q. HAVEN'T THERE BEEN REPORTS TO THE MEDICAL LITERATURE WHAT ONE DOSE OR ONE USE OF COCAINE COULD DO TO THE BABY?

A. BACK IN THE EARLY MIDDLE OR LATE EIGHTIES WHEN WE WERE FIRST READING MORE AND MORE, AND LEARNING MORE AND MORE ABOUT THE PROBLEM, THERE WERE ANY NUMBER OF REPORTS THAT SAID THIS PATIENT HAS SUCH AND SUCH A CATASTROPHE, IMMEDIATELY

FOLLOWING OR SHORTLY FOLLOWING HER ONLY USE OF COCAINE.

Q. YOU TALKED ABOUT COCAINE WRECKING PREGNANCIES. AFTER THE POLICY, DID THIS WRECKING SUBSIDE?

A. I THINK IT DECREASED CONSIDERABLY. THERE IS NO QUESTION BUT THAT WE STILL SEE PROBLEMS FROM COCAINE USE.

Testimony of Herbert D. Kleber, M.D.
[Tr. 720, line 9 – tr. 721, line 25]

Q. FROM YOUR ATTENDANCE AT THE MEETING AT THE MEDICAL UNIVERSITY AND YOUR INVOLVEMENT IN THE INTERAGENCY POLICY, WHAT WAS YOUR IMPRESSION OF THE GOAL OF THE POLICY?

A. THE WAY THAT--MY OVERALL RECOLLECTION OF THAT WAS THAT THE EFFORTS PRIOR—PRIOR EFFORTS TO ENCOURAGE WOMEN TO SEEK HELP EARLIER, AND IN TERMS OF DEALING WITH THEIR ADDICTION HAVE--HAD NOT BEEN SUCCESSFUL TO THE--AT LEAST TO THE EXTENT THAT PEOPLE WERE HOPING. AND THIS AS A LAST RESORT WAS OFFERED AS A METHOD TO INTERVENE IN THE ADDICTION PROCESS AND GET SOMEONE'S ATTENTION AT A POINT WHERE MAYBE USING THAT AS A LEVERAGE, USING THE ISSUE OF THAT INTERVENTION AS LEVERAGE TO MAKE THEM SEEK TREATMENT THAT THEY WOULD NOT HAVE SOUGHT OTHERWISE.

THE PROCESS OF ADDICTION IS SUCH THAT DENIAL IS ONE OF THE KEY FEATURES, ONE OF THE KEY SYMPTOMS. AND A PERSON LEFT TO THEIR OWN RESOURCES, AS MANY OF US MIGHT HAVE WITNESSED, RARELY ADMIT ADDICTION. THEY WILL SACRIFICE A LOT OF THINGS PRIOR TO ADMITTING THAT. SO THIS WAS THE WAY TO INTERVENE, HOPEFULLY GET SOME WOMEN SOME HELP IN THAT ADDICTION PROCESS BEFORE IT CAUSED EVEN GREATER HARM TO THEM AND OTHERS.

Q. YOU MENTIONED LEVERAGING. COULD YOU EXPLAIN WHAT YOU MEAN BY LEVERAGING TO THE JURY?

A. AGAIN, IN THE EXPERIENCE THAT I HAVE HAD, AND PRIOR TO BEING AT THE CHARLESTON COMMISSION, I HAD WORKED IN THE ADDICTION FIELD AS AN--IN AN ADMINISTRATIVE CAPACITY FOR A NUMBER OF YEARS PRIOR TO THAT. IT'S NOT COMMON, I WON'T SAY IT NEVER HAPPENS, BUT IT'S NOT COMMON FOR SOMEONE ON THEIR OWN PERFECT FREEWILL TO COME IN AND SAY I HAVE AN ADDICTION AND I NEED SOME HELP. USUALLY IT'S A FAMILY MEMBER, A PHYSICIAN OR A JUDGE OR AN EMPLOYER. VERY FREQUENTLY AN EMPLOYER. A PERSON WILL HOLD THE JOB LONGER THAN THEY WILL HOLD ONTO A FAMILY AND A HOUSE.

SO BY INTERVENING INTO THAT, BY SAYING TO SOMEONE EITHER YOU GET--EITHER YOU ADDRESS THIS ADDICTION, EITHER YOU GET SOME HELP OR YOUR JOB IS AT JEOPARDY, EITHER YOU

GET SOME HELP OR THE MARRIAGE IS OVER, OR YOU GET SOME HELP OR YOUR HEALTH IS GOING TO SUFFER OR YOU GO TO JAIL, THOSE ARE INTERVENING TECHNIQUES THAT SOMETIMES IT TAKES TO GETS SOMEBODY'S ATTENTION, OTHERWISE THEY WILL NOT LOOK AT IT CLOSELY ENOUGH THEMSELVES TO BREAK THROUGH THAT DENIAL AND UNDERSTAND THE LEVEL OF THAT PROBLEM.

[Tr. 839, line 21 – tr. 840, line 13]

A. WE HAVE A SAYING IN THE FIELD OF DRUG ABUSE THAT DRUG USE IS A PREVENTABLE DISORDER AND DRUG ADDICTION IS A TREATABLE DISEASE, SO THAT WE BELIEVE THAT WE KNOW HOW, NOT AS WELL AS WE WOULD LIKE OR OFTEN AS WE WOULD LIKE TO TREAT DRUG ADDICTION, BUT MUCH OF THE TIME IT CAN BE SUCCESSFULLY TREATED. HOWEVER, THE NATURE OF THE DISORDER IS SUCH THAT GIVEN THE PLEASURABLE EFFECTS OF THE DRUGS THAT WE'RE DEALING WITH, AND THE FACT THAT THEY CHANGE THE REWARD SYSTEM OF THE BRAIN, OFTEN INDIVIDUALS ARE NOT INITIALLY WILLING TO COME TO TREATMENT VOLUNTARILY. THEY OFTEN DON'T WANT TO GIVE UP THE FEELINGS THAT THE DRUGS CAN PRODUCE.

SO OVER THE PAST 30 YEARS THERE HAVE BEEN A NUMBER OF INSTANCES WHERE INDIVIDUALS HAVE BEEN COERCED INTO TREATMENT. NOT--IN MANY WAYS PROBABLY MOST ADDICTS ARE COERCED INTO TREATMENT. THE ISSUE IS ONLY WHO IS DOING THE COERCING.

WE OFTEN THING OF COERCIVE TREATMENT AS PRIMARILY SOMETHING DONE BY THE CRIMINAL JUSTICE SYSTEM, BUT PROBABLY THE VAST MAJORITY OF ADDICTS THAT I TREAT ARE THERE BECAUSE AN EMPLOYER HAS SAID GET TREATMENT OR I'M GOING TO FIRE YOU. A SPOUSE HAS SAID GET TREATMENT OR I'M GOING TO LEAVE YOU. OR A JUDGE SAID GET TREATMENT OR YOU WILL GO TO JAIL. SO THAT PROBABLY THE LARGE MAJORITY OF PATIENTS COME INTO TREAMENT THROUGH SOME SORT OF COERCIVE INTENT.

Q. DOES COERCIVE TREATMENT MEAN FORCED TREATMENT OR MANDATORY TREATMENT?

A. WELL, THE LANGUAGE HERE IS A LITTLE SLIPPERY. I DISTINGUISH BETWEEN COERCED TREATMENT AND MANDATORY TREATMENT. MANDATORY TREATMENT IS WHEN SOMEONE SAYS YOU MUST HAVE TREATMENT. COERCIVE TREATMENT SAYS YOU HAVE A CHOICE. YOU HAVE TO HAVE TREATMENT OR CHOOSE THE ALTERNATIVE. THE CONTINGENCY.

SO IN THE CASE OF THE EMPLOYEE, COERCIVE TREATMENT WOULD SAY YOU HAVE TO HAVE TREATMENT OR YOU'LL BE FIRED. OR THE SPOUSE WHO SAYS YOU HAVE TO HAVE TREATMENT OR I'LL LEAVE YOU. SO THE TREATMENT IS COERCED BECAUSE YOU HAVE COERCION THERE, BUT THEY DO HAVE THE OPINION OF TAKING THE ALTERNATIVE SAYING I DIDN'T LIKE THE JOB ANYWAY, YOU KNOW, I'M GOING TO LEAVE THAT JOB. SO WHEREAS

MANDATORY TREATMENT YOU MUST GO INTO THAT TREATMENT. YOU HAVE NO CHOICE. SO, THAT'S AT LEAST HOW I USE THE TERM.

Q. FROM YOUR REVIEW OF THE INTERAGENCY POLICY, WAS IT MANDATORY TREATMENT OR COERCIVE TREATMENT?

A. IT'S MY UNDERSTANDING THIS WAS COERCED TREATMENT.

[Tr. 852, line 20 –tr. 853, line 20]

Q. (BY MS. SHOWERS, CONTINUING) BACK TO THE PREVALENCE OF COCAINE DURING THE TIME PERIOD, DR. KEBLER, WHAT TIME PERIOD ARE YOU TALKING ABOUT?

A. THE TIME PERIOD OF THE LATTER PART OF THE 1980'S.

Q. GO AHEAD WITH YOUR ANSWER ABOUT THE PREVALENCE OF COCAINE.

Q. PERHAPS WHAT I SHOULD DO IS LAY THE STAGE FOR HOW WE GET THERE. HOW DO WE KNOW WHAT IS GOING ON ARE THREE MAJOR DATA SOURCES. ONE, THE HOUSEHOLD SURVEYS WHICH GATHERS DATA ABOUT DRUG USE, PEOPLE WHO LIVE IN HOUSEHOLD. THE HS SURVEYS WHICH LOOK AT DRUG USE AMONG COLLEGE STUDENTS. AND THE EMERGENCY ROOM DATA WHICH LOOKED AT THE AMOUNT OF DRUG USE AMONG PEOPLE COMING TO EMERGENCY ROOMS,

THE REASONS THEY COME TO THE EMERGENCY ROOMS AS FAR AS ILLICIT DRUGS ARE CONCERNED.

ALL OF THOSE SURVEYS INDICATED THAT DURING THE 1980'S, THERE WAS A SHARP RISE IN COCAINE USE. BY THE MID-80'S, FOR EXAMPLE, THE HOUSEHOLD SURVEY INDICATED THAT SIX MILLION AMERICANS WERE USING COCAINE DURING THE PAST 30 DAYS. THERE WERE--

Q. HOW MANY DID YOU SAY?

A. SIX MILLION AMERICANS WERE USING COCAINE CURRENTLY. CURRENTLY DEFINED IN THE PAST 30 DAYS. THERE WAS A MAJOR CONCERN SINCE MANY OF THESE WOMEN, THAT MANY OF THESE WERE WOMEN, THAT MANY OF THEM WERE TAKING COCAINE DURING PREGNANCY, THAT THERE WOULD BE A MAJOR PROBLEM WITH IMPAIRED NEWBORNS. AND THAT'S WHY WE MADE PREGNANT ADDICTS ONE OF OUR THREE MAJOR CONCERNS.

[Tr. 859, lines 16-24]

Q. (BY MS. SHOWERS) HAVE YOU REVIEWED THE INTERAGENCY POLICY, THE ONE DEVELOPED BY THE MUSC, THE SOLICITOR'S OFFICE AND THE CHARLESTON CITY POLICE DEPARTMENT.

A. YES I HAVE.

Q. AND HAVE YOU REACHED OPINIONS ABOUT THAT POLICY, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, MOST PROBABLY?

A. YES. I FEEL THAT THE POLICY WAS A REASONABLE RESPONSE TO THE PROBLEM OF COCAINE-ABUSING PREGNANT WOMEN AT THAT PERIOD OF TIME.

Testimony of Roger Newman, M.D.
[Tr. 211, line 17 – tr. 212, line 21]

Q. NOW, THIS LAWSUIT IS ABOUT WHAT WE CALL THE INTERAGENCY POLICY. I WANT TO TELL THE JURY FIRST BEFORE THE POLICY IN LATE '89, IF A WOMEN CAME IN AND HAD MEDICAL COMPLICATIONS WHAT WAS DONE? I WANT TO TALK ABOUT WHAT WAS BEING DONE IN—AT THE MEDICAL UNIVERSITY BEFORE THE POLICY.

A. IN REGARD TO DRUG TESTING OR GENERAL TREATMENT?

Q. WELL, NO. LET'S TALK ABOUT DRUG TESTING.

A. WELL, IF A PATIENT CAME INTO THE HOSPITAL THAT HAD AN OBSTETRICAL COMPLICATION THAT WE FELT WAS RELATED TO THE POTENTIAL OF DRUG ABUSE, WE WOULD PERFORM DRUG TESTING, URINE DRUG TESTING ON THAT PATIENT TO DETERMINE IF DRUGS WERE INVOLVED. WE DID IT NOT UNDER A PROTOCOL

AT THAT POINT BUT MORE JUST AS A PART OF CLINICAL DECISION MAKING.

AT SOME POINT, I THINK PROBABLY IN '89, WE DID PUT TOGETHER A LIST JUST TO TRY TO MAKE IT MORE UNIFORM OF WHAT WE FELT WERE THE INDICATORS FOR WHICH WE SHOULD OBTAIN URINE DRUG TESTS. AND AGAIN THIS WAS PRIOR TO INSTITUTING THE POLICY. WE WERE RECOGNIZING WHAT WE FELT WERE MORE AND MORE PATIENTS EXPERIENCING, USING COCAINE DURING PREGNANCY AND WE FELT AND IT WAS IN OUR OPINION RELATED TO A NUMBER OF DIFFERENT OBSTETRICAL COMPLICATIONS. WHAT WE PROBABLY SAW THE MOST WERE ABRUPTIO PLACENTA, STILLBIRTHS AND PREMATURE LABOR THAT DIDN'T RESPOND TO THE TYPICAL TREATMENT THAT WE USED. AND, AGAIN, THESE ARE VERY SERIOUS.

AND ALSO THE PEDIATRICIANS WERE ALSO TELLING US THAT IN THEIR EXPERIENCE THEY WERE DEALING WITH MORE AND MORE BABIES THAT WERE HAVING WITHDRAWAL TYPE SYNDROME AND OTHER PROBLEMS THEY FELT WAS ATTRIBUTED TO COCAINE OR OTHER DRUGS WELL. BUT, WE WERE EXPERIENCING, WE THOUGHT, A SIGNIFICANT INCREASE IN THIS. AT THE SAME TIME THE MEDICAL LITERATURE THERE WAS MORE AND MORE BEING WRITTEN ABOUT AS TO CONSEQUENCE OF DRUG ABUSE AND PREGNANCY.

AND IN MANY OCCASIONS IT BECAME VERY CLINICALLY NECESSARY TO HAVE THIS

INFORMATION. HOW TO DEAL WITH PREMATURE LABOR IN THIS SITUATION WAS DIFFERENT. THEY DIDN'T RESPOND TO THE TYPICAL MEDICATION WE USED. THEY AT SOME POINT, IF WE USED THE TYPICAL MEDICATION WE USED, IN A PATIENT WHO WAS ON COCAINE, THAT INCREASED THE MATERNAL RISK OF THE DRUG. THERE WERE REPORTS OF WOMEN BEING TREATED WITH DRUGS SUCH AS RITORINE AND TERBUTALINE, WHICH ARE TYPICALLY USED FOR PRE-TERM LABOR, WHICH IS CARDIAC STIMULANT, AND THAT BEING USED ON TOP OF A PATIENT WHO HAD USED COCAINE, WHICH IS ALSO A CARDIAC STIMULANT, RESULTING IN HEART ATTACKS AND STROKES AND THINGS LIKE THAT. SO WE WERE CONFRONTING THESE CASES OF PREMATURE LABOR AND WE WERE COLLECTING THAT INFORMATION.

STILL BIRTHS WE COLLECTED. EXCUSE ME, WHEN THERE WERE STILLBIRTHS OR ABRUPTIO PLACENTA, WE WOULD GET THIS INFORMATION AND TRY TO IDENTIFY THE CAUSE. IF A WOMEN LOST A BABY, SHE WAS GOING TO BE INTERESTED IN KNOWING WHY, WE WERE INTERESTED IN KNOWING WHY, AND WE WOULD WANT TO DO WHAT WE COULD TO PREVENT IT. IN FUTURE PREGNANCIES THERE IS A RISK OF RECURRENCE OF STILLBIRTH, AND TO BE ABLE TO DEAL WITH THAT RISK YOU HAVE TO KNOW WHAT CAUSED IT. AND COCAINE WAS PROVING TO BE ONE OF THE THINGS ASSOCIATED WITH IT.

WE ALSO EXPERIENCE, AGAIN, WOMEN WITH ABRUPTIO PLACENTA. I VERY VIVIDLY

REMEMBER A PATIENT WHO WE HAD BEEN FOLLOWING IN OUR HIGH-RISK CLINIC HAD HAD A VISIT WITHIN THE LAST SEVERAL DAYS FOR WHATEVER REASON HAD WANTED TO BE ADMITTED AND PUT INTO LABOR, I CAN'T REMEMBER THE REASON WHY. WE DIDN'T FEEL LIKE IT WAS NECESSARY AT THAT POINT. AND SHE CAME BACK WITH AN ABRUPTIO PLACENTA AND I BELIEVE HER BABY DIED. AND SHE WAS VERY ANGRY TELLING US THAT WE SHOULD HAVE PUT HER IN THE HOSPITAL LAST WEEK WHEN YOU FELT LIKE SHE SHOULD HAVE BEEN DELIVERED AND THAT IT WAS ALL OUR FAULT. AND FORTUNATELY IN THAT CASE FOR US, NOT FOR HER OR THE BABY, SHE PROVED TO BE COCAINE POSITIVE. AND SHE—WE DIDN'T HEARD MUCH FROM HER AFTER THAT. BUT I HAD NO DOUBT WE WERE GOING TO BE SUED BY HER FOR MALPRACTICE UNTIL WE HAD THAT INFORMATION.

SO HAVING THAT INFORMATION HAD CLINICAL IMPORTANCE, IT HAD IMPORTANCE FROM KNOWING THE CASE OF WHY THINGS HAPPEN, BOTH FOR THE PATIENTS' BENEFIT AND OUR BENEFIT TO KNOW WHY THINGS HAPPENED, SO WE TESTING THE PATIENT AT THAT POINT IN TIME.

Q. AND THAT'S UDS, URINE DRUG SCREENS?

A. YES, SIR.

Q. OKAY.

A. I WOULD ALSO ADD THAT PEDIATRICIANS WERE TESTING AS WELL BECAUSE THEIR MANAGEMENT OF NEWBORNS WERE AFFECTED BY WHETHER OR NOT THEY WERE GOING TO HAVE A COCAINE WITHDRAWAL OR OTHER MANIFESTATIONS OF COCAINE EXPOSURE.

[Tr. 219, lines 12-23]

Q. BEFORE THE POLICY WERE THEY SUBJECTIVE, THAT IS, UP TO INDIVIDUAL DOCTORS' CHOICE WITH REGARD TO URINE DRUG SCREEN?

A. YES, SIR. ONE OF THE SPECIFIC REASONS THAT WE CHOSE TO INSTITUTE A PROTOCOL AS TO WHO WERE APPROPRIATE CANDIDATES FOR SCREENING IS BECAUSE WE FELT THAT WOULD BE BETTER, MORE EVENHANDED THAN TO LEAVE IT UP TO THE SUBJECTIVITY OF INDIVIDUAL PRACTITIONERS.

Q. AND ONCE THE POLICY WAS PUT INTO EFFECT, WHICH I THINK IS NOVEMBER OF '89, FROM THAT TIME FORWARD WAS THERE A SPECIFIC MEDICAL CRITERIA BY WHICH PATIENTS WERE TESTED?

A. YES SIR. SEVERAL MEDICAL CRITERIA.

[Tr. 220, lines 1-4]

A. NO. NO, SIR. AS I SAID, WE SPECIFICALLY PUT THE LIST OF INDICATORS TOGETHER AND

INSISTED THAT LIST OF INDICATORS BE PART OF THE POLICY TO INSURE THAT PEOPLE WERE TESTED FOR MEDICAL INDICATIONS AND NOT FOR OTHER EXTRANEOUS INDICATIONS.

[Tr. 220, lines 13 – tr. 226, lines 12]

A. WELL THE INDICATIONS THAT WE USED, THESE ARE THE INDICATIONS THAT WERE DEVELOPED FOR THE POLICY THE M-7 POLICY. THE INDICATION THAT WERE USED PRIOR TO THE M-7 POLICY BASICALLY ARE THESE LISTED UNDER "A" WHICH WERE THE OBSTETRICAL INDICATORS. AND THEN FOR THE PURPOSE OF THE POLICY WE ADDED THESE DOWN HERE WHICH WERE THE INVOLVEMENT OF PEDIATRICIANS AND NEONATOLOGISTS.

THE PATIENTS THAT WE FELT REQUIRED SCREENING WOULD BE PATIENTS THAT PRESENTED FOR LABOR--IN LABOR OR TO ON DELIVERY SUITE WHO DID NOT AVAIL THEMSELVES TO ANY PRENATAL CARE AT ANY POINT DURING THAT PREGNANCY.

THEN THESE TWO HERE WOULD REALLY BE SOMEWHAT ANALOGOUS TO THAT. THESE WERE PATIENTS WHO EITHER HAD WHAT CALLED LATE PRENATAL CARE, WHICH FOR OUR PURPOSES WERE WOMEN WHO DID NOT COME FOR PRENATAL CARE UNTIL AFTER 24 WEEKS GESTATION, SO THIS IS REALLY THE LAST THIRD OF THEIR PREGNANCY, AND THEN PATIENTS WHO HAD INCOMPLETE PRENATAL CARE. AND WE USED THE CRITERIA OF PATIENTS WHO MAY HAVE

COME FOR PRENATAL CARE EARLY BUT THAT HAD HAD LESS THAN SIX PRENATAL CARE VISITS.

Q. LET ME STOP YOU. US MEN DON'T UNDERSTAND THIS. HOW MANY WEEKS IS NORMAL PREGNANCY?

A. PREGNANCY LASTS 42 WEEKS. TYPICALLY DIVIDED INTO TRIMESTERS, FIRST, SECOND, THIRD. FIRST WOULD BE UP TO 13 WEEKS AND SECOND UP TO 26 WEEKS, AND THE THIRD TRIMESTER WAS DELIVERY.

Q. AND WHEN IS A CHILD CONSIDERED VIABLE AS TO THE FETUS?

A. FOR THE PURPOSES OF THIS POLICY WE USED 27 WEEKS. BABIES ARE CERTAINLY VIABLE AS EARLY AS 26 AND SOMETIMES 25 WEEKS, ALTHOUGH AT THAT POINT IT'S MUCH MORE RISKY TO BE BORN AND MOST OF THOSE BABIES WILL PROBABLY DIE AT 24 TO 25 WEEKS. BUT BY 27 WEEKS THERE IS AN EXCELLENT CHANCE OF SURVIVAL. I THINK THE MEDICAL UNIVERSITY HAS ABOUT 80 PLUS OR 80 PERCENT FOR SURVIVAL AT 27 WEEKS, WHICH WOULD BE ROUGHLY A LITTLE OVER TWO POUNDS.

Q. TWO POUNDS?

A. YES.

Q. THE FOURTH INDICATION IS PROBABLY THE MOST COMMON COMPLICATION OF COCAINE ABUSE IN PREGNANCY, WHICH IS ABRUPTIO

PLACENTA.--THE PLACENTA IS AN ORGAN THAT PROVIDES THE EXCHANGE OF OXYGEN AND NUTRIENTS FOR THE BABY AND THE MOM. AND UNDER THE INFLUENCE OF COCAINE, FOR INSTANCE, THAT CAUSES AN INTENSE HYPERTENSIVE EPISODE IN THE USE OF COCAINE. BLOOD PRESSURE GOES UP DRAMATICALLY WHEN YOU TAKE COCAINE. AND THAT BLOOD PRESSURE CAN CAUSE A SEPARATION FROM THE PLACENTA FROM THE UTERUS. BLEEDING BEGINS AND AS THE BLEEDING CONTINUES IT FORMS A CLOT THAT JUST GRADUALLY SEPARATES THE PLACENTA. SOMETIMES IT CAN BE SMALL AND THE BABY WILL SURVIVE IT AND THEN USUALLY IF THE ABRUPTION INVOLVES HALF OF THE PLACENTA OR MORE, IT WILL BE FATAL.

Q. IS THAT A MEDICAL CRISES?

A. OH YES. I MEAN, AGAIN HALF THE TIME OR MORE IT CAN BE FATAL TO THE INFANT, THIS IS SEVERE ABRUPTION. AND IT'S ASSOCIATED WITH HEMORRHAGE AND SHOCK AND COAGULATING PROBLEMS IN THE MOTHER. SO, IT'S POTENTIALLY LIFE-THREATENING TO THE MOTHER AS WELL.

Q. AND CAN THAT BE CAUSED BY ONE USE OF COCAINE DURING PREGNANCY?

A. YES. YES. IT DOESN'T RELATE TO CHRONIC OR MUCH YOU USED IT OR HOW YOU TOOK IT, IT'S AN INDIVIDUAL RESPONSE THAT CAN BE CAUSED BY A SINGLE USE OF COCAINE.

Q. LET'S TALK ABOUT COCAINE FOR A MINUTE. FOR A CHILD IN UTERO, WHEN THE MOTHER INGESTED IT, WHAT DOES THAT DO TO THE LIFE SUPPORT FOR THE BABY?

A. WELL, THE DRUG IS—CAUSES CONSTRICTION OF BLOOD VESSELS. IT'S A VASAL CONSTRICTOR. WHEN YOUR BLOOD VESSEL CONSTRICTS YOUR BLOOD PRESSURE GOES UP, SO TWO THINGS ARE HAPPENING TO THE FETUS. FIRST OF ALL THE BLOOD SUPPLY TO THE PLACENTA AND TO THE BABY IS GOING TO BE REDUCED BECAUSE OF THE CONSTRICTION OF THE BLOOD VESSELS. ONE OF THE OTHER THINGS THAT IS ASSOCIATED WITH COCAINE USED IN PREGNANCY IS GROWTH RETARDATION, WHICH IS MORE OF A CHRONIC EFFECT, IT'S A BABY THAT HAS HAD RESTRICTIONS TO ITS BLOOD SUPPLY ON MULTIPLE OCCASIONS THROUGHOUT THE PREGNANCY.

Q. AND IF THAT HAPPENS WHEN THE CHILD'S ARM IS DEVELOPING OR HAND IS DEVELOPING, THE MOTHER USES COCAINE, WHAT CAN HAPPEN TO THE ARM?

MR. WHERRY: OBJECTION TO THE LEADING NATURE OF THE QUESTION.

Q. (BY MR. HOOD, CONTINUING) WHAT CAN HAPPEN TO THE ARM OR THE HAND?

A. WELL IT'S REPORTED BY SOME INVESTIGATORS THAT CONGENITAL ANOMALIES CAN BE ASSOCIATED WITH COCAINE INGESTION.

AND THE PROPOSED MECHANISM IS AT THE TIME OF FETAL DEVELOPMENT, THE FIRST 13 -- 12 OR 13 WEEKS OF PREGNANCY, IF AT THAT TIME THERE IS INTERRUPTION OF THE OXYGEN SUPPLY, IT INTERFERES WITH THE DEVELOPMENT OF THAT PARTICULAR ORGAN SYSTEM. AND THE EXAMPLE WAS AN ARM OR A LEG, BUT THERE ARE MANY--IT COULD HAPPEN TO ANY ORGAN SYSTEM.

AND PROBABLY THE ONE THAT I HAVE SEEN MOST FREQUENTLY RELATED TO COCAINE USE IS A DISRUPTION OF THE URINARY TRACT. THE DEVELOPMENT OF THE URINARY TRACT. SO THAT BLOCKAGE TO ESCAPE URINE AND WHATEVER ABNORMALITIES AND HOW THE KIDNEYS DEVELOP. SO, GOING BACK TO, THE QUESTION WAS, THE TWO EFFECTS THAT COCAINE HAS ON PREGNANCY IS TO CONSTRICT THE BLOOD VESSELS AND REDUCE SUPPLY OF OXYGEN AND NUTRIENTS TO THE BABY.

ALSO SECONDARY TO THAT, BLOOD PRESSURE GOES UP, AND THE PLACENTA IS REALLY A HUGE VASCULAR ORGAN, IT'S AN INTERMINGLING OF SMALL BLOOD VESSELS BETWEEN THE MOTHER AND THE BABY'S CIRCULATION. THE BLOOD DOESN'T ACTUALLY CROSS, BUT THE BABY'S VESSELS ARE VERY THIN WALLS, AND BLOOD AND OXYGEN AND NUTRIENTS AND THINGS DIFFUSE CIRCULATION BY THE MOTHER. IF ONE OF THOSE SMALL VESSELS RUPTURES AND BLEEDING OCCURRED, THAT CLOT, THAT BLEEDING WILL DISRUPT OTHER VESSELS AND CAUSE MORE BLEEDING AND

LEAD TO THE PLACENTAE ABRUPTION THAT I MENTIONED EARLIER.

Q OTHER CRITERIA UNDER THE POLICY WHICH WOULD MEAN THE MOTHER WOULD GET TESTED.

A. INTRAUTERINE FETAL DEATH OR STILLBIRTH, PREMATURE LABOR WHEN WE COULD FIND NO OTHER OBVIOUS CASE. FIRST INSTANCE, WOMEN WITH TWINS, HUGE RISK FACTOR. IF THAT PATIENT WOULD HAVE AN OBVIOUS CASE, URINARY TRACT INFECTION, IF THEY HAD BEEN IN A CAR ACCIDENT, THAT PATIENT WOULDN'T HAVE BEEN SCREENED, BUT SOMEBODY WHO HAD NO OTHER APPARENT REASON TO BE IN LABOR WOULD BE SOMEBODY THAT WE WOULD SCREEN. COCAINE HAS BEEN SHOWN TO STIMULATE UTERINE CONTRACTIONS, AND THE EXACT MECHANISM I DON'T THINK I CAN EXPLAIN.

Q. DEFINE THIS WORD PRE-TERM. PRE-TERM LABOR?

A. PRE-TERM LABOR IS ENTERING LABOR PRIOR TO 37 WEEKS GESTATION. WE SAY PREGNANCY LASTS 40—WOMEN ARE CONSIDERED TO BE AT TERM BETWEEN—BETWEEN 37 AND 42 WEEKS. ANYTHING LESS THAT 37 IS CONSIDERED PRE-TERM. OBVIOUSLY THE MORE PRE-TERM YOU ARE THE GREATER RISK OF BEING—

Q. IN OTHER WORDS, IF THE BABY COMES BEFORE 37 WEEKS?

A. YES, SIR.

Q. WHAT ARE WE DEALING WITH MEDICALLY?

A. WELL, IT WOULD DEPEND ON THE TIME AND GESTATION. A BABY BORN AT 36 WEARS IS GOING TO DO VIRTUALLY AS WELL AS A BABY BORN AT TERM. THEY MAY HAVE A LITTLE JAUNDICE, THEY MAY HAVE A LITTLE FEEDING PROBLEM, DIFFICULTY WITH TEMPERATURE REGULATION, BUT THEY'RE NOT GOING TO HAVE MAJOR COMPLICATIONS. A BABY BORN AT 24 WEEKS IS GOING TO DIE. MAYBE AFTER A LONG TIME IN THE NURSERY, BUT IT'S VERY UNLIKELY TO SURVIVE. WE SEE MORE PRE-TERM LABOR IN WOMEN BETWEEN 29 TO 31 WEEKS. IF YOU GRAPHED IT OUT, THAT'S WHEN MOST PRE-TERM LABOR SEEMS TO OCCUR. AND A BABY THAT IS DELIVERED AT 30 WEEKS GESTATION HAS AN 85 PERCENT CHANCE OF SURVIVAL. BUT THE MAJORITY OF THOSE BABIES WOULD GO TO THE INTENSIVE CARE UNIT, THE MAJORITY WOULD PROBABLY REQUIRE BEING ON A VENTILATOR FOR A VARIABLE PERIOD OF TIME. AND THEY WOULD BE AT RISK FOR OTHER COMPLICATIONS, WHICH ARE LESS FREQUENT BUT VERY SEVERE, SUCH AS INTRACRANIAL HEMORRHAGE, A BOWEL THAT BECOMES ISCHEMIC AND HAS TO BE REMOVED. INFECTION, JAUNDICE AND PROBLEMS SUCH AS THAT.

SO A BABY BORN AT 30 WEEKS GESTATIONAL, A RULE OF THUMB THAT WE USE WHEN WE ADVISE MOMS IS THE BABY WILL PROBABLY STAY IN YOUR TUMMY BEFORE IT

GOES HOME. SO 30 WEEK BABY YOU'RE LOOK AT PROBABLY SEVEN TO EIGHT MONTHS--

[Tr. 235, line 10 – tr. 236, line 2]

A. IN THE FORMULATION OF THIS POLICY WE DID GIVE CONSIDERATION TO FINANCIAL ISSUES IN TERMS OF OUR CONCERN OVER THE COSTS THAT COULD BE ENCOUNTERED IN TAKING CARE OF BABIES THAT WERE BORN PREMATURELY OR WITH OTHER--WITH MALFORMATIONS OR OTHER PROBLEMS THAT WOULD REQUIRE EITHER PROLONGED NEONATAL INTENSIVE CARE OR EVEN LONGER TERM CARE. IN DISCUSSIONS IN GENERAL WITH THE NEONATOLOGIST, WE, FROM LONG-STANDING, WE ARE AWARE OF THE VERY HIGH COSTS OF INTENSIVE CARE UNIT STAYS.

MR. WHERRY: I OBJECT TO THAT.

THE COURT: OBJECTION OVERRULED. YOU MAY PROCEED.

A. SPECIFIC NUMBERS AS TO THE COSTS OF VARIOUS SPECIFIC BABIES WHO MAY HAVE BEEN BORN DUE TO COCAINE INGESTION I COULD NOT TELL YOU. JUST AS EVIDENCE OF MY CONCERN OVER THE COST, I WOULD REFER TO THE LETTER THAT I SENT TO THE MICH COUNCIL THAT WE HAVE TALKED ABOUT EARLIER WHERE I POINTED OUT THAT I FELT THAT THE COST OF TAKING CARE OF THESE BABIES AND THE CONTINUING COSTS THAT MAY OCCUR WAS ONE REASON WHY

THIS STATE SHOULD HAVE AN INTEREST IN TRYING TO REDUCE THIS.

Testimony of William B. Pittard, M.D.
[Tr. 217, line 11 – tr. 218, line 14]

Q. COULD YOU DESCRIBE TO THE JURY THE MEDICAL NECESSITY OF WHY THIS WAS DONE? WHY THIS TEST WAS PERFORMED?

A. WHY IS IT PERFORMED? IT'S SORT OF LIKE MANY OF THE TESTS THAT YOU HAVE WHEN YOU GO TO YOUR PHYSICIAN FOR ANY PARTICULAR PROBLEM, THERE IS, FOR INSTANCE IN A CHILD WHO IS BEEN EXPOSED TO COCAINE IN UTERO, ONE OF THE MANY THINGS THAT YOU MIGHT SEE IS THE CHILD COULD BE UNDERGROWN OR HE COULD BE JUST NOT FEEDING VERY WELL. AND IN FACT THEY'RE VERY IRRITABLE ON OCCASION. ALL CHILDREN WHO ARE IRRITABLE ARE NOT EXPOSED TO COCAINE AND ALL CHILDREN WHO ARE EXPOSED TO COCAINE ARE NOT VERY IRRITABLE. SO IT'S A MATTER, YOU LOOK AT THE SERIES OF CLINICAL SYMPTOMS OF THE CHILD PRESENTS WITH AND THEN YOU WAY WHAT IS THE--WHAT IS THE DIFFERENTIAL DIAGNOSIS.

IN OTHER WORDS, WHAT ARE THE POSSIBILITIES THAT MIGHT EXPLAIN WHY THIS CHILD IS ACTING THE WAY HE OR SHE IS ACTING. WE'RE LOOKING AT A BABY THAT IS DOING SOMETHING ABNORMAL, OF COURSE. AND WITH THAT IN MIND, YOU MAY NARROW IT DOWN TO A SERIES OF LET'S SAY SIX OR SEVEN CRITERIA, NOT UNLIKE TRYING TO FIGURE OUT WHAT IS WRONG

WITH YOUR AUTOMOBILE IF THERE IS SOMETHING WRONG WITH IT AND THERE ARE SEVERAL THINGS THAT IT MIGHT BE, AND THEN YOU SAY THIS IS THE MOST LIKELY OR THESE ARE THE MOST LIKELY. AND THEN TRYING TO FIGURE OUT WHICH ONE OF THOSE SIX OR SEVEN POSSIBILITIES MIGHT BE CAUSING THIS CHILD TO ACT THIS WAY.

AND WITH THAT IN MIND, WOULD BE OF THE STUDIES YOU MIGHT DO, WOULD BE A URINE DRUG SCREEN SAYING THIS COULD BE EXPLAINED BY BEING EXPOSED TO DRUGS IN UTERO. WITH AN UNDERSTANDING OF WHAT IS WRONG, WE CAN THEN MUCH BETTER DEAL WITH HOW TO CORRECT IT.

Testimony of Thomas Rowland, M.D.
[Tr. 611, line 21 – tr. 612, line 10]

Q. AND AS AN OBSTETRICIAN, WHAT DID YOU SEE THE GOAL OF THIS POLICY BEING?

A. THE GOAL OF THIS POLICY WAS TO PREVENT THE DAMAGE TO THE FETUS AND TO EDUCATE AND HOPEFULLY REHABILITATE THE MOTHER. WE HAVE HEARD A LOT OF QUESTIONS ABOUT THE ALCOHOL AND TOBACCO ABUSE AND I WOULD ADMIT THAT THE ALCOHOL AND TOBACCO ABUSE ARE MORE COMMON, BUT THEY'RE ALSO NOT AS SEVERE. ALTHOUGH ALCOHOL ABUSE CAN BE VERY DAMAGING TO A CHILD IN A SEVERE ALCOHOLIC MOTHER, SOCIAL USE OF ALCOHOL MAY--MAY NOT HAVE ANY SIGNIFICANT EFFECT. AND YOU MAY HAVE VERY

LITTLE--LITTLE WAY TO DETERMINE HOW MUCH ALCOHOL A MOTHER IS DRINKING. COCAINE ON THE OTHER HAND CAN KILL YOU WITH ONE DOSE, ESPECIALLY CRACK COCAINE.

Q. AND THE BABY?

Q. AND THE BABY.

Testimony of Sarah E. Schuh
[Tr.290, lines 6-11]

A. THAT WE WERE SEEING AN INCREASE IN PROBLEMS IN OUR PREGNANCIES WITHIN THE UNIVERSITY THAT RELATED TO THINGS THAT HAD BEEN DESCRIBED AS ATTRIBUTED TO COCAINE IN THE PAST. AND MY UNDERSTANDING FROM MY PRIOR WORK WAS, AND I THINK MOST OF THE CURRENT LITERATURE AT THAT TIME DID NOT INDICATE MARKEDLY INCREASED RISK TO THE FETUS FROM OTHER DRUGS OF ABUSE.

Joint Exhibit # 12

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

The hospital and attending physician are authorized to release any medical information required in the processing of applications for financial coverage for services rendered this admission. I permit a copy of this authorization to be used in place of the original. I certify that the information given by me in applying for payment under Title XVIII of the Social

Security Act is correct. I authorize release of any information needed to act on this request. I request that payment of authorized benefits be made in my behalf. I assign payment for the unpaid charges for the physician(s) for whom the hospital is authorized to bill in connection with its services.

"I authorize any holder of medical or other information about me to release to the Social Security Administration and Heath Care Financing Administration or its intermediaries or carriers, Department of Social Services or its contractor, Blue Cross and Blue Shield and South Carolina, Champus and it's agents and to the billing agent of this physician or supplier, which is the Professional Staff Office, any information needed for this or a related Medicare, Medicaid, Champus or Blue Shield claim. I permit a copy of this authorization to be used in place of the original and request payment of medical insurance benefits either to myself or to the party who accepts assignment"

I request that payment of authorized benefits be made either to me or on my behalf to Dr. _____ for any services furnished me by that physician. I authorize any holder of medical information about me to release to OCHAMPUS and its agents any information needed to determine these benefits or the benefits payable for related services.

This also applies to any commercial insurance.

ASSIGNMENT OF INSURANCE BENEFITS.

I/we hereby assign all my rights under any policy of insurance to my attending physician and the Medical University Hospital including, but not limited to, major medical insurance, hospital benefits, sick benefits, injury

benefits due to me because of liability of a third party, such as auto insurance, workman's compensation insurance, and/or minimum medical hospital and disability payments commonly referred to as "PIP" pursuant to Section 56-11-1110, S.C. Code of Laws, 1976, as amended and the proceeds of all claims resulting from the liability of the third party payable to an person, employer, insurance company to or for the patient, up to the full amount of the hospital bill. in addition, I/we further warrant and represent that any insurance that we assign is valid insurance and in effect and that I/we have the right to make this assignment.

PERSONAL LIABILITY

I expressly understand that I am personally responsible for the entire hospital and physician charges resulting from my care and treatment. Any payment received by the Medical University as a result of the above Authorization for Release of Medical Information and Assignment of Insurance Benefits will be credited toward my account, and I will be personally liable for any and all remaining balance on my hospital or physician account.

AND CONSENT FOR MEDICAL TREATMENT

"I acknowledge that I am suffering from a condition requirin Medical/Hospital care and thereby voluntarily consent to such Medical/Hospital care encompassing diagnostic procedures and medical treatment by my physicians, assistants, or assignees, as may be necessary in his or her judgment. I further consent to the testing for infectious diseases such as, but not limited to syphilis, hepatitis, and AIDS and I further consent to the testing of drugs if deemed advisable by my physician. I am aware that the practice of medicine and surgery is not an exact science and I

acknowledge that no guarantee has been made as to the result of treatments or examinations. I have read or had had read to me this consent and I voluntarily certify that I understand and agree to its contents"

VALUABLE RELEASE FORM

I have been requested to check my valuables wit the hospital and hereby release the Medical University Hospital of any liability and assume responsibility myself for any items not deposited to the hospital's care. Any valuables not claimed with thirty (30) days of discharge will become the property of the Medical University Hospital.

By signing below, the undersigned certify that the foregoing paragraphs have been read and in full and explained to the undersigned

Signature of patient

Signature of patient or legal guardian in case of minor	Signature of guarantor (if different from patient) ADDRESS:
Date/Time signed	Witness signature

Joint Exhibit 13

CONSENT FOR TREATMENT
MUSC MEDICAL CENTER
AMBULATORY CARE

Patient: _____
Date of Birth: _____
Date: _____

I, __[patient's name/authorized person]__, hereby authorize the administration of medical treatment(s) and the performance of medical procedure(s) while __[patient's name]__ is a patient of the Medical University Clinics.

I understand that such treatment(s) and procedures(s) will be performed by attending physicians, members of House Staff, hospital employees and/or supervised students. The intention hereof is to grant full authority to such physicians and surgeons and the Medical University Clinics, their respective employees and assistants, and supervised students, to administer and perform all and singular any drugs, treatments, tests or diagnostic procedures, including the testing for infectious diseases such as but not limited to, Syphilis, Hepatitis, and AIDS. I further consent to the testing for drugs if deemed advisable by or necessary in the professional judgment of the physician or surgeon, or a physician or surgeon acting under their instructions. Attending physicians, members of House Staff, and the Medical University Clinics have my permission to reveal information to appropriate agencies and individuals where it because necessary to protect the welfare of myself/the patent and/or the community. I consent to and authorize the above to or upon me, or the person for who I am authorized to consent.

The Medical University of South Carolina is authorized to furnish requested information or excerpts to the referring physicians, if any, and to any insurance company or authorized third party payor for the purpose of obtaining payment of the account of the Medical University of South Carolina or any physician for services provided to the patient. I expressly agree to be personally responsible for any portion of the account which is not paid by a third party payor.

I hereby certify that I have read and understand the above authorization, that inappropriate paragraphs, if any, were stricken before I affixed my signature and no guarantees or assurances have been made as to the results of treatment(s) and procedure(s)

DATE: _____ By:_____
(Patient or authorized person)
If not patient, then state patient's name and relationship

WITNESS: _____ _____
Patient's Name

_____
Relationship to Patient.

Plaintiffs' Exhibit # 105

December 13, 1990

State Council on Maternal Infant
And Child Heath

Dear Sirs:

Thank you very much for the opportunity to present to you some of my feelings on the very important issue of drug abuse in pregnancy. I apologize for not being able to present this to you in person; however I was unable to extricate myself from other responsibilities.

As you have already identified in your position paper, intrauterine drug abuse is a significant contributor to our escalating toll of fetal, neonatal and childhood morbidity and mortality. The cost to society of supporting these damaged citizens and absorbing their lost productivity is a significant impetus to the state taking action in this regard even if the harm to the individual were not considered.

I believe the major deficiency of this position paper is its failure to recognize the possibility for positive cooperation between both the medical profession and governmental authorities. The position paper suggests there is an either/or situation where criminal prosecution would be used as a substitute for effective prenatal services. Obviously, it is essential that adequate preconceptual and prenatal care be provided including an increased accessibility to substance abuse treatment facilities. Unfortunately, it has been our experience that efforts at approaching this on a purely medical basis have not been successful as many of the patients in greater need of assistance are completely outside

the medical loop. It has been our experience that despite patent education, counseling and voluntary referral for substance abuse treatment, the actual number of women who have taken advantage of this opportunity is minimal. However, the cooperative effort of the concerned police force, a conscientious but thoroughly professional solicitor's office, and the judiciary has significantly improved the ability of the medical profession to make a positive impact. The involvement of the criminal process system has allowed us the leverage to firmly but fairly apply the power of the state to insist that substance abusing woman avail herself to prenatal care, substance abuse treatment, and social service whiles at the same time maintaining the ability to protect the community, the infant and the unborn from the continuing abuse if treatment fails. Our preliminary efforts with this approach appear to have been successful and I am sure that this information will be outline for you in detail by the other participants in this conference.

I would like to strongly point out that there is no evidence that this approach has driven any patients away from prenatal care as is popularly asserted. This is a major criticism addressed to such approached which are frequently misinterpreted as being "punitive"; however, this assertion is unproven. Our own data does not demonstrate any change in the utilization patterns of our prenatal clinics nor have we identified any increase in unbooked deliveries at other regional hospitals. Our own experience suggests that a zero tolerance approach to drug abuse during pregnancy supported by the police and judicial system has had a chilling effect on the social or casual use of drugs during pregnancy, particularly cocaine. As will be demonstrated to you in date from our experience at the Medical University, the incidence of positive testing for cocaine during pregnancy has consistently fallen despite an increased

frequency of testing from the time that this program was instituted.

It is widely known that the failure to avail oneself of prenatal care is very typical of the seriously substance addicted patent. There is very little opportunity to impact of this pregnancy as these patients because they do not make themselves available for identification. It is therefore most important that these people not be allowed to slip away from intervention as has been the case almost uniformly in the past. Failure to effetely intervene, often the index pregnancy allows this destructive behavior to repeat itself from pregnancy to pregnancy. Through the threat of prosecution, we have been able to insist upon these women receiving substance abuse treatment available in our community. The involvement of the legal system also requires the involvement of child protective services. While it is agreed that the "ultimate goal should be to protect the integrity of the family." It should also be the role of the state to protect the safety of the infant in the dysfunctional family. From a sociological perspective, there is probably no greater role for either the medical profession or the state than to intervene effectively to prevent the abuse of children which leads unfortunately to the creation of abusive and dysfunctional adults.

The popular characterization of the approach which we have taken is that it is "punitive". However, I think this is a significant misconception. While this may be considered a coercive approach, the ultimate goals are to rehabilitate the adult who is currently abusing illegal substances, prevent needless prenatal morbidity and mortality, and protect infants and children from abuse and social neglect. If this program can be shown to be effective in achieving these

goals, then I think it is probably as far from the concept of punitive as is possible.

As physician and medical advisor, I have been significantly troubled by the consideration that this program violates the physician-patient relationship and patient confidentiality. I agree that this violation is inherent in the reporting of drug abuse by pregnant women. However, with the continuing erosion of the physician-patient relationship which is evident in may ways, this may be a moot point. At the present time, patients cannot be admitted to the hospital without getting pre-authorization from either federal, state, or private agencies regarding the indications for said admission. A similar situation exists if complications develop requiring reconsultation with public or private payers to justify the extension of hospitalization. As its essence, this is probably the most basic violation of the physician-patient relationship where medical decisions to treat or not treat and the specifics of individuals cases must be reviewed by outside non-medical consultants for their approval. Additionally, the legal system has dissected the concept of doctor-patient relationship in the pursuit of discovery, and the legislature has enacted laws which redefine this relationship to meet other societal needs. Most importantly would be the laws requiring the reporting of evidence of child abuse as an excellent example of how societal needs to protect the defenseless assumes greater importance than the concept of the doctor-patient relationship and the confidentiality. AS you are aware, the reporting of such child abuse is considered mandatory under South Carolina state law.

As a specialist in maternal-fetal medicine, I am constantly confronted with situations that required compromise to protect both the mother and the fetus. My responsibility is to provide the fetus with the best possible environment while at

the same time maintaining the health and autonomy of the mother. Frequently, the needs of the fetus come into conflict with maternal autonomy and at those times, significant ethical decisions must be made. I am of the strong opinion that the third trimester fetus deserves legal stand comparable with the fact that it is a potentially viable human being and is worth of protection of this or her life or health is in jeopardy . When such jeopardy clearly exists as it does with the situation of maternal substance abuse during pregnancy, then the ultimate benefits to both the individual fetus and to society as a whole seems to outweigh the potential deterioration to the physician-patient relationship, maternal confidentiality, and the legal rights of the mother especially considering her involvement in an already defined illegal activity. As a maternal fetal medicine specialty, I do not have the option of viewing this topic in any other way because my career is wholly involved in trying to maximize the outcome of pregnancy for both the mother and the infant.

I do not pretend to be either a lawyer, philosopher or ethicist. I prefer to consider myself as being practical. WE have attempted to address the drug problem in pregnancy by education, identification, counseling and referral for voluntary substance abuse treatment. This has not been successful to any degree and unfortunately, I believe that this position paper does little to improve the status quo and will therefore not effectively intervene in this escalating problem. In fact by accepting this more passive approach to intervention, we may indeed be sending the wrong message for a large number of the casual users of drugs such as cocaine regarding the importance of substance abuse during pregnancy. I emphasize again that our more aggressive approach should be considered very preliminary but does appear to be effective in preventing substance abuse, allowing for better rehabilitation of the substance abusing

mother, and in better protecting the infant at risk. It is critical that more extensive and effective preconceptual and prenatal educated be instituted regarding the risk of drug abuse in pregnancy. Additionally, our state as many others, has an insufficiency of affordable and effective treatment services for the drug abusing mother. However, using the legitimate power of the state to intervene following the commission of an illegal act to compel and supervise the compliance of these individuals with prescribed treatments plans as deemed necessary by the medical advisors seems to be the best opportunity at present to reduce the relevance of substance abuse during pregnancy, enhance the rehabilitative possibilities for the mother, and most importantly, protect the infant and break the cycle of abuse. I urge you consider the continued evaluation of this approach.

I apologize for the rambling nature of this letter. Admittedly, it was put together somewhat hastily, but I do appreciate your consideration of it. I would encourage you to look beyond the position paper which was presented tome and consider the possibility that the conscientious, concerned, and fair cooperation between the medical profession and the legal authority of the state may provide the opportunity for both a compassionate and effective intervention to reduce the emotional, physical, and socials costs of drug abuse during pregnancy.

Sincerely,

/s
Roger B. Newman, M.D.
Associate Professor of Obstetrics and Gynecology/Director of Maternal-Fetal Medicine

RBN/fwm

Defendants' Exhibit # 133

1991 South Carolina Prevalence Study of Drug Use Among Women Giving Birth

EXECUTIVE SUMMARY

PURPOSE: The State Council on Maternal, Infant and Child Health (MICH), through its Substance Abuse Committee, commissioned this study to estimate the number and percentage of women giving birth in this state who use alcohol, illegal drugs and non-prescribed drugs and to describe the women who use them.

METHODS: Anonymous urine specimens were collected from women giving birth in 24 hospitals and anonymous meconium specimens were collected from newborns in 3 hospitals over a six week period between November 1990 to April 1991. The 24 hospitals were selected in such a way as to represent all women delivering in South Carolina community hospitals. The responses rates were 89.7% and 66.4% respectively.

Alcohol and drugs can be detected in urine for uop to 7 days and in meconium, an infant's first stool, for up to six weeks. Urine and meconium samples were tested for the presence of the following 11 drugs:

Alcohol
Amphetamines (Speed)
Barbiturates (sleeping bills Seconal (R), etc)
Benzodiazepines (Valium (R),
Marijuana
Methaqualone (Quaaludes (R))
Methadone
Opiates
Phencyclidine (PCP)

Tranquilizers, etc) *Propoxyphene (darvon ®)*
Cocaine

MAJOR FINDINGS:

Overall

- Over 15,000 infants are born each year in South Carolina to mothers who use alcohol, illegal drugs or non-prescribed drugs. This represents roughly 1 in 4 infants born each year.

- 12.1% of delivering women statewide used alcohol and drugs based on urine testing (short detection period), 22.4% based on meconium testing (longer detection period), and 25.8% based on both testing methods.

- South Carolina is the first state in the nation to complete a prevalence study of this size, nature, and quality. Therefore, it is difficult to directly compare ourselves to other places. Published studies suggest that the use of cocaine and marijuana by delivering women in this State may be lower than other places while the use of barbiturates and opiates may be higher.

- The problem of alcohol and drug use among women giving birth is not limited to any one group of women or one place. The percentage of women using alcohol and drugs varies by type of drug, geographic location, and characteristics of the women.

****

Cocaine

- As many as 3,221 delivering women statewide (5.8%) use cocaine each year based on urine and meconium testing.

- Black women are nearly 6 times more likely to use cocaine than white women based on urine testing.

- Women whose intended payment source is other than commercial insurance (i.e., Medicaid and Other defined sources) are 17-18 times more likely to use cocaine than women with commercial insurance based on urine testing.

- Cocaine use is also higher among women delivering in urban hospitals than rural hospitals based on urine testing.

I. Introduction

I.A. STUDY BACKGROUND

This prevalence study has been conducted under the auspices of the State Council on Maternal, Infant and Child Health (MICH Council). The MICH Council was created in 1986 by the South Carolina General Assembly to improve the planning and coordination of maternal, infant and child health services. The MICH Council, as a collaborative effort of the public and private sector, includes the commissioners of State health, human services, and education agencies; legislators; representatives of medical schools, school of public health, health care providers and voluntary organizations; and gubernatorial appointees. The MICH Council is staffed by the Governor's Office.

The MICH Council created the Substance Abuse Committee in December 1989 to study the problem of maternal substance abuse and its impact on infants and child, and to develop policy and program recommendations for the MICH Council. The Committee identified the need to know, as accurately as possible, the prevalence of maternal substance abuse in South Carolina. The Committee also initiated efforts to study effective prevention and treatment interventions as well as ethical and legal issues raised by this problem. The work of the Substance Abuse Committee has been accomplished through three subcommittee focusing on 1) prevalence, 2) prevention and treatment, and 3) ethical and legal issues.

The Prevalence Subcommittee coordinated the design and implementation of the prevalence survey. Funding for the study was achieved through contributions of several State and private agencies. Scientific direction was also provided by representatives from several agencies. The entire effort has required interagency and interdisciplinary coordination, and efforts on the part of may individuals and agencies.

I.B. CONSEQUENCES OF DRUG USE DURING PREGNANCY

The use of alcohol and other drugs during pregnancy can have serious consequences for the health of the baby, the health of the mother, and the health of our society.

****

- *Cocaine Use* during pregnancy is associated with an increased risk of sudden infant death syndrome, low birth weight, seizures, stroke, heart attacks, lack of bonding, emotional disorders, behavioral problems and learning disabilities among infants.

****

The maternal effects of alcohol and other drug use also include increased risk of premature delivery, increased risk of premature separation of the placenta, and increased risk of spontaneous abortion.

Women who use alcohol and other drugs during pregnancy are more likely to have other poor health behaviors such as smoking cigarettes. Poor nutrition and inadequate weight gain during pregnancy are also a result. Such mothers are more likely to have inadequate prenatal care, start prenatal care later, or have no prenatal care at all. Mothers who use alcohol and other drugs are also at a higher risk for hepatitis and sexually transmitted diseases, such as syphilis and HIV infection.

The societal costs of maternal drug use are staggering:

- Premature and low birth weight births caused by drug exposure are associated with increased need for neonatal intensive care (NICU) at birth.
- Drug-exposed infants are more likely to need socials services and are more likely to enter the foster care system.
- Infants exposed to alcohol and other drugs during pregnancy are more likely to need special education services.
- These infants are less likely to achieve educational or occupational goals that otherwise might have been possible.
- Drug exposure is also associated with family stress and reduced bonding between mother and child

The excess medical cost associated with affected drug-exposed infants can easily exceed $50,000 per infant in the first year of life alone. The lifetime economic cost associated with the severe effects of drug exposure can exceed $1 million per infant.

****

IV. Discussion

Historically, South Carolina has enjoyed a cooperative atmosphere in addressing health issues among State agencies, health care providers, and voluntary health organizations. The complexity and design of this study necessitated that all participants work closely to design, implement and monitor the project. Because of cooperative history among participating organizations, the demands generated by the magnitude of this study were addressed in a timely manner resulting in this quality study.

Although drug use can be a criminal activity and drug use during pregnancy raises many ethical, legal and social questions, this prevalence study went beyond these issues and represents a major step towards accurately defining the problem of drug use during pregnancy in South Carolina. The study is representative of all women giving birth in South Carolina: both insured and Medicaid, young and old, black and white, rural and urban, Piedmont and Low Country. Using a conservative definition for the calculation of a response rate, the overall response rate was 90% with over 80% response rate among all groups. The study's high response rate and representativeness strongly support the accuracy of the study's prevalence estimates.

With over 3,7000 urine specimens, this study also has the statistical power to reliably define the magnitude of the problem statewide and describe the women using alcohol and drugs during pregnancy. This study represents the largest population-based study of drug use among women giving birth using one common laboratory and has one of the highest response rates for this type of study. Many of the study findings are statistically significant at a p-value less than 0.05 which strongly supports that these differences are real and less likely to be due to the number of women tested. In fact, one needs to be cautious in using findings that are not statistically significant for policy and program development. For example, very few study women reported that their main intended payment was self-pay. Therefore, it is difficult to interpret the findings related to this group because a few more women testing positive or negative could substantially alter findings. This problem is especially true when examining detailed tables for each of the reasons. Again, because of the size of this study, many of the important finds can be stated more confidently.

IV.A. NUMBER OF DRUG-EXPOSED INFANTS

This study estimates that thousands of infants are being born each year in South Carolina to mothers who used alcohol, illegal drugs or non-prescribed drugs near the time of delivery (See Table X). By multiplying the number of 1990 South Carolina births to South Carolina residents based on birth certificates by the prevalence of material drug use based on urine testing, as few as 107 infants are exposed to Darvon (R) or propoxyphene near the time of delivery to as many as 2,974 to barbiturates (See Table IX). Over 1,000 infants are exposed to the recent use of marijuana, opiates and alcohol; 422 infants exposed to cocaine.

The actual number of drug-exposed infants may be even higher than estimates based on urine testing. Using a combined prevalence to urine prevalence ratio based on the prevalence in Table V (combined prevalence divided by urine prevalence) and multiplying by the number of exposed infants based on urine testing in Table X, over 15,000 infants infants are exposed to alcohol and drugs. Approximately 4,500 infants this year will be exposed to barbiturates and marijuana. Roughly 3,000 infants will be exposed to cocaine and opiates.

****

Testimony of David Schwacke
[Tr. 159, lines 1-10]

Q. AND IF THEY DID WHAT THE POLICY REQUIRED, DID YOUR OFFICE PROSECUTE THEM IF THEY WERE TO SUBSTANCE ABUSE LIKE THEY WERE SUPPOSED TO?

A. IF THEY DID THE PROGRAM REQUIREMENTS, ATTENDING COUNSELING, ATTENDING THE PRISON TOUR, WHATEVER WAS REQUIRED OF THEM, THOSE CHARGES WERE DISMISSED AND THEY WERE ABLE TO EXPUNGE THEIR RECORD.

Q. WE HAD 253 THAT WERE TESTED POSITIVE, 30 WERE ARRESTED AND TWO WERE PROSECUTED. DID THOSE TWO ACTUALLY EVER GET SENTENCED TO JAIL?

[Tr. 159, line 22 – tr. 160, line 7]

Q. (BY MR. HOOD, CONTINUING) THE TWO WOMEN THAT CAME UNDER THE POLICY, WERE THEY EVER ACTUALLY PUT IN PRISON AND SENTENCED?

A. THEY WERE NOT SENTENCED TO ACTIVE JAIL TIME, THEY WERE PLACED ON PROBATION. CONTINUED DRUG TREATMENT WAS A SPECIAL CONDITION ON THEIR PROBATION.

Q. AND THE THIRTY WOMEN THAT WERE ARRESTED, DID ANY OF THEM EVER GET PLACED IN JAIL OTHER THAN THE INITIAL ARREST, WHERE THEY SENTENCED AND CONVICTED AND PUT IN JAIL FOR VIOLATING THE LAW?

A. NO, THEY WERE NOT. NOT--NOT RELATED TO THESE OFFENSES.

No. 99-936

Supreme Court, U.S.
FILED
JAN 24 2000
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR *WRIT OF CERTIORARI*

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Petitioners Crystal Ferguson, *et al.*, respectfully submit the following reply brief in support of the petition for certiorari.

Introduction

Contrary to Respondents' characterization in their Brief in Opposition ("Opp. Br."), this case is not about whether pregnant women should use cocaine or any other substance that may be harmful to themselves or their fetuses. Nor is this case about the legitimacy of different medical approaches to this problem. Rather, as the dissenting opinion below clearly recognized, this case is about the limits that the Fourth Amendment puts on state actors who conduct searches to further their traditional law enforcement objectives -- collecting evidence to be used for the arrest and prosecution of people suspected of breaking the law -- when those traditional functions are carried out in conjunction with other non-law enforcement purposes.

Respondents ignore this threshold legal question, though, arguing instead that under this Court's "special needs" jurisprudence, despite the dominant law enforcement purpose present in the Policy, the search at issue was "reasonable" under the Fourth Amendment. By reducing this case to a factual dispute over reasonableness, Respondents hope to distract the Court from the important and well-defined legal issue presented by this case: when are law enforcement purposes so dominant that a search with a concomitant public policy purpose falls within the normal Fourth Amendment requirements of a warrant and probable cause and not within the "special needs" exception.

Respondents also attempt to obfuscate this clear legal issue by arguing that the ruling of the court of appeals is sustainable under two alternate independent grounds, namely that Petitioners consented to the searches and/or that the Medical University of South Carolina ("MUSC") staff were not state actors. These arguments, unsupported by the facts and the case law, are mere red herrings. Neither is an adequate ground for declining to address the important constitutional questions raised by this Petition.

Argument

I. Respondents' Fact-Based Argument Diverts This Court From the Threshold Legal Question, Virtually Ignored by the Fourth Circuit, of Whether the Search Conducted Here Was "Beyond the Normal Need for Law Enforcement."

As Respondents point out, this Court has never stated, in the context of the "special needs" exception to the Fourth Amendment's requirements of a warrant supported by probable cause, that "the 'special need' must be to the exclusion of normal law enforcement goals." Opp. Br. at 20. However, as Respondents have ignored throughout their brief, this Court has twice acknowledged that it is an open federal question as to how much law enforcement involvement is too much.

First, in *New Jersey v. T.L.O.*, a case in which the search policy was not formulated for law enforcement purposes,[1] this Court wrote that "[t]his case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question." *T.L.O.*, 469 U.S. 325, 341 n.7 (1985).

This Court once again acknowledged the presence of this important legal issue in *Skinner v. Railway Labor Executives' Association* when it wrote that "[w]e leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program." *Skinner*, 489 U.S. 602, 621 n.5 (1989).

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[1] Respondents' claim that *T.L.O.* decides the question presented by Petitioners borders on the disingenuous. *See* Opp. Br. at 20. In *T.L.O.*, the policy was designed by the school *alone*, and evidence was passed along to law enforcement as a mere afterthought. In this case, the Policy itself was *designed* by and for law enforcement, and positive search results were routinely forwarded to law enforcement pursuant to the Policy itself.

Clearly, then, Respondents are wrong when they claim that "the principles and parameters of the special needs doctrine are clearly established by Supreme Court precedent," Opp. Br. at 11, and that this Court "has clearly enunciated the guiding principles and parameters of the special needs doctrine." Opp. Br. at 16. Instead, the open question, as detailed more fully in the Petition, is an important constitutional question requiring this Court's guidance, a question that directly governs the outcome of this case.

Respondents are also wrong when they claim that Petitioners argue that a "special needs search must be *totally* divorced from any law enforcement activity." Opp. Br. at 20 (emphasis added). Nowhere in the Petition is such a claim made. In fact, Petitioners' argument is limited to searches conducted "primarily" for law enforcement purposes. *See* Pet. at 11. Such a search is exactly what occurred here.

Respondents themselves admit that their Policy was developed for law enforcement purposes. At first, in 1989, Respondents started using what they referred to as their "*voluntary* referral protocol." Opp. Br. at 4 (emphasis added). Pursuant to this protocol, certain pregnant women were tested for drugs. Women who tested positive were not reported to the police. Respondents claim that instead, they were referred for treatment. *Id.* According to Respondents, when that protocol failed, they turned instead to an *involuntary* protocol, the Search Policy challenged here by Petitioners, consisting of arrest and prosecution. *Id.* at 4-5. This new protocol was based on "publicity about a policy being implemented in the upstate."[2] *Id.* at 5. In Respondents' own words, MUSC's second protocol "paralleled the prior protocol" except that it added one thing -- the "threat of law enforcement intervention."[3] *Id.* at 5. Even Respondents' version of events,

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[2] The policy Respondents refer to so obliquely is the policy of arrest and prosecution that was implemented by "our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs," and described by MUSC General Counsel Joseph Good. PX 2 (App. 67); *see also* Pet. at 3.

[3] The existence of this dominant law enforcement purpose belies Respondents' claim that the key legal focus in this case should be the special non-adversarial relationship between "healthcare providers and

then, establishes that the key component of the policy, the component that Respondents claim proved to be the "pivotal factor in making this an effective policy," *see* Opp. Br. at 7, was the law enforcement involvement. This case, with such a dominant law enforcement purpose, even if combined with a non-law enforcement purpose, poses the important threshold question raised by Petitioners.

Respondents also fail to refute the evidence of a dominant law enforcement purpose cited in the Petition. Without repeating the detail included in the Petition, we reiterate here only the most important pieces of evidence: Solicitor Condon's letter describing the task force's purpose as "to consider possible prosecution of the mothers of drug affected babies"; the fact that the Search Policy was first memorialized by law enforcement personnel; Mr. Good's letter admitting that the policy was developed "at the suggestion of law enforcement and the solicitor's office," and the requirement that MUSC personnel maintain an evidentiary chain of custody. *See* Pet. at 3-4. These pieces of evidence support the conclusion gleaned from Respondents' own history of the policy: that the policy's dominant purpose was law enforcement.[4]

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patients." Opp. Br. at 18. A policy whose "pivotal factor" was the "threat of law enforcement intervention" cannot reasonably be regarded non-adversarial.

[4] Respondents' reliance on cases in which there is no comparable level of law enforcement involvement to argue that the "special needs" exception should apply to the searches at issue here is also a distraction from the central issue presented in this case. For example, Respondents ignore that *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993), was not a special needs case; rather, *Wildauer* relied on the line of "administrative search" cases. *See Wildauer*, 993 F.2d at 372. Furthermore, the Fourth Circuit differentiated the "home visits by social workers" at issue there from "searches in the criminal context," such as those at issue here. *Id.*

Moreover, as noted by Respondents themselves, *see* Opp. Br. at 26, the search in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), did not fall within normal Fourth Amendment requirements because criminal prosecution was a "contingency [] certainly of secondary importance" to the social worker's visual inspection of the child's body. *Id.* at 902. Such is certainly not the case here, where Respondents have clearly stated that the threat of criminal prosecution was the "new third step [that]

II. This Case Presents No "Alternate Independent Grounds" for Denying the Petition for a Writ of Certiorari.

First, Respondents' contention that Petitioners consented to the drug tests is simply wrong. As the district court explained, "In order to consent to something, you must have knowledge of what that something is. And that means you must have knowledge of the scope of the search. . . ." Tr. of Further Charge to Jury at 16 (Supplemental Appendix ("SA") at 2). As the Petition outlines in more detail, *see* Pet. at 6-7, none of the evidence proffered by Respondents to establish consent, namely, Joint Exhibit 10 ("To Our Patients" letter),[5] the patient videotape, the hospital consent to medical treatment forms,[6] the public service announcement, and the solicitor's letters, put the Petitioners on notice that their medical providers at MUSC were searching their urine for drugs for law enforcement purposes. Thus, as the dissent below noted, the evidence presented at trial was insufficient to sustain the jury's verdict where it was "not sufficient to establish the plaintiffs' voluntary and knowing consent to the possible use against them in a criminal case of drug test results taken in the course of their pregnancy and labor." *Ferguson v. City of Charleston*, 186 F.3d 469, 488-89 (4th Cir. 1999) (Blake, J., dissenting) (App. 31); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 248 (1973) (consent, to be valid, must be given "freely and voluntarily" and without evidence of coercion, express or implied).

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proved to [be] the pivotal factor in making this an effective policy." Opp. Br. at 7. Thus, *Darryl H.*'s holding involving criminal prosecutions of "secondary importance" has no application to the facts of this case.

[5] The evidence contradicts Respondents' claim that "all patients were given a letter at the time of their initial visit which explained the urine drug testing policy." Opp. Br. at 27; *see* Pet. at 6-7.

[6] Like the court in *United States v. Attson*, 900 F. 2d 1427, 1431 (9th Cir. 1990) (consent forms established consent to medical treatment, not to a search for law enforcement purposes), the district court correctly found that the "written consent is not sufficient to make the searches constitutional" because they were "not broad enough to cover the search as performed because the consent gave only the doctors the right to [test the urine] and use it for their purposes, and it did not refer to the giving of the results of that urine screen to the police to use for their purposes." Tr. of Further Charge to the Jury at 16 (SA at 2).

Second, Respondents' contention that MUSC employees are not state actors is contradicted by well-established precedent of this Court. A warrantless search made by non-law enforcement government officials, such as the MUSC Respondents in this case, for criminal or investigatory purposes is subject to Fourth Amendment protections. *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (when a non-law enforcement government official conducts a search, "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment."); *see also United Teachers of New Orleans v. New Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998) (public school officials are public employees and state actors regardless of whether they are engaged in law enforcement activity). Even the court of appeals accepted that MUSC employees are governmental actors, reasoning that "when a state hospital develops a general policy to test the urine of certain patients suspected of drug use, the testing constitutes a search within the meaning of the Fourth Amendment." *Ferguson*, 186 F.3d at 477 n.6 (App. 10).

United States v. Attson, 900 F. 2d 1427, 1433 (9th Cir. 1990), is not to the contrary. In that case, the court held that the actions of a physician at a public hospital were not covered by the Fourth Amendment because he "did not intend to elicit a benefit for the government in its investigative or administrative capacity." *Id.* at 1433. In contrast, in this case, the searches were conducted as part and parcel of an interagency plan to report pregnant women who tested positive for cocaine to the police and prosecutors. The tests were clearly intended to "benefit the government in its investigative (or administrative) capacity." *Id.* at 1432. Moreover, in contrast to this case, the doctor in *Attson* refused to turn the test results over to the police. *Attson*, 900 F.2d at 1433.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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Excerpt of Transcript of Further Charge to the Jury (1/6/97)
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. . . IN ORDER TO CONSENT TO SOMETHING, YOU MUST HAVE KNOWLEDGE OF WHAT THAT SOMETHING IS. AND THAT MEANS YOU MUST HAVE KNOWLEDGE OF THE SCOPE OF THE SEARCH. IT IS WITHIN THAT CONTEXT THAT I SAID THAT THE CONSENT MUST BE BROAD ENOUGH TO INCLUDE THE PARAMETERS OF THE SEARCH. IT IS WITHIN THAT CONTEXT THAT I SAID THAT THE WRITTEN CONSENT PERMITTING THE DEFENDANTS OR SOME OF THEM TO DRAW URINE FOR MEDICAL PURPOSES DOES NOT CONSTITUTE CONSENT TO USE THAT URINE FOR POLICE PURPOSES. THE CONSENT FORM AS WRITTEN IS NOT BROAD ENOUGH TO COVER THE SEARCH AS PERFORMED BECAUSE THE CONSENT GAVE ONLY THE DOCTORS THE RIGHT TO DRAW IT AND USE IT FOR THEIR PURPOSES, AND IT DID NOT REFER TO THE GIVING OF THE RESULTS OF THAT URINE SCREEN TO THE POLICE TO USE FOR THEIR PURPOSES.

SO THE WRITTEN CONSENT IS NOT SUFFICIENT TO MAKE THE SEARCHES CONSTITUTIONAL. THER MUST BE SOMETHING MORE. SOMETHING MORE TO SHOW THAT THE DEFNEDANTS – THE PLAINTIFFS CONSENTED NOT ONLY TO THE URINE BEING TAKEN FOR MEDICAL PURPOSES, BUT THAT THEY CONSENTED TO IT BEING ALSO USED FOR POLICE PURPOSES. . . .

(3)

No. 99-936

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JAN 03 2000

CLERK

IN THE

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File as *Amici Curiae* and Brief in Support of the Petition for Certiorari of the American Public Health Association, American Society of Addiction Medicine, Society of General Internal Medicine, South Carolina Medical Association, National Association of Alcoholism and Drug Abuse Counselors, Inc., National Council on Alcoholism and Drug Dependence, American Nurses Association, South Carolina Nurses Association, Association of Reproductive Health Professionals, American Medical Women's Association, National Women's Health Network, National Association of Social Workers, Inc., Association for Medical Education and Research in Substance Abuse, Society for Medical Anthropology, California Medical Association, California Society of Addiction Medicine, Institute for Health and Recovery, Consortium for Substance Abusing Women and their Children and Robert G. Newman, M.D.

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39 pp

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Sup. Ct. Rule 37.2(b), *Amici* -- physicians, nurses, counselors and public health practitioners from around the country and their professional associations -- move for leave to file the attached brief *Amici Curiae* in support of the Petition for Certiorari filed by Crystal Ferguson, *et al.*, seeking review of Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999).

In the decision below, a divided panel of the Fourth Circuit upheld a governmental policy whereby the trust inherent in the doctor-patient relationship was manipulated by law enforcement authorities to obtain bodily fluids from indigent pregnant women for use as incriminating evidence.

Amici have recognized expertise in the areas of the physician-patient relationship, the need to maintain the confidentiality of personal medical information, maternal and neonatal health, and the treatment and prevention of substance abuse among pregnant and parenting women. This brief is offered to highlight basic medical misunderstandings that infected the decision upholding the policy's constitutionality and to alert this Court to the real harms that the Fourth Circuit's decision, if left undisturbed, will cause individuals, their families and their communities.

Amici, from their vantage point as health care and social services providers and medical researchers, wish to bring to the Court's attention the troubling consequences of the Ferguson decision not only for the patients receiving treatment at the Medical University of South Carolina but for all patients.

This motion is necessary because Respondents have declined to consent to the filing of the following proposed brief.

INTEREST OF *AMICI CURIAE*

As the names of the *Amici* organizations suggest, and the descriptions of these organizations appended to the attached proposed brief underscore, *Amici* comprise a broad array of South Carolina and national medical, social services, legal services, and substance abuse treatment organizations, with memberships that range from direct service providers to researchers, academics, and theorists. What unites these organizations is a recognition that substance abuse is a treatable disease but that the Fourth Circuit's decision in Ferguson threatens to stymie the delivery of effective treatment to some of the most vulnerable patients in the community.

Amici share at least two basic, interrelated interests in this case. First, *Amici*, many of whom provide prenatal and substance abuse treatment to pregnant women, understand that the Ferguson decision strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the critical relationship between health care professionals and their pregnant patients. To compromise the doctor-patient relationship is to compromise care. The result will be damaged health, increased suffering, escalating health care costs, and decreased life expectancy.

Second, *Amici* are concerned that the decision below will deter pregnant women from obtaining adequate prenatal care, including substance abuse treatment. *Amici*, individually and as a whole, have professional and ethical interests in promoting women's and children's health, and wish to apprize this Court of the tragic health implications of the Fourth Circuit's decision for pregnant women and their children.

Respectfully submitted,

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STATEMENT OF INTEREST*

As the Petition for Certiorari filed by Crystal M. Ferguson, *et al.* makes plain, the Court of Appeals decided this case in a manner that cannot be reconciled with this Court's teaching concerning the narrow scope of the "special needs" exception to ordinary Fourth Amendment requirements. *Amici* respectfully submit this Brief to highlight the full importance of the issue wrongly decided by the Fourth Circuit panel majority. See Sup. Ct. R. 10.

Amici include physicians, nurses, counselors, public health practitioners and their professional associations. They have both recognized expertise and longstanding concern in the areas of maternal and neonatal health and in the understanding and reduction of the harms that drugs and other substances can cause users, their families and society as a whole. This Brief is offered to cast light upon basic medical misunderstandings that marred both the prosecutorial policy at issue and Fourth Circuit's decision and to alert this Court to the real harms that the decision, if left undisturbed, will continue to cause.

SUMMARY OF ARGUMENT

Under any circumstance, the potential significance of the Court of Appeals legal ruling would be large. If, as that Court held, the interest of law enforcement officers in deterring conduct already prohibited by the criminal code could count as a "special need" for Fourth Amendment purposes (at least when pursued without "vindictiveness"), there would be few cases left for which the constitutional rule, that searches conducted without warrants and probable cause are unreasonable *per se*, and not the narrow special needs exception, would control.

But the specific governmental policy at issue here --

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*No entity or counsel apart from those whose names appear on this Brief have contributed monetarily or substantively to its production. Sup. Ct. R. 37.6.

drawing on the trust inherent in the doctor-patient relationship to obtain bodily fluids for use as incriminating evidence -- is especially offensive to the Fourth Amendment's core personal privacy concerns. Although the Court of Appeals decision characterized the invasion of privacy implicated here as "minimal," on the ground that "giving . . . a urine sample is a normal, routine, and expected part of a medical examination," see Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999), that conclusion ignores the reason why such intimate examinations have become "routine": individuals willingly undergo medically necessary, albeit personally intrusive procedures because protecting patient confidentiality is a fundamental part of the daily practices of the physicians, nurses, and counselors to whom they entrust their care. Indeed, the Medical University of South Carolina ("MUSC"), like all hospitals in which the members of *Amici* organizations practice, expressly informs patients that, absent their authorization, the sum and substance of their medical treatment will not be disclosed to third parties except to advance patient care.

The rules requiring respect for patient privacy ultimately rest on principle, but they reflect, as well, a critical public health reality. Decades of research and clinical experience teach that patients who do not believe that their privacy will be respected -- let alone those who fear that health professionals will perform tests in the service of police and prosecutors -- either will not candidly discuss their health conditions with those care providers or will avoid seeking help altogether. These problems are exacerbated where would-be patients have substance abuse problems; they become particularly pronounced when the would-be patients are pregnant women who suffer from chemical dependency. When such patients cannot trust their treatment providers to maintain the confidentiality of the therapeutic relationship, they tend to avoid prenatal care or refrain from full

disclosure to care-providers thereby increasing the health risk to their offspring.

Finally, although *Amici* have no interest in either minimizing the health dangers posed by *in utero* exposure to any drugs, licit or illicit, or in having this Court opine as-yet unresolved scientific questions relating to the relative risks posed by of different substances, it is important to note the lack of scientific support for the assumption that animated the policy and its defense (and perhaps the Fourth Circuit's finding of "special need," as well): that the dangers of maternal cocaine use are different in kind from other behaviors that raise risks to children. Without denying the clear advisability of protecting infants from exposure to cocaine, medical research is increasingly finding that the sense of impending "crack baby" crisis that impelled the prosecutors, doctors, and nurses here to discard ethical and legal responsibilities relating to patient privacy were without solid foundation.

Indeed, the facts of this case aptly illustrate the perils of allowing the "special needs" exception to operate as a license for relaxing the strictures of the Fourth Amendment in situations where the governmental purposes are perceived to be especially worthwhile or benevolent. Unlike in instances where compliance with the presumptive requirements of the Fourth Amendment is in tension with the practical exigencies of law enforcement, see, e.g., Chambers v. Maroney, 399 U.S. 42, 50 (1970), or situations where the full array of rules developed to curb arbitrary and overzealous law enforcement efforts seem less necessary, see, e.g, Camara v. Municipal Court, 387 U.S. 523, 537 (1967), the mere fact that government actors are particularly certain of the rightness of their ends cannot constitute a "special need" occasioning a more deferential constitutional standard. To the contrary, it is precisely in such situations that governmental officials are most likely to ignore privacy interests, to act arbitrarily, and to ignore objective facts. See generally Olmstead

v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding").

ARGUMENT

The significance of the Fourth Circuit's decision in this case has two aspects. First, the panel majority addressed an important question of Fourth Amendment law -- namely, when may courts discard the presumptively applicable regime for analyzing the legality of searches and seizures and rely on the more flexible "special needs" inquiry -- in a manner plainly out of step with the pertinent precedents of this Court. See Sup. Ct. R. 10(c). The divided panel's decision threatens serious consequences for search and seizure law generally. The more immediate effect of the court's decision, one no less broadly important, derives from the Court of Appeals' specific holding, that governmental policies such as the one challenged here -- where doctors and nurses are deputized to gather evidence for use by police and prosecutors -- are "reasonable" as a matter of constitutional law.

I. The Appellate Panel Majority Committed a Significant Fourth Amendment Error

As Petitioners have explained, the Fourth Circuit ruling did not question that the urine tests administered in this case were a "search" within the meaning of the Fourth Amendment, of the type that generally requires a valid warrant and probable cause. Rather, the court held that this case falls within one of the admittedly "narrow[]," 186 F.3d at 476, categories of situations in which those requirements have been held inapplicable, i.e, the class of cases where the challenged search or seizure is

occasioned by "special needs beyond those of ordinary law enforcement."

The panel's ruling rests on a serious misreading of this Court's decisions. Although the Court may not have articulated a "unified field theory" for determining when governmental action can be upheld in the absence of a warrant and/or probable cause, it has emphasized that such situations are rare, and the instances where it has done so bear scant resemblance to the policy challenged here. First, the Court has recognized that in certain situations the ordinary strictures of the Fourth Amendment would make law enforcement impracticable, see Chambers, 399 U.S. at 50, and that in others, the intrusion on legitimate privacy interests or the risk of arbitrary law enforcement is sufficiently minimal, see, e.g., New York v. Burger, 482 U.S. 691, 703-704 (1987) (administrative inspections of "closely regulated" businesses), or the governmental concerns sufficiently far removed from enforcement of the criminal law, that general rules developed to protect against prosecutorial or police excesses need not be rigidly adhered to, so long as the reasonableness of the particular action can be sustained. See, e.g., National Treas. Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (emphasizing that the drug-testing program upheld was "not designed to serve the ordinary needs of law enforcement" and that "results [could] not be used in a criminal prosecution of the employee").[1]

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[1]Many of the Court's decisions combine more than one of these considerations. Thus, in Skinner v. Railway Labor Execs. Ass'n, 489 U.S. 602 (1989), the "special needs" decision rested both on the fact employees were held to have diminished expectations of privacy as a result of having chosen to work in a "closely regulated" field, 489 U.S. at 627, and the fact that results would not be used against them in criminal proceedings. See also Vernonia Sch Dist. 47J v. Acton, 515 U.S. 646 (1995) (noting that public school students, by virtue of the government's "custodial and tutelary" (continued...)

Finally, the Court has generally not treated "special needs" balancing as yielding an answer to the ultimate Fourth Amendment "reasonableness," but rather as a means for "determin[ing] whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Skinner, 489 U. S. at 624 (upholding search "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion") (emphasis added).

The standard applied by the Court of Appeals eschews the limitations expressed and implied by these decisions. Rather, the panel majority purported to discern two very different lessons from this Court's cases: (1) that the involvement of law enforcement agents does not necessarily mean that a warrant and probable cause will be required, see 186 F.3d at 477 n.7 (citing Griffin v. Wisconsin, 483 U.S. 868, 870 (1987), and Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)); but cf. Chandler v. Miller, 520 U.S. 305, 314 (1997) (equating "special needs" with "concerns other than crime detection"), and (2) that prosecutors and police are not subject to the ordinary rules when they are acting without a "punitive" or "vindictive" purpose, 186 F.3d at 475 n.3. Thus, because the Court below believed it "abundantly clear that Appellees were motivated by a desire to protect the health of children born at MUSC," and not "a vindictive purpose to prosecute women who used cocaine during pregnancy," it ruled that a "special needs" mode of analysis was appropriate. See 186 F.3d at 479.

The two cases cited by the panel majority for the first

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[1](...continued)
power, could be subject to a "greater degree of supervision and control that could not be exercised over free adults," and that student athletes' urine samples "are not turned over to law enforcement authorities").

proposition are far removed from the circumstances that gave rise to this case. One of them, Griffin, dealt with probationers, individuals duly convicted of crimes under the constitutional standard of proof, who remain subject to ongoing criminal justice supervision and possible imprisonment and its attendant intrusions on privacy should they violate court-ordered terms. And policies of the sort upheld in Sitz are even further removed from this case. Sitz entailed a minor privacy invasion -- momentary detention at a roadblock -- which could be avoided altogether by driving a different route, 496 U.S. at 452, and a policy that left little, if any, room for arbitrariness in its application, see id. at 453 (noting that "uniformed police officers stop every approaching vehicle").

The policy here was different in every relevant respect. It involved an intrusive search of the person. The criteria for selecting individuals to be searched were unscientific and highly subjective, and the demographics of those chosen for searching bore a disturbing correlation to the apparent racial prejudices of the policy's chief administrator. And, unlike Sitz, where both the existence and purpose of the contested sobriety checkpoint were publicly known, poor women seeking obstetric care at MUSC neither were apprised of the fact that medical tests were being conducted in such a way as to establish "probable cause" against them, nor were they provided any practicable alternative to prenatal treatment at that medical facility.

Although the Fourth Circuit majority labored hard to minimize the distance between this policy and judicially-recognized exceptions, it spent little effort explaining how this case differs from the acknowledged "general rule," i.e., those cases where the absence of a warrant and probable cause make a search unconstitutional "*per se*," 186 F.3d at 476. If it were true that the presence of benign motives (such as the concern for child health proffered here) sufficed to exempt searches and seizures from the constitutional requirements of a warrant and

probable cause, then all efforts to confine the "special needs" analysis to a narrow, "carefully defined" class of situations would be doomed. Almost all criminal statutes exist to protect innocent third parties from harm, and, to the extent that subjective motives are relevant, it can be hoped that concern for those parties' well-being -- and not "vindictiveness" toward particular individuals prosecuted -- animates most efforts to enforce those laws.

Nor, as the Court of Appeals dissent showed, can the involvement of law enforcement or the centrality of a law enforcement goal be denied in this case. The policy originated with a suggestion from a hospital employee to the prosecutor that he "consider possible prosecution of the mothers of drug–affected babies," Pet. App. 69.[2] The Hospital pledged to do "anything [MUSC] needs to do to assist you" in "future criminal actions" "prosecuting mothers who gave birth to children who tested positive for drugs," id. at 67. Prosecutors and police drafted the guidelines for selecting women to be tested and for preserving the "chain of custody" of the urine samples. Indeed, the Fourth Circuit majority itself stated, in upholding the policy against plaintiffs' privacy claim under the Due Process Clause, that "[i]t is well settled that a state has a compelling interest in the identification of law breakers and in deterring future misconduct. Here, any medical records disclosed were disseminated only to a limited number of law enforcement personnel -- the prosecuting attorney and arresting officers -- in the course of their official duties." 186 F.3d at 482.

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[2]This case does not present the doubtless closer questions concerning potential Fourth Amendment limits on State-employed doctors' power to require patients to submit to unwelcome tests for medical reasons. Nor does this case challenge the constitutionality of the decision to construe South Carolina's criminal code in a manner that would support prosecuting pregnant women with substance abuse problems. See generally Whitner v. South Carolina, 492 S.E. 2d 777 (S.C. 1997), cert denied, 523 U.S. 1145 (1997).

Indeed, only one fact actually distinguishes this case from others where ordinary Fourth Amendment principles are accepted as controlling: that although these Petitioners were arrested and charged, based on the evidence police obtained, most were not prosecuted. But whether or not a trial occurs cannot determine the applicability *vel non* of the "special needs" test. Being arrested and jailed for a crime should not be easily brushed aside under any circumstances, let alone those giving rise to this case: Petitioners were subjected to police tactics that were degrading, physically detrimental to them and their children, and wholly unnecessary. Various of them were shackled to their hospital beds or arrested shortly before or immediately after giving birth, often while still dressed in hospital gowns and still suffering pain and bleeding from childbirth. Moreover, Respondents have at no point disavowed their intention to prosecute women based on the "evidence" gathered for that purpose by MUSC treatment staff at the behest of law enforcement. A policy whereby a prosecutor gathers incriminating evidence against a person, arrests and jails her, and charges her with a serious felony cannot be exempted from the purview of ordinary Fourth Amendment rules simply because the prosecutor "only" hoped (in his words) "to use legal intervention . . . to change human behavior" in the direction that he and MUSC believed desirable. 186 F.3d at 475 n.3.

The extremity of the general legal rule announced by the Fourth Circuit might be illustrated in two further ways. First, although the particular search in this case was a urine screen, there is nothing in the Court of Appeals decision that would prevent the application of the same "special needs" analysis (if not the same outcome) to other searches conducted with the same purpose, i.e., to uncover evidence that could be used to arrest and threaten prosecution of pregnant women believed to be ingesting allegedly fetotoxic substances. Indeed, a principled reading of the decision suggests that the test would apply. Thus, under the Fourth Circuit test, while a police-supervised search of the

belongings -- or homes -- of obstetrics patients meeting the stated "criteria" (e.g., only limited prenatal care or known past drug use, see 186 F.3d at 474) might be invalidated as unreasonable, the mere lack of probable cause or a warrant would pose no decisive Fourth Amendment obstacle.

Nor is the court's holding limited to cases where searches are conducted by officials other than the police. So long as the ultimate purpose is to protect others and not simply to punish the guilty targets of the search prosecutors and police would seem at liberty to conduct any (reasonable) searches and seizures without a warrant or probable cause, and without regard to whether those might practicably be obtained, -- even when they do so with the specific intent of developing probable cause to support an arrest.

II. The Fourth Circuit's Disregard for Important Medical Considerations Has an Ongoing, Adverse Effect on Public Health

Amici, public health professionals and treatment providers, are especially concerned about the negative impact that the Fourth Circuit's holding, were it to stand, will have on the quality of health care not only for pregnant women with substance abuse problems and their children, but for all patients. First, by affirming the constitutional reasonableness of the extreme policy at issue here, the Court of Appeals decision impedes the provision of appropriate health care in the affected States generally, by corroding the basic trust and confidence that are essential for every doctor- or counselor-patient relationship. Relatedly, the panel majority, in concluding that the challenged policy "effectively"addressed health "problems associated with maternal cocaine use" failed even to consider the policy's adverse effects on the readiness of pregnant women with substance abuse problems to seek out prenatal care or do so in a candid manner. As *Amici* can attest -- and a well-established

body of research confirms -- the policy's effect of deterring doctor visits carries serious health threats for the very persons whose well-being the policy purported to advance: pregnant women and the children whom they carry.

A. The Intrusion on Privacy Was Not Minimal

The panel majority's assertion that the invasion of privacy at issue here, urinalysis, can be discounted as minimal (on the ground that this procedure is a "routine" element of medical examination) fails to acknowledge that which enables physicians and counselors "routinely" to perform intimate tests and elicit potentially embarrassing and even incriminating personal information: the informed consent of the patient, obtained with both explicit and implicit reference to the duty of confidentiality health care professionals owe those whom they treat. See Jaffee v. Redmond, 518 U.S. 1, 12 (1997). This obligation to keep patient confidences can be found in the Hippocratic Oath. It is written into the canons of ethics of learned societies, see, e.g., American Med Ass'n Code of Ethics §9; American Psychological Ass'n R. 5.02, and into the tort and professional licensure laws of every State. It is further reflected in this Court's decisions construing the Federal Rules of Evidence, see, e.g., Jaffee, 518 U.S. at 10; Trammel v. United States, 445 U.S. 40, 51 (1980), and in numerous federal statutes, see, e.g., 42 U.S.C. § 290dd-2 (prohibiting federally assisted drug-abuse treatment programs from divulging patient identities and records); id. § 9501(1)(H) (codifying patients' "right to confidentiality" of mental health records).

Nor can the fact that a doctor or nurse is employed by the State alter this bedrock obligation. To the contrary, a patient no more assumes that her confidences to a government-employed doctor will be shared with the police than does a criminal defendant expect that her State-provided attorney will share privileged communication with the prosecutor who is paid out of

the same State funds. See Polk v. Dodson County Pub. Def. Office , 454 U.S. 312 (1981); cf. Jaffee, 518 U.S. at 10 ("like the . . . attorney-client privilege[], the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust").[3]

As medical and public health professionals and this Court have long recognized, the obligation of confidentiality is not solely a matter of principle. It is a necessary precondition of every relationship between a patient and a physician, nurse or substance abuse counselor. See Jaffee, 518 U.S. at 10 ("the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"). Thus, not only does "[v]iolation of confidentiality . . . show[] disrespect to the patient as a human being," R. Arnold, *et al.*, Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research 345, 365 (M. Lipkin, Jr., *et al.*, eds., 1995); but it is widely recognized that:

> To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her

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[3]The Appeals Court's decision disregards, as well, the basic privacy difference between allowing a single doctor or nurse to perform an examination or conduct a test and having the same procedure observed or test results known by police, prosecutors, and a multitude of others – a privacy interest that transcends the desire of those at risk of prosecution not to be caught. Indeed, the difference is not merely intuitive. Last Term, in Wilson v. Layne, 526 U.S. 603 (1999), this Court affirmed that there is a distinction, cognizable under the Fourth Amendment, between the intrusion on privacy that occurs when a government official is present in a home pursuant to a valid warrant and that which happens when the same officer is accompanied by members of the press or public.

> anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people.. . .

Id.; accord A. Lazare, Shame, Humiliation, and Stigma in the Medical Interview, in id. at 333; see also D. Miller & M. Thalen, Knowledge & Belief About Confidentiality in Psychotherapy, 17 Prof. Psychol. Res. & Prac. 15, 18 (1986) ("patients view confidentiality as "an all-encompassing, superordinate mandate for the profession of psychology").

Although the particular Defendants in this case may have been able to trade on (and, misleadingly, foster) patients' well-founded assumption that their relationship was one of trust, that assumption obviously cannot survive when the judicially-approved, routine breach of confidentiality becomes common knowledge. Indeed, the possibility of a judicially-approved breach infects every such relationship.

B. Enlisting Care Providers in Law Enforcement Is Inimical to The Public Health

In pronouncing the challenged policy an "effective" way of "advanc[ing] the public interest" in tackling the "health problems associated with maternal cocaine use," 186 F.3d at 479, the decision below ignored a fundamental medical and legal distinction. Although the majority was not wrong to conclude that urinalysis is a reasonable way to identify women for whom some "intervention" is indicated, its decision evinces no consideration of whether a law enforcement-driven testing regime was necessary to "reduce health effects on children exposed to cocaine *in utero*," and, if so, whether the available ordinary law enforcement tools were somehow inadequate.

This was a serious legal error, for as this Court has explained, departures from the presumptively applicable Fourth

Amendment framework are appropriate only after it is explained "why ordinary law enforcement methods would not suffice." see Chandler, 520 U.S. at 320; see also Skinner 489 U. S. at 627 (1989) (noting that an otherwise impermissible search might be upheld when "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion").

This oversight was especially fateful in this case. As *Amici* can attest and a compelling body of medical research confirms, the effect of law enforcement intrusion on the delivery of prenatal care is so deleterious that not only is a strictly medical approach to maternal substance abuse more effective, but a law enforcement-driven approach threatens to make things worse, not better, for children exposed to cocaine *in utero*.

First, what has been said about patients generally concerning the need for trust applies with particular force to those with substance abuse problems:

> It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery . . . . Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.

M.J. Kreek & M. Reisinger, The Addict as a Patient, in Comprehensive Textbook 822, 830

And this is even more urgently the case where pregnant women with drug problems are concerned. These women are particularly reticent to see doctors and are especially reluctant to give accurate information concerning the nature and extent of their drug use -- lest such information be used to take their children away from them. Thus, after a comprehensive three-year study of perinatal substance abuse in southern States

(including South Carolina), the Southern Regional Project on Infant Mortality (an initiative of the Southern Governors' Association and the Southern Legislative Conference) concluded:

> If pregnant women . . . feel that they will be "turned in" by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment.

Southern Regional Project, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women 21 (1993).

Numerous studies have confirmed that the intrusion of the criminal justice system on health care practices aggravates exponentially the already-strong reluctance to seek medical attention and treatment. Thus, the Board of Trustees of the American Medical Association determined that if the criminal justice system were used to deal with drug-abusing mothers, "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment,"[4] and the American Society of Addiction Medicine has similarly found that "criminal prosecution of chemically dependent women will have the overall result . . . increasing, rather than preventing, harm to children and to society as a whole."[5] And a United

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[4]American Medical Ass'n, Legal Intervention During Pregnancy, 264 JAMA 2663, 2667 (1990).

[5] American Soc'y of Addiction Med., Bd. of Directors, Public Policy Statement on Chemically Dependent Women and Pregnancy (Sept. 25, 1989).

States General Accounting Office study concluded that "the threat of prosecution poses . . . [a] barrier to treatment for pregnant women."[6]

The health consequences of this documented reluctance to seek care or confide fully in health care professionals are extremely serious for the pregnant woman and her future child. Open communication with physicians regarding drug use is necessary to insure optimum safety before, during and after deliveries. See D. J. Birnbach *et al.*, Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay, 84 Anesthesia Analg. 76 (1997) (patients using cocaine "may have untoward responses to anesthesia"); Unrecognized "Crack" Cocaine Abuse in Pregnancy, 77 British J. Anaesthesiology 553, 555 (1996).

By contrast, when substance abuse -- including cocaine use -- is known to treatment-givers, they can focus on providing interventions that substantially improve health outcomes for pregnant women and for children. A trusting relationship with health professionals makes it more likely that a pregnant patient will seek out and complete drug treatment, and far more likely that she will avail herself of early, comprehensive prenatal care. See S.R. Kandall, Substance and Shadow: Women and Addiction in the United States 278-79 (1996). Indeed, even if the pregnant patient does not reduce or discontinue her drug use, prenatal care has been shown to improve health outcomes. Pregnant women who use cocaine but who have at least four prenatal care visits have been found to face significantly reduced chances of delivering low birth weight babies,[7] and the negative health

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[6] GAO, ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women 5, 20 (1991).

[7] A. Racine *et al*, The Associationn Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 JAMA

(continued...)

effects associated with prenatal drug exposure can be mitigated through intensive counseling and training in parenting skills.[8]

The accumulation of clinical evidence as to the special barriers to – and special benefits of – full disclosure by pregnant women with substance abuse problems has led those who have studied this problem to conclude, with an unusual degree of unanimity, that punitive approaches must be avoided. In fact, *Amici* and every other prominent public health and medical organization to have given the subject serious consideration have rejected the notion of turning to the criminal justice system to address drug use during pregnancy. See American College of Obstetricians and Gynecologists Committee Opinion 55 (Oct. 1987) (resort to the legal system" is almost never justified" in treating pregnant women); American Academy of Pediatrics, Comm. on Substance Abuse, Drug-Exposed Infants, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant."); American Nurses Ass'n, Position Statement (Apr. 5, 1992) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants . . . . The threat of criminal prosecution is counterproductive"); see also Legal Intervention During Pregnancy, 264 JAMA at 2670 (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate"); see generally State v. Luster, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health

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[7](...continued)
1581, 1585-86 (1993).

[8] See, e.g., L. P. Finnegan & S. R. Kandall, Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse, A Comprehensive Textbook 513, 529 (J.H. Lowinson *et al.*, eds., 1997).

organizations opposing the prosecution of women for cocaine use during pregnancy).

The panel majority did not advert to this solid scientific and professional consensus that police- and prosecution-based approaches will yield more harm than good for the children exposed to drugs *in utero* -- nor did it appear to even consider it relevant to the Fourth Amendment inquiry.[9] Instead, the court cited this Court's admonition in Sitz that a policy does not fail the Fourth Amendment test merely because it is not the most effective one.

But the issue here is fundamentally different from that in Sitz. Unlike there, where claims of ineffectiveness were largely predicated on the low percentage (in absolute terms) of drunk drivers detected, this case relied on criteria for singling out particular individuals, see Sitz, 496 U.S. at 454 (distinguishing Delaware v. Prouse, 440 U.S. 648 (1979)), for a far more serious invasion of privacy.

Although the panel majority found it obvious that only urinalysis would enable Defendants to determine which patients to threaten with prosecution, the "effectiveness" assessment did not take account of the drastic consequences the policy might have as a deterrent not to drug use, but to doctors' visits. In cases such as Sitz and Von Raab, the deterrent effects of testing were mutually reinforcing: either individuals would not drink or they would not drive; here, the problem with linking testing disclosure and arrest and possible prosecution to medical visits is that it subverts the policy's professed objective -- encouraging

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[9]Thus, the court brushed aside as wholly irrelevant evidence that the policy was not, in many respects, designed to achieve its claimed objectives, insisting that the only relevant question is whether urinalysis is a reliable means of detecting the presence of cocaine.

pregnant women who use cocaine to seek medical assistance both for their drug problem and for their pregnancy.[10]

III. Cocaine Addiction Among Pregnant Women Does Not Present a "Special Need"

A recurring theme of decisions relieving governmental actors from presumptively applicable Fourth Amendment requirements is that the Constitution should not be construed as preventing the government from responding "reasonably" to exigent circumstances and crises -- a proposition evident in certain "special needs" cases, see, e.g., Skinner, 489 U.S. 602. In such cases, the limitation to needs "beyond those of ordinary law enforcement" has a different connotation: that a problem is so formidable that the Fourth Amendment restraints should not apply. The behavior of the Defendants in this case (and, to a lesser extent, the opinion of the Fourth Circuit majority) proceed on the assumption that cocaine use by pregnant women presented such a crisis, truly different in kind from those which law enforcement (and the medical profession) usually deal. Cf. 186 F.3d at 473.

Although that understanding is consistent with contemporaneous, sensationalized media accounts, *Amici* note that it is seriously lacking in support from empirical data. See,

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[10] *Amici* would hasten to add that not drinking or not driving may meaningfully be described as "options" for many of the individuals who test positive at sobriety checkpoints -- for example, social drinkers exercising poor judgment. As Defendants' policy plainly recognized, many women who continue to use cocaine after becoming pregnant cannot so readily "decide" to stop. At various times relevant to this case, drug treatment resources for pregnant women in Charleston were either entirely nonexistent or seriously inadequate. It might also be observed that the penalties imposed on those driving while intoxicated -- despite the potent threat to human life -- are orders of magnitude removed from the lengthy sentences confronting the plaintiffs in this case.

e.g., L. Mayes, *et al.*, The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992) (noting that "[f]indings about neurobehavioral effects in the newborn period have been inconsistent or contradictory"); D.R. Neuspiel, Cocaine and the Fetus: Mythology of Severe Risk, 15 Neurotoxicology and Teratology 305 (1993); See also H. Hurt *et al.*, Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing, 151 Arch. Pediatric & Adolescent Med. 1237 (1997).[11] Although *Amici* have no interest in downplaying the harm that ingesting cocaine could cause to a fetus or child -- indeed they share a professional dedication to avoiding and reducing those dangers -- it is important that this Court's disposition of this matter not be influenced by such widespread but discredited assumptions.

Rather, it has always been and remains a principal object of judicial enforcement of the Fourth Amendment to distinguish between those cases where otherwise unconstitutional law enforcement tactics are truly necessary and those where the claims of "crisis" -- even if sincerely subscribed to by "men of zeal," Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting) -- turn out to be illusory. This policy at issue in this case falls squarely into the latter category, and, as explained above, the ongoing effects of the Fourth Circuit's approval continue to compromise the effective delivery of health care.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Honorable Court to grant the petition for certiorari.

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[11] See also J. Held, *et al.*, The Effect of Prenatal Cocaine Exposure on Neurobehavioral Outcomes: a Meta-Analysis, 21 Neurotoxicology & Teratology 619, 624 (1999) (noting "general consensus among researchers that the reproductive effects of cocaine appear to be minimal" and finding that "the effect of prenatal exposure to cocaine on neurobehavior appears to be only marginal and transitory").

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APPENDIX

Amicus Curiae American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Amicus Curiae American Society of Addiction Medicine ("ASAM") is devoted to increasing access to and improving the quality of addiction treatment. ASAM members are physicians from all medical specialties and sub-specialties. They are engaged in private practice, serve as corporate medical directors, and work in group practice or other clinical settings. A number are also involved in research and medical education. Through its clinical and scientific conferences, continuing medical education courses, and publications, including the quarterly Journal of Addictive Diseases, ASAM actively educates physicians, medical and osteopathic students, and the public about addiction disorders and diseases, as well as treatment guidelines and practice parameters in the field of addiction medicine. ASAM staunchly opposes policies that create obstacles to or deter persons from receiving substance abuse treatment and counseling.

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in primary care Internal Medicine. The Society, which has nearly 3000 members in the United

States (including South Carolina) and 11 other countries, publishes the Journal of General Internal Medicine and is a leader in research and education in the medical care of adults. Many SGIM members have national expertise in issues related to alcoholism and abuse of other substances. SGIM is deeply concerned that the Ferguson decision, if let stand, could deter women in South Carolina and elsewhere from seeking drug-treatment and prenatal services that are essential to the delivery of a healthy child. The failure to maintain proper patient confidentiality (at the heart of MUSC's policy) will not only discourage women from seeking this vital care but may well interfere with physicians ability to provide it when sought.

Amicus Curiae South Carolina Medical Association ("SCMA") is the primary professional association for individuals licensed to practice medicine in South Carolina. The SCMA has over 5500 members representing all medical specialties that provide medical services to the citizens of the state. The SCMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina. To this end, SCMA opposes policies and practices that undermine patient confidentiality and weaken the trust between health care providers and patients that promotes positive treatment outcomes.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors, Inc. ("NAADAC") is the nation's largest organization of alcohol and drug counselors, with 17,000 members. NAADAC's members have special expertise in the substance abuse treatment needs of pregnant women. NAADAC joins this brief becaus it is deeply concerned that the decision below, if permitted to stand, will undermine the quality of care that South Carolina substance abuse professionals can provide pregnant patients, and will deter pregnant women from seeking these essential services.

Amicus Curiae National Council on Alcoholism and Drug Dependence ("NCADD") with its nationwide network of affiliates, provides education, information, help and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD historically has provided confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. If NCADD affiliates were required to provide the names and medical information of drug-using pregnant women to law enforcement authorities, it would greatly inhibit their ability to serve this population. In 1990, the NCADD Board of Directors adopted a policy statement on "Women, Alcohol, Other Drugs and Pregnancy" that recommended that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services. . . ." For these reasons, NCADD urges the Court to review the decision below.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing this nation's over 2.2 million registered nurses. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal-child health services is particularly critical to efforts to prevent disease and to provide early intervention for health care problems. Thus it opposes all barriers to prenatal care. ANA is concerned that when health care providers divulge patient information to law enforcement officials women in need of prenatal care and/or substance abuse treatment are deterred from seeking these essential services.

Amicus Curiae South Carolina Nurses Association ("SCNA"), a constituent member of ANA, is a professional organization which represents registered nurses in South Carolina. SCNA's legislative positions speak strongly to support

health care for a number of vulnerable populations and emphasize the importance of accessing prenatal health care secure in the knowledge that the providers are wholly devoted to treatment and are not doubling as the agents of law enforcement. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the breaching of patient confidentiality and the threat of criminal prosecution serves as a real deterrent to pregnant women who suffer from chemical dependence from seeking and obtaining prenatal care.

Amicus Curiae Association of Reproductive Health Professionals ("ARHP") is a non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, other clinicians, pharmacists, and researchers, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, the media, legislators, and other professionals. ARHP is accredited by the Accreditation Council for Continuing Medical Education and for the past 35 years has sponsored clinical education for physicians on reproductive health issues. ARHP is deeply concerned that the decision threatens to undermine the quality of care provided by physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women in South Carolina.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the arrest, jailing and/or prosecution of

pregnant women as a method for preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that breaching the medical confidentiality of these women or otherwise hindering their ability to establish a relationship of trust with their treatment providers will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care.

Amicus Curiae National Women's Health Network (the "Network") is a national advocacy group representing 500,000 women through its individual and organizational members. The Network's goals include ensuring that all women have access to appropriate prenatal, delivery and post-partum care. Toward these goals, the Network works to eliminate cultural, economic, educational and legal barriers to health care for women. The Network staunchly opposes the breaching of patient confidentiality of women by virtue of their status as pregnant substance abusers, as well as the arrest and criminal charging and prosecution of pregnant addicts – policies which threaten to create yet another barrier to health care that will endanger the health of women and their future children.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe that the expansion of law enforcement into the treatment context and the blurring of lines between prenatal / obstetrical care providers and peace officers

is inimical to family stability and counter to the best interests of the child.

Amicus Curiae Association for Medical Education and Research in Substance Abuse ("AMERSA") is a national organization of three hundred health care and social services professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians, nurses, and social workers who work in general health and social services settings identifying individuals with alcohol and drug problems, providing counseling, and referring them as necessary to treatment specialists; most members are professors at medical schools, nursing schools, or social work programs. To be effective, prenatal care and treatment for pregnant addicts must occur in the context of a confidential, respectful, and trusting relationship between professional and patient. AMERSA believes that when this relationship is jeopardized net harm to the health of mothers and children will likely occur because women will be deterred from obtaining prenatal care, addiction treatment, and counseling.

Amicus Curiae Society for Medical Anthropology ("SMA") is a private, voluntary, not-for-profit organization of anthropologists and other social scientists who specialize in the anthropological study of health and healing. Current membership exceeds 1,300 professionals who are employed in traditional academic settings of colleges and universities, schools of public health and medical schools, as well as in applied research and service settings. SMA supports its members in the goal of educating academic and lay audiences about the cultural dimensions of health and disease in order to improve the health

of all populations. SMA is concerned about any policy or practice – like the one at issue here – that may prevent individuals and groups from seeking medical care during pregnancy. Prenatal care – which includes open and trusting communication between women and their care givers – is vital to positive birth outcomes, especially for low-income women whose poverty increases the risk of adverse health consequences.

Amicus Curiae California Medical Association ("CMA") is the primary professional association for individuals licensed to practice medicine in California. CMA has over more than 30,000 members representing all medical specialties that provide medical services throughout the state. CMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in California. CMA thus stands opposed to laws and policies, like the policy being challenged here, that unnecessarily hinder the effective practice of medicine or that have the effect of depriving persons of needed medical care.

Amicus Curiae California Society of Addiction Medicine ("CSAM") is the California chapter of The American Society of Addiction. CSAM's mission is to increase access to and improve the quality of addiction treatment through education and research, and to reduce the stigma and prejudice commonly associated with addiction disorders. Accordingly, CSAM opposes the policy being challenged in this case as it has the effect of driving pregnant women away from seeking substance abuse treatment and further stigmatizing chemical dependence by entwining it with criminal justice ramifications.

Amicus Curiae Institute for Health and Recovery ("IHR"), formerly the Coalition on Addiction, Pregnancy and Parenting, is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol- and drug-

dependent women and their families throughout Massachusetts. IHR is committed to establishing collaborative models of service delivery and fostering family-centered services. IHR firmly believes that addiction is an illness requiring treatment, not a condition warranting arrest and possible prosecution and punishment. IHR members know firsthand the fears that pregnant substance abusing women have regarding arrest and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Accordingly, IHR opposes the policy enacted by MUSC and challenged here.

Amicus Curiae Consortium for Substance Abusing Women and their Children ("The Consortium") is comprised of more than 60 agencies in the state of Connecticut dedicated to improving the health of and services available to substance abusing and mentally ill women and their children. The Consortium serves as the principal resource in Connecticut for the development and implementation of policy, advocacy, and technical assistance to promote the behavioral health of women and their children, the integration and coordination of services for women and their children, and access to and retention in treatment. Established in 1990 in response to data showing that New Haven led the nation in infant mortality rates, The Consortium oversees the development of client-based models of care for addicted and mentally ill women and their children. The Consortium opposes MUSC's policy being challenged in this case as improper and counterproductive measures for promoting maternal and child health.

Amicus Curiae Robert G. Newman, M.D., is President and Chief Executive Officer of Continuum Health Partners, Inc., comprising four hospitals with a total of 3,100 beds, and with the largest chemical dependency treatment services of any health care system in the United States. He is Professor of Epidemiology and Social Medicine and Professor of Psychiatry

at the Albert Einstein College of Medicine, and a member of the Board of Commissioners of the Joint Commission of Accreditation of Health Care Organizations. Dr. Newman has played a major role in the development of addiction treatment in the U.S., Australia, Asia and Europe.

(10)

No. 99-936

Supreme Court, U.S.
FILED
JUN 1 - 2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX
VOLUME I OF III, (Pages 1 to 623)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Crystal M. Ferguson, Theresa Joseph Darlene M. Nicholson, Paul S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and LaVerne Singleton, on behalf of themselves and a class of women similarly situated

Plaintiffs,

v.

The City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker, Jr., Dr. Charles B. Hanna, Dr. Cotesworth P. Fishburne, Dr. E. Conyers O'Bryan, Melvyn Berlinsky, Patricia T. Smith, M.J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W. Peoples, Dr. Carroll V. Bing, Jr., Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar O. Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., Melesia Henry, R.N.,

Defendants.

DEFENDANT'S ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT
(Jury Trial Demanded)

The Defendants, The City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker Jr., Dr. Charles B. Hanna, Dr. Cotesworth P. Fishburne, Dr. E. Conyers O'Bryan, Melvyn Berlinsky, Patricia T. Smith, M.J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W.

Peoples, Dr. Carroll V. Bing, Jr., Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar O. Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., Melesia Henry, R .N., (hereafter Defendants) answer the Second Amended Complaint of the Plaintiffs and reserving all their rights under their motions filed herewith, allege as follows:

1. The Defendants deny each and every allegation of the Plaintiffs' Second Amended Complaint which is not hereinafter specifically admitted.

2. The allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are denied.

3. The allegations of Paragraphs 12 and 13 state conclusions of law which the Defendants are required neither to admit nor deny.

4. The allegations of Paragraph 14 are denied.

5. The allegations of Paragraph 15 state a conclusion of law which the Defendants are required neither to admit nor deny.

6. The Defendants, upon information and belief, admit the allegations contained in Paragraph 16.

7. Upon information and belief, the allegation that Plaintiff Joseph is an African-American woman is denied. The Defendants, upon information and belief, admit remaining the allegations contained in Paragraph 17.

8. The Defendants, upon information and belief, admit the allegations contained in Paragraphs 18, 19, 20, 21, 22, 23, 24 and 25.

9. In response to the allegations of Paragraph 26, the Defendants admit only that the City of Charleston is a domestic municipal corporation. The remaining allegations are denied as stated.

10. In response to Paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40, the Defendants admit that the individuals named are members of the Board of Trustees of the Medical University of South Carolina and that MUSC is a state-administered institution receiving both state and federal funding. All other allegations are denied.

11. The Defendants admit only the allegations of Paragraphs 41, 42, 43, and 44 regarding the individual Defendants' positions. The remaining allegations regarding the capacity in which they are sued are specifically denied.

12. In response to the allegations of Paragraph 45, the Defendants admit only that Edgar O. Horger, III, M.D. was a physician in the Department of Obstetrics and Gynecology at MUSC prior to June 1990. The remaining allegations are specifically denied.

13. In response to the allegations of Paragraph 46, the Defendants admit only that Victor Del Bene was a Medical Director at MUSC prior to November of 1990. The remaining allegations of said Paragraph are denied.

14. The Defendants admit only the allegations regarding the individual Defendant's positions at MUSC contained in Paragraphs 47, 48, and 49. The remaining allegations of said Paragraphs are denied.

15. In response to the allegations of Paragraph 50, the Defendants admit only that Harold Bivins was a physician in Obstetrics and Gynecology at MUSC after July

1, 1991. The remaining allegations of said Paragraph are specifically denied.

16. In response to the allegations of Paragraph 51., the Defendants admit only that Melesia Henry, R.N. was an MUSC Obstetrics Case Manager prior to July 15, 1994. The remaining allegations of said Paragraph are specifically denied.

17. The Defendants, upon information and belief, deny the allegations as stated in Paragraphs 52 through 279, including subparts. In denying these paragraphs, the Defendants make reference to the Interagency Policy, the medical records, the hospital records, and all documents dealing with the care of the Plaintiffs which fully and more completely set forth the care and treatment of the Plaintiffs. The allegations as set forth in these Paragraphs are specifically denied as the records are more accurate and correct.

18. The Defendants deny the allegations contained in Paragraphs 280 through 316, being all the remaining allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Causes of Action.

FOR A SECOND DEFENSE
(§ 1983)

19. That any alleged violations committed by the Defendants, which are specifically denied, are violations of state law and do not rise to the level of a Constitutional right or interest and thus, the Plaintiffs have no basis for recovery under 42 U.S.C. § 1983.

20. The action taken by the Defendants in formulating, adopting, implementing, and enforcing the MUSC Interagency Policy and the Laws of the State of

South Carolina resulted in no deprivation of the Constitutional rights, privileges, or immunities of the Plaintiffs or any injury whatsoever to the Plaintiffs. Thus, the Plaintiffs have no legal basis for recovery.

FOR A THIRD DEFENSE
(No Policy or Custom)

21. The Defendants are immune from this suit under 42 U.S.C. § 1983, in that the Defendants adopted no policy or custom in violation of the Plaintiffs' Constitutional rights.

FOR A FOURTH DEFENSE
(Officials)

22. The Defendants sued in their official capacities as state actors are immune from this suit based on the Eleventh Amendment of the United States Constitution and the Supreme Court's holding in Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Further, the Plaintiffs are barred from the recovery of money damages from these Defendants as a matter of law.

FOR A FIFTH DEFENSE
(Immunity)

23. Those Defendants sued in their individual capacities have both absolute and qualified immunity from suit and therefore, the Plaintiffs are barred from recovery.

FOR A SIXTH DEFENSE
(Statutory Immunity)

24. The Defendants are immune from this suit under South Carolina Code § 20-7-540, and therefore the Plaintiffs are barred from recovery.

FOR A SEVENTH DEFENSE
(Consent)

25. The Plaintiffs consented to treatment at MUSC which included testing and subsequent disclosure of their drug use as evidenced by their consent form(s) attached hereto as Exhibit "A" and therefore are barred from recovery.

FOR AN EIGHTH DEFENSE
(Justification)

26. The Defendants had probable cause to arrest the Plaintiffs and therefore the arrests of the Plaintiffs were justified and the Plaintiffs are barred from recovery.

FOR A NINTH DEFENSE
(Justiciable Controversy: Mootness)

27. The issues presented in the Plaintiffs' Second Amended Complaint are no longer live, nor do the Plaintiffs have a legally cognizable interest in the outcome nor does there exist a reasonable expectation that the Plaintiffs will again be subjected to the actions alleged in the Second Amended Complaint. The Plaintiffs' Second Amended Complaint presents no case or controversy susceptible of adjudication sufficient to warrant invocation of federal court jurisdiction on their behalf and therefore Plaintiffs' Second Amended Complaint should be dismissed.

FOR A TENTH DEFENSE
(Malicious Prosecution)

28. The Law Enforcement Defendants had probable cause to institute any and all proceedings; the Defendants had no malice in instituting the proceedings; the Defendants have continued no proceedings against the Plaintiffs; and the Plaintiffs suffered no injury or damages as a result of any proceedings and thus the Plaintiffs are barred from recovery.

Further, any deprivation of the Plaintiffs' rights, which is specifically denied, are violations of state law only and do not rise to the level of a Constitutional deprivation so as to bar Plaintiffs from bringing this action pursuant to 42 U.S.C. § 1983.

FOR AN ELEVENTH DEFENSE
(Election of Remedies)

29. The Plaintiffs allege that they are entitled to remedies allowed by law (which is specifically denied) that are different and inconsistent and would allow double recovery should the requested relief be granted. In order to meet the demands of fairness and orderly adjudication, the Plaintiffs should be required, to elect among their inconsistent remedies.

FOR A TWELFTH DEFENSE
(Standing)

30. The Plaintiffs have sustained no direct injury nor are they in immediate danger of sustaining some direct injury as a result of some alleged official conduct on behalf of the Defendants. Any alleged harm or threat to the Plaintiffs by the Defendants is not real or immediate. There exists no likelihood that these particular Plaintiffs will be subject to any illegal conduct and thus have no standing to sue for prospective injunctive relief. The Plaintiffs have suffered no injury traceable to the Defendants' acts or omissions and have no personal stake in the outcome of any decision forthcoming from this case sufficient to warrant invocation of Federal Court jurisdiction on their behalf and therefore Plaintiffs' Second Amended Complaint should be dismissed.

FOR A THIRTEENTH DEFENSE
(Ripeness)

31. The Plaintiffs have suffered no specific present, objective harm, nor are they suffering any objective threat of specific future harm, nor does there exist a reasonable certainty that the Plaintiffs themselves will be subjected to any specific unconstitutional harm or threat of injury in the future. Thus, the matters alleged in the Plaintiffs' Second Amended Complaint are not ripe, nor are they sufficient to warrant invocation of Federal Court jurisdiction on their behalf and therefore Plaintiffs' Second Amended Complaint should be dismissed.

FOR A FOURTEENTH DEFENSE
(Assumption of the Risk)

32. That, upon information and belief, the Plaintiffs had knowledge of and assumed the risks incident to their drug use. The injuries alleged by the Plaintiffs were caused by and arose out of such risks so as to bar the Plaintiffs from recovery.

FOR A FIFTEENTH DEFENSE
(Authority of Statute or Ordinance)

33. That, upon information and belief, in allegedly committing the act alleged in the Second Amended Complaint, the Defendants were duly authorized by, and acted under authority of the provisions of Section 20-7-540 of the Laws of the State of South Carolina so as to bar the Plaintiffs from recovery.

FOR A SIXTEENTH DEFENSE AND MOTION TO DISMISS
(Failure to State a Claim)

34. That, upon information and belief, the allegations in the Second Amended Complaint fail to state a claim upon which relief can be granted and should therefore be

dismissed under Rule 12 (b) of the Federal Rules of Civil Procedure.

FOR A SEVENTEENTH DEFENSE AND MOTION TO DISMISS
(Action Under and Within Proper Color of State Law)

35. The Defendants at all times acted in good faith and according to the law, and under and within proper color of State Law, in connection with the alleged incidents. All acts of the Defendants were done in good faith and without malice so as to bar the Plaintiffs from recovery.

FOR AN EIGHTEENTH DEFENSE AND MOTION TO DISMISS
(Probable Cause)

36. The Law Enforcement Defendants had probable cause to arrest the Plaintiffs and the arrests were done in good faith and with sufficient probable cause so as to bar the Plaintiffs from recovery.

FOR A NINETEENTH DEFENSE AND MOTION TO DISMISS
(Proper Enforcement of the Law)

37. That, upon information and belief, the Plaintiffs were arrested for Possession of Crack and/or Cocaine and/or Heroin pursuant to S.C. Code § 44-53-370, Distribution to Persons Under Eighteen pursuant to S.C. Code § 44-53-440, and Unlawful Neglect of a Child pursuant to S.C. Code § 20-7-50. The Defendants involved acted appropriately and sought to enforce the law in a proper and correct manner. The acts of the Defendants involved were done solely to uphold the law and therefore the claims of the Plaintiffs should be dismissed.

FOR A TWENTIETH DEFENSE
(Equal Protection)

38. The Interagency Policy at issue in this case was not enacted for the purpose of discriminating against pregnant patients on the basis of race. The enactment of the Interagency Policy, therefore, does not violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution under the holding in Washington v. Davis, 426 U.S. 229 (1976).

39. The Medical University of South Carolina has a compelling interest to prevent unborn children from suffering from temporary and permanent birth defects that are associated with the use of illegal drugs during pregnancy. The Interagency Policy is necessary to enforce this compelling interest.

40. The Interagency Policy is a well-reasoned and an appropriate reaction to the increasing number of drug-affected children that have been born at the MUSC Hospital.

41. The Interagency Policy, by its explicit terms, does not discriminate against African-Americans or any other racial classification of pregnant patients. The Interagency Policy, therefore, does not violate the Equal Protection Clause of the 14th Amendment to the Constitution under the holding in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 254 (1979).

42. The Interagency Policy is not administered in a racially discriminatory manner. All pregnant patients who meet the criteria of the policy are treated similarly under the guidelines of the policy. The administration of the Interagency Policy, therefore, does not violate the Equal

Protection Clause of the 14th Amendment under the holding in Alexander v. Louisiana, 405 U.S. 625 (1972).

FOR A TWENTY-FIRST DEFENSE
(Legal Search)

43. That, upon information and belief, any alleged search conducted by the Law Enforcement Defendants was conducted with the consent of the Plaintiffs and in a legal manner, supported by probable cause and thus, bars the Plaintiffs from recovery.

FOR A TWENTY-SECOND DEFENSE
(Punitive Damages)

44. That, upon information and belief, any award or assessment of punitive damages as prayed for by the Plaintiffs against the Defendants would violate their Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FOR A TWENTY-THIRD DEFENSE
(Class Action Certification)

45. That, upon information and belief, in a case such as this, where a decision on the merits in favor of the plaintiff would inure to the benefit of any putative class, class certification is unnecessary and should be denied.

FOR A TWENTY-FOURTH DEFENSE
(42 U.S.C. § 290dd-2)

46. The Medical University of South Carolina including their OB/GYN Clinics, qualify as a general care facility that does not have an identified unit or medical personnel whose primary function is to provide alcohol or drug diagnosis, treatment or referral for treatment.

Additionally, the Center does not qualify as a federally assisted drug abuse program. Thus, the Defendants are not required to maintain confidential records for the Plaintiffs pursuant to 42 U.S.C. § 290dd-2.

47. If it is determined that the Medical University of South Carolina does fall within 42 U.S.C. § 290dd-2, which is specifically denied, the Defendants involved are and have been in compliance with all of the mandates of the statute and accompanying regulations in that the Plaintiffs consented to the drug testing and disclosure.

FOR A TWENTY-FIFTH DEFENSE
(Pullman Abstention)

48. The Plaintiffs' Second Amended Complaint tenders substantial Constitutional issues touching upon sensitive issues of social policy. However, a definite ruling on a state issue could terminate the controversy. The State courts have not yet ruled on whether a fetus is included within the definition of a "person" or "child" under S.C. Code § 44-53-440 and S.C. Code § 20-7-50. Thus, this federal court must abstain from deciding this case.

FOR A TWENTY-SIXTH DEFENSE
(Younger Abstention)

49. State criminal prosecutions against the Plaintiffs were pending prior to the filing of this suit in federal court, thus the court must not stay or enjoin these prior pending state court criminal proceedings as determined by the Supreme Court's holding in Younger v. Harris, 401 U.S. 36 (1971).

FOR A TWENTY-SEVENTH DEFENSE
(Prosecutorial Immunity)

50. The Defendants as Prosecutors have absolute immunity from suit and therefore, the Plaintiffs are barred from recovery.

FOR A TWENTY-EIGHTH DEFENSE
(Good Faith)

51. The Defendants at all times acted in good faith and according to the laws of South Carolina and the United States and with the reasonable belief that their actions did not violate the clearly established statutory or Constitutional rights of the Plaintiffs.

FOR A TWENTY-NINTH DEFENSE
(Personal Involvement)

52. The Defendants had no personal involvement in any of the alleged actions and are thus not subject to suit for these actions and therefore, the Plaintiffs are barred from recovery.

FOR A THIRTIETH DEFENSE
(Not "Persons" under § 1983)

53. The Defendants are not "persons" as contemplated by 42 U.S.C. § 1983 and therefore are not subject to suit under that section and therefore, the Plaintiffs are barred from recovery.

FOR A THIRTY-FIRST DEFENSE
(Not Under Color of State Law)

54. The actions of the Defendants were not taken under color of state law and thus any deprivation of any constitutional or federal statutory right of the Plaintiffs, which is specifically denied, is not actionable under 42 U.S.C. § 1983 and therefore, the Plaintiffs are barred from recovery.

FOR A THIRTY-SECOND DEFENSE
(Lack of Jurisdiction over State Law Claim)

55. This Court lacks jurisdiction over the pendant or supplemental state law claim of abuse of process pursuant to 28 U.S.C. § 1367(c), and therefore, this claim should be dismissed.

FOR A THIRTY-THIRD DEFENSE
(Mootness)

56. The Plaintiffs are not facing any further risk of injury, damages, or harm resulting from the actions alleged, and therefore their claims are moot and should be dismissed.

FOR A THIRTY-FOURTH DEFENSE
(Tort Claims Act)

57. The Plaintiffs' abuse of process claim against these Defendants are exclusively controlled by the South Carolina Tort Claims Act, South Carolina Code § 15-78-10, et seq. (Law. Co-op. Supp. 1993).

58. The abuse of process claim for which the Plaintiff seeks recovery are barred by South Carolina Code § 15-78-60 in that the alleged loss resulted from:

a) legislative, judicial, or quasi-judicial action or inaction (subsection 1);

b) administrative action of a legislative, judicial, or quasi-judicial nature (subsection 2);

c) execution, enforcement, and lawful implementation of process (subsection 3);

d) adoption, enforcement and compliance with the law (subsection 4);

e) the exercise of a discretionary act (subsection 5);

f) an act or omission of a person other than an employee (subsection 20); and

g) institution or prosecution of any judicial or administrative proceeding.

59. Any award or assessment of actual damages from the abuse of process claim against these Defendants in this case or the other cases pending which arose from the same occurrence described in Plaintiffs' Second Amended Complaint are limited to $500,000.00 in the aggregate, and no one Plaintiff is entitled to more than $250,000.00 pursuant to South Carolina Code § 15-78-120(2).

BY WAY OF COUNTERCLAIM
(Attorneys Fees)

60. The Defendants repeat and reallege each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

61. That, upon information and belief, the Plaintiffs' action in bringing this suit is frivolous, unreasonable and without foundation and thus the Defendants are entitled to recover from them their reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988.

WHEREFORE, the Defendants, answering the Second Amended Complaint of the Plaintiffs herein and specifically reserving their rights under their motions filed herewith, pray that the Plaintiffs' Second Amended Complaint be dismissed with costs; together with such other and further relief as the Court deems appropriate.

HOOD LAW FIRM

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/s/

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Attorneys for Defendants

July 10, 1995
Charleston, South Carolina
RHH\CHAS-MU.280\2-AMEANS.WER

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 10th day of July, 1995

/s/

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF DAVID ANNIBALE

[ANNIBALE 175]

(JURY ENTERS AT 10:07 A.M.)
THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.
JURY PANEL: GOOD MORNING.
THE COURT: OKAY. YOU MAY PROCEED.
MR. WHERRY: CALL DR. DAVID ANNIBALE TO THE STAND,
PLEASE.

- - -

DAVID ANNIBALE, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. WHERRY:
Q. DR. ANNIBALE, YOU'RE AN EMPLOYEE OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. YES, THAT'S CORRECT.
Q. YOU HAVE BEEN FOR HOW LONG, DOCTOR?
A. SINCE 199.
Q. DOCTOR, YOUR POSITION AT THE MEDICAL UNIVERSITY IS THAT YOU ARE THE MEDICAL DIRECTOR OF LEVEL ONE AND LEVEL TWO NURSERY FOR NEWBORN AND INTERMEDIATE CARE AT THE MEDICAL UNIVERSITY; IS THAT RIGHT?

A. THAT'S ONE OF MY RESPONSIBILITIES, THAT'S CORRECT.
Q. AND YOU PREVIOUSLY HELD THAT POSITION WITH CHARLESTON MEMORIAL HOSPITAL; IS THAT CORRECT?
A. THAT'S CORRECT.
Q. THE NURSERY THERE CLOSED AND YOU CAME TO MUSC?

[ANNIBALE 176]

A. BOTH NURSERIES WERE OPEN AT THE SAME TIME, BUT THE CHARLESTON MEMORIAL NURSERY DID CLOSE.
Q. YOU WERE ALSO THE DIRECTOR OF THE NEONATOLOGY FELLOWSHIP TRAINING PROGRAM AND THE CLINICAL DIRECTOR OF THE NEONATOLOGY NURSE PRACTITIONER PROGRAM; IS THAT RIGHT?
A. THAT'S CORRECT. I'M NO LONGER THE CLINICAL DIRECTOR OF THE NURSE PRACTITIONER PROGRAM HOWEVER.
Q. WHEN DID THAT END?
A. THAT ENDED, I DON'T RECALL THE EXACT DATE, BUT IT WAS ON THE ORDER OF SIX MONTHS AGO, AT MY REQUEST.
Q. WHEN DID YOU BEGIN YOUR TENURE AT MUSC?
A. IN AUGUST OF 1989. I'M SORRY. JULY OF 1989.
Q. DOCTOR, I TAKE IT THAT YOU ARE FAMILIAR THEN WITH THE CONCEPT KNOWN AS THE INTERAGENCY POLICY?
A. YES, SIR.

Q. AND YOU WERE AT MUSC AT THE INCEPTION OF THAT POLICY?
A. YES.
Q. DOCTOR, IN ADDITION TO YOUR DUTIES AT MUSC, YOU ALSO HOLD A CONSULTING STAFF POSITION AT ROPER, TRIDENT AND SAINT FRANCIS HOSPITALS; IS THAT CORRECT?
A. THAT WAS CORRECT IN 1989, THE STAFF PRIVILEGES AT TRIDENT. SUMMERVILLE MEDICAL CENTER IS NOW FULLY STAFFED.
Q. WHEN DID THAT CHANGE, DOCTOR?
A. I DON'T RECALL THE DATE EXACTLY. IT WAS SEVERAL YEARS AGO. AND ACTUALLY, I'M SORRY. WITHIN APPROXIMATELY A YEAR

[ANNIBALE 177]

AGO, FULL ACTIVE STAFF AT SAINT FRANCIS AS WELL.
THE COURT: I DIDN'T UNDERSTAND WHAT YOUR ANSWER WAS.
THE WITNESS: MY ORIGINAL STAFF PRIVILEGES AT ALL FOUR HOSPITALS WERE CONSULTING STAFF. BUT OVER THE LAST SEVEN YEARS AT TRIDENT AND SAINT FRANCIS THEY WERE CHANGED TO ACTIVE STAFF.
THE COURT: OKAY.
Q. (BY MR. WHERRY, CONTINUING) DID YOU CHANGE TO ACTIVE STAFF?
A. I'M NOT QUITE SURE HOW TO ANSWER THAT.

Q. WELL, WHAT I'M TRYING TO UNDERSTAND IS WHETHER YOUR ASSOCIATION WITH ROPER, TRIDENT AND SAINT FRANCIS CONTINUES TODAY?
A. YES, IT DOES.
Q. AND THAT ASSOCIATION WITH THOSE HOSPITALS BEGAN APPROXIMATELY WHEN?
A. WITH ROPER AND SAINT FRANCIS, IT WAS APPROXIMATELY 1989. WITH TRIDENT, APPROXIMATELY ONE TO TWO YEARS SUBSEQUENT TO THAT. AND SUMMERVILLE MEDICAL CENTER BEGAN WHEN SUMMERVILLE OPENED ITS LABOR AND DELIVERY SERVICES, WHICH I BELIEVE WAS ABOUT THREE YEARS AGO.
Q. LEAVING OUT SUMMERVILLE - SAINT FRANCIS, TRIDENT AND ROPER, THE INTERAGENCY POLICY, DOCTOR, TO YOUR KNOWLEDGE, WAS IT EVER APPLIED AT ANY OF THOSE THREE HOSPITALS, SAINT

[ANNIBALE 178]

FRANCIS, TRIDENT OR ROPER?
A. I DON'T RECALL SEEING A VERSION OF THE INTERAGENCY POLICY POLICY AT ANY OF THOSE HOSPITALS.
Q. AND DID YOU EVER SEE SOMETHING THAT APPEARED TO BE THE SAME BEING APPLIED AT THOSE HOSPITALS?
A. AS A POLICY?
Q. DID YOU EVER SEE ANY WOMEN AT THOSE HOSPITALS BEING ARRESTED FOR DISTRIBUTION OF COCAINE TO A MINOR OR ENDANGERING

THE WELFARE OF A MINOR, THE MINOR BEING THEIR FETUS, FOR TESTING POSITIVE FOR URINE DRUG SCREEN FOR COCAINE WHILE IN THE HOSPITAL?

MS. SHOWERS: I OBJECT TO RELEVANCE, YOUR HONOR.

MR. WHERRY: MAY I RESPOND?

THE COURT: CERTAINLY. GO AHEAD. I OVERRULE THE OBJECTION. THANK YOU.

THE WITNESS: RESPOND?

THE COURT: YES.

A. I NEVER PERSONALLY SAW THAT OCCUR.

Q. DOCTOR, YOU ARE AWARE, ARE YOU NOT, OF THE TERM CHAIN OF CUSTODY?

MS. SHOWERS: OBJECTION, RELEVANCE. THIS WITNESS IS A DOCTOR.

THE COURT: WELL I DON'T KNOW HOW THE TERM IS GOING TO BE USED. EVERYONE KNOWS A LITTLE BIT ABOUT WHAT IT MEANS. IF HE IS GOING TO BE ASKED TO TESTIFY FROM A LEGAL STANDPOINT

* * *

[ANNIBALE 181]

DID YOU HAVE OCCASION TO INTERACT IN THE INTERAGENCY POLICY WITH RESPECT TO INFANTS IN THOSE NURSERIES WHO TESTED POSITIVE FOR COCAINE?

A. AS THE DIRECTOR OF THE UNIT?

Q. YES.

A. NO, I WAS NOT INVOLVED IN THE DEVELOPMENT OR THE INITIATION OF THAT POLICY.
Q. OKAY. THAT WASN'T QUITE MY QUESTION. MY QUESTION WAS: AS DIRECTOR OF THE UNIT, DID YOU HAVE OCCASION TO DEAL WITH INFANTS IN EITHER OF THOSE NURSERIES TESTING POSITIVE FOR COCAINE AS IT RELATED TO THE INTERAGENCY POLICY?
A. I DON'T BELIEVE THAT I HAD THE OCCASION TO DEAL WITH INFANTS WITH REGARD TO THE INTERAGENCY POLICY THROUGH MY OFFICIAL POSITION AS THE DIRECTOR OF THOSE UNITS.
Q. AS A PHYSICIAN WORKING IN THOSE UNITS?
A. AS A PHYSICIAN I HAVE TAKEN CARE OF PATIENTS WHO WERE EITHER PRENATALLY OR POSTNATALLY INVOLVED WITH THE POLICY, YES.
Q. AND, DOCTOR, IN THAT REGARD, DID YOU HAVE TO DEAL WITH THE CONCEPT OF CHAIN OF CUSTODY?
A. I SUPPOSE SO, ALTHOUGH I'M NOT - I GUESS I DON'T REALLY UNDERSTAND THAT I HAVE TO DEAL WITH IT. I MEAN I DIDN'T FILL OUT PAPERWORK OR ANYTHING LIKE THAT, BUT -
Q. DID YOU COMPLY WITH YOUR UNDERSTANDING OF WHAT CHAIN OF CUSTODY MEANT?

A. I THINK SO.
Q. WITHIN THE INTERAGENCY POLICY?
A. YES, I THINK SO.
Q. AND WHAT DID IT MEAN TO YOU?
A. MY UNDERSTANDING OF THE TERM CHAIN OF CUSTODY WAS THAT IF - IF POTENTIAL EVIDENCE IS COLLECTED, THAT THERE WOULD BE A SPECIFIC GROUP - MY UNDERSTANDING OF CHAIN OF CUSTODY IS, YOU KNOW, WHAT I HAVE SEEN ON TELEVISION AND SUCH THAT THERE IS A SPECIFIC ROUTE AND DOCUMENTATION THAT THAT FOLLOWS.
Q. DOCTOR, IN YOUR CAPACITY AS THE CLINICAL DIRECTOR OF THE NEONATOLOGY - I'M SORRY - YES, AS THE DIRECTOR OF THE NEONATOLOGY FELLOWSHIP TRAINING PROGRAM, WERE YOU THE MENTOR OR SUPERVISOR OF A DR. TRIBBLE?
A. YES, I WAS.
Q. DR. TRIBBLE WAS A MEDICAL DOCTOR?
A. YES, SHE IS AND WAS.
Q. THAT'S FAIR. AND, DOCTOR, THE NEONATOLOGY FELLOWSHIP,

THAT WAS A POST-DOCTORAL TRAINING PROGRAM?
A. YES, SIR.
Q. AND THAT WAS SOMETHING VOLUNTARILY UNDERTAKEN BY DR. TRIBBLE TO FURTHER HER EDUCATION AND TRAINING?
A. YES.
Q. DOCTOR, AS PART OF THAT FELLOWSHIP IN THE ACADEMIC

INSTITUTION AT MUSC, WAS IT EXPECTED THAT DR. TRIBBLE WOULD PUBLISH?

* * *

[ANNIBALE 237]

A. I THINK SO, YES.
Q. AND SHE EXPLAINED TO YOU ABOUT THE POLICY?
A. YES, SHE DID.
Q. WAS THERE A POLICE OFFICER PRESENT WHEN SHE EXPLAINED THE POLICY?
A. NO, THERE WASN'T.
Q. COULD YOU EXPLAIN TO THE JURY THE MEDICAL NECESSITY FOR TESTING A NEWBORN FOR DRUGS?
A. I THINK THERE ARE CERTAIN –
MR. WHERRY: OBJECT, YOUR HONOR, SCOPE. NOT COVERED IN MY DIRECT AT ALL.
MS. SHOWERS: HE IS A NEONATOLOGIST.
THE COURT: WELL, I CAN EITHER LIMIT IT OR I CAN PERMIT HER TO ASK IT AS IF ON DIRECT EXAMINATION. AND SINCE IT'S HER WITNESS REALLY, I'LL PERMIT IT.
MR. WHERRY: FINE. GO AHEAD.
THE WITNESS: COULD YOU REPEAT THE QUESTION.
Q. (BY MS. SHOWERS, CONTINUING) SURE. COULD YOU EXPLAIN TO THE JURY THE MEDICAL NECESSITY OF TESTING OR EVEN KNOWING THAT A NEWBORN HAS TESTED POSITIVE FOR DRUGS?

A. THERE ARE CERTAIN MEDICAL CONDITIONS THAT ONE WOULD SEE IN NEWBORN - IN A NEWER BORN INFANT THAT COULD BE THE RESULTS OF EXPOSURE TO DRUGS OR WITHDRAWAL FROM EXPOSURE TO DRUGS THAT COULD PRESENT IN THE FIRST SEVERAL DAYS OF LIFE.
Q. AND AS A NEONATOLOGIST, DO YOU HAVE CONCERNS ABOUT

[ANNIBALE 238]

SENDING A CHILD HOME THAT HAS TESTED POSITIVE FOR DRUGS?
A. YES, I WOULD. I THINK THERE - THEY'RE - THERE ARE SOME DATA THAT SUGGEST THAT FAMILIES OF — THE FAMILIES - THAT THERE IS HIGHER RISK OF CHILD ABUSE IN FAMILIES WHERE DRUG ABUSE AND SUBSTANCE ABUSE IS PRESENT.
Q. AND ARE YOU FAMILIAR WITH THE SOUTH CAROLINA CHILD ABUSE LAW?
A. YES.
Q. IN YOUR POSITION AS NEONATOLOGIST DO YOU HAVE OCCASION TO REPORT INCIDENCES OF SUSPECTED CHILD ABUSE AND NEGLECT?
A. YES, I THINK - USUALLY PERTAINING TO DRUG ABUSE, WE USUALLY - WHAT WE USUALLY DO IS REPORT THAT TO OUR SOCIAL SERVICE DEPARTMENT.
Q. AND THAT'S MANDATORY REPORTING REQUIREMENT?
MR. WHERRY: I OBJECT.

THE COURT: IT'S A LEADING QUESTION AND I THINK IT CALLS FOR A CONCLUSION OF LAW. I SUSTAIN THE OBJECTION.

MS. SHOWERS: I WAS JUST ASKING OF HIS UNDERSTANDING OF A NEONATOLOGIST, IF THAT'S HIS UNDERSTANDING.

THE COURT: THAT WASN'T YOUR QUESTION.

MS. SHOWERS: ALL RIGHT, I'LL REPHRASE MY QUESTION.

Q. (BY MS. SHOWERS, CONTINUING) DR. ANNIBALE, IN YOUR POSITION AS A NEONATOLOGIST, WHAT IS YOUR UNDERSTANDING AS TO THE REPORTING REQUIREMENT UNDER THE SOUTH CAROLINA CHILD ABUSE STATUTE?

[ANNIBALE 239]

A. MY UNDERSTANDING IS IF A PHYSICIAN OR ANY HEALTH CARE PERSONNEL HAS SOME REASONS TO SUSPECT THAT CHILD ABUSE HAS OCCURRED, THAT THEY'RE REQUIRED TO REPORT THAT TO THE APPROPRIATE AUTHORITIES, INCLUDING THE DEPARTMENT OF SOCIAL SERVICES OR THE POLICE.

Q. AND THAT WOULD INCLUDE A POSITIVE URINE DRUG SCREEN?

MR. WHERRY: I OBJECT TO THE LEADING NATURE OF THE QUESTION.

THE COURT: SUSTAINED.

Q. (BY MS. SHOWERS CONTINUING) CAN YOU TELL ME THE

CIRCUMSTANCES THAT WOULD INCLUDE IN THE NEONATAL UNIT, DOCTOR?
A. IN NEONATAL UNIT IT WOULD BE RELATIVELY LIMITED BECAUSE PARENTS ARE NOT USUALLY WITH THE PATIENT. I GUESS DRUG ABUSE WOULD BE CONSIDERED ONE OF THEM.
Q. AND PRIOR TO THIS POLICY, WERE URINE DRUG SCREENS ROUTINELY PERFORMED ON NEONATES IN THE UNIT?
A. PRIOR TO 1989?
Q. PRIOR TO THE INCEPTION OF THE POLICY?
MR. WHERRY: OBJECTION, YOUR HONOR. THIS WITNESS WASN'T THERE BUT FOR ONE MONTH BEFORE.
MS. SHOWERS: WELL, YOUR HONOR.
THE COURT: IF HE CAN ANSWER IT, FINE. IF HE CAN'T THEN WE'LL FIND OUT.
A. I DON'T KNOW IF I WOULD SAY THEY WERE ROUTINELY DONE ON NEONATES. WHEN THE SITUATION THAT ONE WAS REQUIRED, IT WAS

[ANNIBALE 240]

DONE.
Q. AND, DOCTOR, SINCE YOU HAVE BEEN AT MUSC, DURING THE TIME OF THE POLICY, WAS A POLICE OFFICER EVER STATIONED IN THE NEONATAL IC UNIT?
A. NO.
Q. DID A POLICE OFFICER EVER INSTRUCT YOU TO TEST A NEWBORN

UNDER THE INTERAGENCY POLICY?
A. NO.
Q. AND YOU TESTIFIED THAT YOU ARE IN A CONSULTING BASIS TO OTHER HOSPITALS IN CHARLESTON; IS THAT RIGHT?
A. YES, I WAS.
Q. AND AT ANY OF THESE HOSPITALS DID YOU EVER OBTAIN A POSITIVE URINE DRUG SCREEN ON AN INFANT THAT YOU DID NOT REPORT?
A. I DON'T RECALL BEING IN THAT SITUATION.
Q. DR. ANNIBALE, AS TO THE QUESTIONS MR. WHERRY POSED ABOUT THE INFORMATION YOU RECEIVED FROM SHIRLEY BROWN, IS IT FAIR TO SAY THAT THE ONLY NUMBERS YOU OBTAINED FROM SHIRLEY BROWN WAS THE COCAINE POSITIVE NUMBERS?
A. THE ONLY NUMBERS THAT I OBTAINED FROM SHIRLEY BROWN WERE THE IDENTIFICATION OF PATIENTS WHO WERE COCAINE POSITIVE, THAT'S CORRECT.
MS. SHOWERS: NOTHING FURTHER. THANK YOU.
THE COURT: ANYTHING FURTHER FROM THE PLAINTIFF?

REDIRECT EXAMINATION

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF STANLEY BAKER

[BAKER 608]

A. I'M A MEMBER OF THE BOARD.
Q. LET ME ASK YOU FIVE QUESTIONS WITH REGARD TO THIS POLICY. THE SPECIFIC SEQUENCE AND EVENTS THAT LED UP TO THE APPROVAL AND IMPLEMENTATION OF THIS POLICY, WAS IT ANY DIFFERENT THAN THE WAY THE MEDICAL UNIVERSITY BOARD HAS APPROVED OTHER POLICIES?
A. NO DIFFERENCE.
Q. WAS THERE ANY DEPARTURE FROM THE NORMAL PROCEDURES, THE NORMAL STANDARDS AND PROCEDURES THAT THE MEDICAL UNIVERSITY HAS IN IMPLEMENTING AND APPROVING THIS POLICY?
A. NO DEPARTURE.
Q. DOES THE MEDICAL UNIVERSITY COMPLY WITH THE MANDATORY REPORTING OF CHILD ABUSE, AND HAS IT SINCE YOU HAVE BEEN ON THE BOARD?
A. IT'S REQUIRED BY THE BOARD THAT THEY DO THAT.
Q. AND HOW LONG HAVE YOU BEEN ON THIS MEDICAL UNIVERSITY BOARD, DR. BAKER?
A. SINCE 1977. NINETEEN YEARS.

Q. IS THE INTERAGENCY POLICY CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS AND STANDARDS AND PHILOSOPHY?

A. YES.

Q. AS YOU UNDERSTAND IT, WHAT WAS THE GOAL THAT WAS HOPED TO BE OBTAINED BY THIS POLICY?

A. TO PROTECT THE MINDS OF THESE UNBORN CHILDREN AND TO HOPEFULLY HELP THE MOTHERS KICK THE HABIT OF COCAINE.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF JUDITH BAYS

[BAYS 18]

MS. SMITH: CAN I ASK FOR A SECOND, DOES THE COURT REPORTER - DID YOU GET MY OBJECTION THERE?

COURT REPORTER: YES.

MS. SMITH: OKAY. THANK YOU. I AM SORRY TO INTERRUPT.

A. THEY CAN BE - THEY CAN BE SMALL IN LENGTH AND SMALL IN WEIGHT, TOO, BUT THERE'S OFTEN A DISPROPORTIONATE SMALL HEAD SIZE, MEANING ALTHOUGH THE BABY ITSELF IS SMALL, THE HEAD IS SMALLER THAN IT SHOULD BE EVEN FOR A SMALL BABY. AND THAT REFLECTS DAMAGE TO THE BRAIN OR POOR BRAIN GROWTH. AND THAT'S THE MOST CONCERNING THING THAT WE SEE.

OTHER THINGS THAT WE SOMETIME SEE ARE RELATED TO WHAT COCAINE DOES IN TERMS OF CUTTING OFF THE BLOOD SUPPLY. WE CALL IT VASOCONSTRICTION. VASO MEANS BLOOD VESSEL AND CONSTRICTION MEANS IT SHUTS IT DOWN. AND

THAT'S THE WAY COCAINE AFFECTS PEOPLE, ADULTS AND BABIES, IS IT - IT CLOSES DOWN THESE SMALL BLOOD VESSELS AND THEN IT SHUTS OFF THE OXYGEN AND - OXYGEN SUPPLY, THE BLOOD SUPPLY, THE FOOD SUPPLY TO WHATEVER WAS BEYOND THAT SHUTDOWN BLOOD VESSEL.

SO IN AN ADULT YOU WOULD CALL THAT STROKE. IF YOU HAD THAT HAPPEN IN YOUR BRAIN, THAT WOULD BE A STROKE. SO PART OF YOUR BRAIN COULD BE DAMAGED OR ACTUALLY DIE. IF IT HAPPENS IN YOUR HEART, IT'S CALLED

[BAYS 19]

A HEART ATTACK BECAUSE A PART OF THE MUSCLE IN YOUR HEART DIES. SO WE HAVE SEEN IT IN INFANTS WHERE IT HAPPENS IN THEIR BRAIN. AND THE BRAIN - BRAIN GROWTH IS AFFECTED OR PARTICULAR PARTS OF THE BRAIN ARE KNOCKED OUT.

IF IT - THERE ARE CASE REPORTS - I HAVEN'T SEEN THIS PERSONALLY, BUT THERE ARE CASE REPORTS OF SEVERAL INFANTS WITH HEART ATTACKS RELATED TO MATERNAL USE OF COCAINE. THEN IF IT HAPPENS TO THE GUT, PORTIONS OF THE GUT CAN DIE BEFORE BIRTH. IF IT HAPPENS TO THE

DEVELOPING FINGERS AND TOES OF THE FETUS, THEN THE FINGERS AND TOES WON'T DEVELOP BECAUSE THE BLOOD SUPPLY IS CUT OFF TO THEM. AND THAT'S WHY WE THINK WE GET - WE SEE THESE - WHAT WE CALL LIMB REDUCTION DEFECTS WHERE THEY'RE MISSING FINGERS, TOES OR ACTUALLY PART OF THE ARM OR LEG. IF IT HAPPENS TO THE KIDNEYS, YOU CAN BE - YOU CAN HAVE KIDNEY DAMAGE OR MISSING KIDNEY, IF IT HAPPENS TO THE GENITOURINARY SYSTEM, THEIR REPRODUCTIVE SYSTEM, THEN PART OF THAT CAN BE DAMAGED, TOO.

BUT THOSE ARE THE MOST CONCERNING EFFECTS WE SEE WHEN THE - THE BLOOD AND OXYGEN SUPPLY IS CUT OFF TO A PART OF THE DEVELOPING BABY. THE MOST CONCERNING, OF COURSE, WOULD BE THE HEART OR THE BRAIN. LATER ON, WE SEE SOME BEHAVIORAL AND NEUROLOGIC EFFECTS WHICH ARE VERY CONCERNING TOO.

[BAYS 20]

Q. AND ALL OF THESE EFFECTS THAT YOU HAVE DESCRIBED, DR. BAYS, IN YOUR OPINION, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY MOST PROBABLY, ARE THEY A RESULT OF COCAINE EXPOSURE IN UTERO?

A. YES.
MS. SMITH: OBJECTION, IRRELEVANT, PREJUDICIAL. LACK OF FOUNDATION.
Q. WHAT OTHER RISKS DO CHILDREN WHO ARE PRENATALLY EXPOSED TO COCAINE FACE AS THEY GROW AND DEVELOP, DOCTOR?
A. WELL, THEIR - THEY HAVE PARTICULAR LEARNING DISABILITIES. SOME OF THEM, NOT ALL OF THEM. THERE'S A WHOLE SPECTRUM. SOME BABIES MAY APPEAR TO BE NOT AFFECTED AT ALL AND THEN SOME BABIES ARE MORE MILDLY AFFECTED, MORE MODERATELY AFFECTED AND THEN SOME BABIES SEVERELY AFFECTED. SO WE SEE THE WHOLE SPECTRUM. SO I'M GOING TO GIVE YOU WHAT WE HAVE SEEN ON THE MORE WORRISOME END OF THINGS.
WE SEE BABIES THAT ARE - AS THEY GROW ARE HYPERACTIVE AND HAVE ATTENTION DEFICIT DISORDER. THEY HAVE DIFFICULTY FOCUSING ON A TASK AND PAYING ATTENTION TO THE TASK. THEY HAVE DIFFICULTY WITH ORGANIZED PLAY, MEANING, LET'S SAY YOU'RE GOING TO PLAY HOUSE. THEY DON'T UNDERSTAND HOW TO PLAY HOUSE, HOW TO HAVE THE, YOU KNOW, THE DADDY COME HOME AND MOMMY FIX DINNER AND SO

[BAYS 21]

ON. THEY CAN'T SEQUENCE. SEQUENCING IS A PROBLEM,
PUTTING THINGS IN ORDER. SO THIS IS FIRST, THIS IS
SECOND, THIS IS THIRD. SO SOCIAL PLAY, INTERACTIVE,
PLAY.

EARLY ON, ONE OF THE TWO THINGS THAT ARE SEEN
IN – AND CAN CONTINUE LATER IN LIFE ARE DIFFICULTIES
WITH - AND THIS IS PART OF FOCUSING - DIFFICULTY WITH
FOCUSING ON THE GAZE. IT'S CALLED GAZE AVERSION WHERE
BABIES WON'T LOOK AND HOLD A LOOK, A GLANCE. AND THIS
CONCERNS US BECAUSE THIS IS PART OF THE BONDING PROCESS
BETWEEN THE MOTHER AND THE INFANT IS FOR THE MOTHER TO
LOOK IN THE BABY'S FACE AND THE BABY TO LOOK BACK. AND
SOME OF THESE INFANTS DON'T WANT - DON'T SEEM TO WANT TO
LOOK AT A FACE, AND WILL LOOK AWAY, WHEREAS NORMAL
BABIES WILL PREFER TO LOOK AT A FACE. AND THAT'S PART
OF THE NORMAL BONDING PROCESS. SO WE'RE CONCERNED IT
MAKES THESE BABIES MORE DIFFICULT TO REAR WHEN THEY'RE
NOT LOOKING AND SMILING AT THE ADULT CARETAKER AND MAKES
THEM AT HIGHER RISK OF ABUSE.

I THINK THE MOST CONSISTENT PATTERN THAT PEOPLE ARE SEEING IS EFFECT ON LANGUAGE. LANGUAGE - AND THIS - THIS IS BOTH LANGUAGE PROCESSING SO THIS IS THE INPUT OF LANGUAGE, THAT IS, A CHILD UNDERSTANDING WHAT YOU'RE ASKING THEM TO DO. SOMETIMES DON'T SEEM TO BE ABLE TO PROCESS THE VERBAL INFORMATION COMING IN WELL.

[BAYS 22]

THEN THERE'S ALSO A PRODUCTION DEFECT THAT SOME OF THEM DON'T SEEM TO BE ABLE TO PRODUCE LANGUAGE WELL. AND PART OF IT IS A MOTOR DIFFICULTY WITH MOVEMENTS OF THE MOUTH AND THE TONGUE, BUT PART OF IT IS WHAT WE CALL A CENTRAL PROCESSING DEFECT, LI[illegible] THE CENTRAL COMPUTER OF THE BRAIN IS NOT PRODUCING - PROCESSING AND PRODUCING LANGUAGE NORMALLY. SO WHEN - IN ITS MOST SEVERE FORM, WE SEE WHAT WE CALLED PARROTING WHERE A CHILD SEEMS TO SPEAK FLUENTLY, BUT THEN IF YOU EXAMINE THEM A LITTLE MORE CAREFULLY AND QUESTION THEM A LITTLE MORE CAREFULLY, IT TURNS OUT THAT THEY'RE JUST RECITING BACK WHAT THEY'VE HEARD.

I'LL GIVE YOU AN EXAMPLE. I SAW A CHILD, A COCAINE AFFECTED CHILD IN THE OUTPATIENT CLINIC A FEW YEARS AGO AND SHE WAS ABOUT THREE. AND WHEN I WALKED IN THE ROOM I SAID, " HI, HOW ARE YOU?" AND SHE SAID, "HI, HOW ARE YOU?" AND I SAID, "WHAT'S YOUR NAME?" AND SHE SAID, "WHAT'S YOUR NAME?" AND UP TO THERE - UP TO THAT POINT, I THOUGHT SHE WAS DOING PRETTY WELL FOR A THREE YEAR OLD BECAUSE SHE COULD PRODUCE FULL SENTENCES. BUT THEN IT TURNED OUT SHE COULDN'T SPEAK SPONTANEOUSLY. SHE COULD ONLY PARROT BACK OR RECITE BACK WHAT SHE HAD HEARD FROM ME. SO SHE HAD NO GOOD SPONTANEOUS SPEECH OF HER OWN WHICH IS VERY, VERY WORRISOME PROBLEM.

AND SO IN TALKING TO PEOPLE AROUND THE COUNTRY

[BAYS 23]

WHO ARE WORKING WITH COCAINE AFFECTED INFANTS AND FOLLOWING THEM LONG TERM, LANGUAGE IS ONE OF THE CONSISTENT THINGS THAT WE'RE SEEING. AGAIN, NOT IN EVERY CHILD, BUT IN MANY CHILDREN.

Q. WHAT ABOUT IN THE HOME, DOCTOR, HAVE YOU LOOKED

AT THE RISK OF CHILD ABUSE AND NEGLECT TO CHILDREN THAT HAVE BEEN EXPOSED TO COCAINE IN UTERO?

MS. SMITH: AGAIN, I OBJECT TO THIS LINE OF QUESTIONING AS IRRELEVANT AND PREJUDICIAL. IT'S SIMPLY NOT AT ISSUE IN THIS CASE.

Q. GO AHEAD, DOCTOR.

A. I LOOKED AT THIS IN A STUDY THAT WE DID AND THAT WE'RE STILL DOING AND THEN THERE IS SOME LITERATURE THAT EXISTS FROM OTHER PARTS OF THE COUNTRY ON THIS ISSUE. THE RISK OF ABUSE AND NEGLECT TO CHILDREN WHO ARE BEING RAISED IN SUBSTANCE ABUSING FAMILIES IS DEFINITELY HIGHER, SOMEWHERE BETWEEN TWO AND FIVE TIMES HIGHER DEPENDING ON THE STUDY. ABOUT THREE TIMES HIGHER.

Q. WHAT ABOUT THE PARENTING BY THESE CHILDREN IN TERMS OF FOLLOW-UP MEDICALLY, IS THERE ANY CORRELATION THERE?

A. YES.

MS. SMITH: SAME OBJECTION. ALSO OBJECT AS TO VAGUE.

[BAYS 24]

A. YES.

Q. GO AHEAD, DOCTOR.

A. THERE - THERE IS SOME INFORMATION IN THE MEDICAL LITERATURE INDICATING THAT MEDICAL FOLLOW UP IS POORER IN TERMS OF NUMBERS OF IMMUNIZATIONS OR MISSED MEDICAL APPOINTMENTS.

Q. DOCTOR, CAN A SINGLE DOSE OF COCAINE BE HARMFUL TO A DEVELOPING FETUS?

A. YES.

Q. CAN IT ACTUALLY KILL EITHER THE BABY OR THE MOTHER OR BOTH?

A. YES.

MS. SMITH: OBJECTION, IRRELEVANT AND PREJUDICIAL.

Q. DOCTOR, HAVE YOU HAD AN OPPORTUNITY TO REVIEW WHAT HAS COME TO BE KNOWN AS THE INTERAGENCY POLICY?

A. FROM MEDICAL UNIVERSITY OF -

MS. SMITH: OBJECTION, VAGUE.

A. IS THIS THE -

Q. YES, THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S INTERAGENCY POLICY, HAVE YOU HAD AN OPPORTUNITY TO REVIEW THAT?

A. I HAVE.

Q. AND CAN YOU TELL THE JURY IF YOU'VE REACHED AN OPINION WHETHER OR NOT THIS WAS A REASONABLE APPROACH TO

A MEDICAL CRISIS?
A. I BELIEVE IT WAS AND IT'S SIMILAR -
MS. SMITH: OBJECT AS TO - EXCUSE ME. I'M SORRY. I WAS TRYING TO GET MY OBJECTION IN, DR. BAYS.
THE WITNESS: GO AHEAD.
MS. SMITH: I OBJECT AS VAGUE.
Q. GO AHEAD, DOCTOR.
MS. SMITH: THAT'S ALL.
A. THE APPROACH IS SIMILAR TO ONE THAT MANY HOSPITALS AROUND THE COUNTRY, INCLUDING OURS, HAVE USED. SOME - THERE ARE SOME SPECIFIC DIFFERENCES, BUT IT'S BASICALLY VERY SIMILAR.
Q. DOCTOR, WHY IS THERE A NEED TO DEVELOP A POLICY TO TEST WOMEN FOR DRUGS DURING PREGNANCY?
MS. SMITH: OBJECTION, VAGUE.
A. WELL, THE - IN THE MEDICAL COMMUNITY WE FEEL THAT THIS IS A HIGH MEDICAL RISK FACTOR TO INFANTS AND TO THEIR MOTHERS. HUT AS A PEDIATRICIAN, I'M PRIMARILY CONCERNED WITH THE INFANTS. AND IT WOULD BE SIMILAR TO TESTING THAT WE DO FOR GENETIC DEFECTS OR DEFECTS IN CHEMISTRY LIKE WHEN BABIES ARE BORN, BY LAW WE HAVE TO TEST THEM - WE TAKE SOME BLOOD FROM THEIR - FROM ALL THE HEELS OF NEWBORNS AND WE TEST FOR DISEASES LIKE FENAL

KETONURIA, SICKLE-CELL DISEASE. THERE'S A WHOLE PANEL
OF ABOUT TEN OR 12 DIFFERENT DISEASES THAT WE TEST FOR.

* * *

[BAYS 65]

Q. GO AHEAD, DOCTOR.
MS. SMITH: IRRELEVANT AND PREJUDICIAL. LACK
OF FOUNDATION.
Q. IN YOUR OPINION AS A MEDICAL DOCTOR.
A. COCAINE - ONE DOSE CAN - CAN KILL AN INFANT OR
A MOTHER. THAT'S ALSO TRUE OF HEROINE AND METHADONE.
BUT I - I THINK THE CONCERN WE HAD ABOUT COCAINE WAS IT
WAS - THE USE OF IT WAS REACHING EPIDEMIC PROPORTION.
IT WAS A NEW MEDICAL CRISIS IN THE - IN THE 1980S AND AN
ONGOING CRISIS NOW BECAUSE OF THE SHEAR NUMBERS.
Q. THE CRISIS BEGAN IN THE MID - I'M SORRY,
DOCTOR.
A. BECAUSE OF THE SHEAR -
Q. THE CRISIS BEGAN IN THE MID TO LATE - IN THE
MID TO LATE 1980S; IS THAT RIGHT?
A. YES.
MS. SMITH: OBJECTION, LACK OF FOUNDATION.
A. WE BEGAN SEEING -
Q. DOCTOR, -
A. WE BEGAN SEEING INFANTS -

Q. GO AHEAD.
A. - HERE FOR THE FIRST TIME WITH COCAINE IN THEIR URINE, I WOULD SAY, ABOUT 1985. AND THEN THE NUMBERS RAPIDLY INCREASED. 1986 AND 1987 IS WHEN WE HAD OUR FIRST MEDICAL SOCIAL SERVICES AND LEGAL CONFERENCE

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF SHIRLEY BECKETT

[BECKETT 227]

(TESTIMONY EXCERPT OF SHIRLEY JACKSON BECKETT 12-96.)

- - -

SHIRLEY J. BECKETT, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY, MS. DUNN:

Q. WOULD YOU STATE YOUR NAME, PLEASE.

A. SHIRLEY ANNE JACKSON BECKETT.

Q. AND WHERE ARE YOU EMPLOYED?

A. AT THE DEPARTMENT OF ALCOHOL AND OTHER DRUG SERVICES OF CHARLESTON COUNTY.

Q. DOES THAT HAVE A SHORT NAME?

A. DAODAS.

Q. DAODAS?

A. YES.

Q. DID DAODAS USE TO BE SOMETHING ELSE?

A. YES, IT USED TO BE THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION.

Q. DID THAT HAVE A SHORTER NAME?

A. CCSAC.

Q. WHAT IS DAODAS NOW, IS THAT WHAT CCSAC USED TO BE?

A. EXACTLY.

Q. AND YOUR WORK - YOU SAID THAT YOU ARE WORKING AT DAODAS NOW?
A. YES.
Q. WHAT IS YOUR JOB AT THE PRESENT TIME?

[BECKETT 228]

A. PRESENTLY I'M TRAINING COORDINATOR.
Q. TRAINING COORDINATOR FOR WHAT?
A. FOR THE AGENCY. I ESTABLISH TRAINING EVENT FOR THE AGENCY AND COMMUNITY AT LARGE THAT ARE RELEVANT TO ADDICTION, COUNSELING SKILLS, DEVELOPMENT, AWARENESS OF ALCOHOL AND OTHER DRUG ISSUES.
Q. AND WHAT KIND OF INSTITUTION IS DAODAS?
A. IT IS A THERAPEUTIC INSTITUTION FOR PERSONS WITH ALCOHOL AND OTHER DRUG PROBLEMS OFFERING COUNSELING, EDUCATION, INPATIENT AND OUTPATIENT SERVICES.
Q. IS IT A PRIVATE INSTITUTION OR GOVERNMENT?
A. IT'S A COUNTY GOVERNMENT INSTITUTION PRESENTLY.
Q. DID IT HAVE ANY OTHER CONFIGURATION AT A PRIOR TIME?
A. IT IS HARD TO SAY. WE WEREN'T PRIVATE, WE WEREN'T COUNTY, WE WERE SUPPORTED WITH STATE AND FEDERAL FUND AND THEREFORE CONSIDERED A STATE INSTITUTION, BUT NOT UNDER STATE

AUSPICY PRIOR TO THREE YEARS AGO.
Q. IN THE SPRING OF 1989, DID YOU WORK FOR CCSAC?
A. YES.
Q. WHAT DID YOU DO THERE?
A. I WAS ASSISTANT PROGRAM MANAGER TO THE OUTPATIENT SEVICES DIRECTOR.
Q. AND WHAT DID YOU DO IN THAT JOB?
A. COUNSELING, MANAGEMENT OF COUNSELORS, OVERSIGHT - ASSISTING REALLY IN OVERSIGHT OF THE PROGRAM FOR ALL PERSONS

* * *

[BECKETT 230]

TIME THERE WAS A DISCUSSION OF WHETHER OR NOT THERE WOULD BE A POLICY CONCERNING WOMEN WITH SUBSTANCE ABUSE PROBLEMS. THE CONCERN AT THAT POINT STATED WAS THAT PERSONS NEEDED TO BE OFFERED SERVICES AND WERE NOT VOLUNTEERING FOR SERVICES. AND SO WE WERE INVOLVED REALLY TO OFFER THE SERVICES TO THOSE INDIVIDUALS.
Q. AND WHEN DID THIS MEETING TAKE PLACE, TO THE BEST OF YOUR KNOWLEDGE?
A. IT WAS LATE - LATE 1989.
Q. AND WHERE DID THE MEETING TAKE PLACE?
A. AT THE MEDICAL UNIVERSITY.
Q. AND YOU SAID THAT THERE WERE PEOPLE THERE FROM THE MEDICAL UNIVERSITY?

A. THE PERSONS I RECALLED AT THAT MEETING WERE DR. SCHUH AND SHIRLEY BROWN FROM MUSC, CHIEF GREENBERG WAS PRESENT, AND ANOTHER PHYSICIAN THERE, AND I DON'T REMEMBER WHO HE WAS. SOMEONE FROM THE SOLICITOR'S OFFICE, MR. CONDON, AND MYSELF, MR. JOHNSON AND DOROTHY ELLIS.
Q. DO YOU RECALL WHAT WAS DISCUSSED AT THAT INITIAL MEETING?
AT CAN GIVE YOU THE GIST OF THE CONVERSATION BUT I DON'T REMEMBER VERBATIM.
Q. CAN YOU GIVE ME THE GIST OF THE CONVERSATION?
A. WHAT I RECALL IS THAT THERE WAS CONCERN AS TO WHETHER OR NOT A POLICY FOR ARRESTS SHOULD BE PLACED - PUT IN PLACE FOR WOMEN WHO WERE DETERMINED THROUGH URINALYSIS TO HAVE

* * *

[BECKETT 232]

Q. WHAT IS IT?
A. A REFERRL PROCEDURE FOR THE PRENATAL CLINIC AT MUSC THAT WE DEVISED.
Q. WHO IS WE?
A. CCSAC.
Q. AND CAN YOU BE MORE SPECIFIC THAN THAT IN TERMS OF LIKE INDIVIDUAL NAMES?
A. MS. ELLIS AND I DEVISED THIS.
Q. WHEN YOU SAY I DEVISED IT,YOU MEAN YOU WROTE IT?
A. YES.

Q. OKAY. AND WHEN DID YOU WRITE THIS?
A. I BELIEVE - I CAN'T REMEMBER THE DATES, BUT IT WAS SOMEWHERE IN EARLY '90 OR MID '90. 1990.
Q. AND WHAT DID YOU DO WITH IT?
A. THIS WAS GIVEN TO SHIRLEY BROWN AND DR. SCHUH, AND IN ORDER THAT WE BE ABLE TO OFFER ASSESSMENTS AFTER - AFTER INDIVIDUALS WHOM THEY HAD IDENTIFIED AT THE CLINIC, AT THE PRENATAL CLINICS AT MUSC - WERE REFERRED. IT WAS A PROCEDURE THAT WE SET UP IN ORDER THAT WE BE ABLE TO DO THE ASSESSMENTS AND PLACEMENT OF THE INDIVIDUALS REFERRED.
Q. AND DID YOU ACTUALLY SEND THAT TO THOSE PEOPLE?
A. YES.
MS. DUNN: I MOVE THIS INTO EVIDENCE.
MS. COMPANION: YOUR HONOR, WE OBJECT TO THE THIRD PAGE AS BEING IRRELEVANT.

[BECKETT 233]

THE COURT: WHEN YOU SAY ASSESSMENT AND PLACEMENT, WHAT DO YOU MEAN?
THE WITNESS: IN ORDER TO DETERMINE SOMEONE'S NEED FOR SERVICE.
THE COURT: UMM-HMM.
THE WITNESS: A CLINICAL ASSESSMENT IS DONE. YOU

GET DEMOGRAPHIC INFORMATION, DRUG HISTORY TAKEN, FAMILIAL HISTORY TAKEN, MEDICAL HISTORY TAKEN AND THEN URINALYSIS AS WELL TO DETERMINE IF IN FACT OUR SERVICES ARE THE APPROPRIATE SERVICE. AND BEYOND THAT, WHETHER OR NOT THEY WOULD BE APPROPRIATE FOR OUTPATIENT OR INPATIENT CARE.

THE COURT: THAT'S THE ASSESSMENT?

THE WITNESS: YES.

THE COURT: WHAT WAS OTHER PART?

THE WITNESS: PLACEMENT.

THE COURT: AFTER YOU DO THE ASSESSMENT?

THE WITNESS: WE DETERMINE THEN WHICH IS THE BEST SERVICE, WHETHER IT BE OUTPATIENT OR INPATIENT FOR THE INDIVIDUALS.

THE COURT: AND THIS IS THE PROCEDURE WHEREBY YOU DID THAT?

THE WITNESS: WHAT WE TALK ABOUT HERE WAS HOW THE MEDICAL UNIVERSITY WOULD IDENTIFY THE CLIENTS,THEN OUR INTAKE COUNSELOR. AND AT THAT TIME WHEN THIS WAS WRITTEN THERE WERE TWO OF US, BUT I WAS PRIMARILY THE PERSON DOING THE

[BECKETT 234]

ASSESSMENTS.

THE COURT: I CAN'T- IT'S NOT IN EVIDENCE YET.
LET ME SEE IT, IF YOU WILL.
THE WITNESS: OKAY.
THE COURT: WHAT IS YOUR OBJECTION?
MS. COMPANION: YOUR HONOR, WE OBJECT TO THE THIRD PAGE AS NOT BEING RELEVANT, BUT WE DON'T OBJECT TO THE FIRST TWO PAGES.
THE COURT: WHAT ABOUT THAT?
MS. DUNN: YOUR HONOR, I BELIEVE THEY'RE PART OF THE SAME DOCUMENT, BUT I MAY HAVE TO ASK THE WITNESS TO EXPLAIN HOW THEY ARE.
THE COURT: AND YOUR OBJECTION TO THAT IS WHAT?
MS. COMPANION: IT'S NOT MY UNDERSTANDING THAT, THEY'RE THE SAME DOCUMENT. AND -
THE COURT: IT NOT YOUR UNDERSTANDING WHAT?
MS. COMPANION: I SORRY. IT'S NOT MY UNDERSTANDING THAT THEY ARE ALL THREE FROM A CONTINUOUS DOCUMENT, BECAUSE THE THIRD PAGE HAS PAGE 17 AT THE BOTTOM AND OTHER TWO PAGES ARE NOT NUMBERED.
THE COURT: LET'S ASK THE WITNESS.
THE WITNESS: THEY ARE SEPARATE DOCUMENTS.
THE COURT: OKAY.
SO WHAT YOU SAID, WHAT YOU IDENTIFIED REFERS TO PAGE

25 1 THAT YOU'RE HOLDING UP?

[BECKETT 235]

1 THE WITNESS: YES, SIR.
2 THE COURT: WHAT ABOUT PAGE 2?
3 THE WITNESS: PAGE 2 IS PROPOSAL FOR EDUCATION FOR
4 THE OB/GYN CLINIC.
5 THE COURT: SO WHAT YOU'RE DOING IS OFFERING PAGE 1
6 AND TWO WHICH THERE IS NO OBJECTION. MARK IT IN.
7 DEPUTY CLERK: PLAINTIFF'S EXHIBIT NUMBER 9 IN
8 EVIDENCE.
9 Q. (BY MS.DUNN,CONTINUING) I HAVE RETURNED THAT DOCUMENT
10 TO YOU. DOES THIS DOCUMENT INCLUDE ANY PROVISION FOR ANY
11 ARREST OR THREAT OF ARREST IN THE REFERRAL OR ASSESSMENT?
12 A. IT DOES NOT.
13 Q. MS. BECKETT, IN THE END OF SEPTEMBER 1989 HUGO STRUCK
14 THIS AREA; IS THAT CORRECT?
15 A. UMM-HMM.
16 Q. WHAT EFFECT DID THAT HAVE TO CCSAC?
17 A. WE WERE OUT OF OPERATIONS FOR TWO, ALMOST THREE WEEKS.
18 DURING THAT PERIOD OF TIME OUR CLIENTS COULD NOT BE SERVED.
19 OUR OUTPATIENT CLIENTS WERE NOT ALLOWED IN THE BUILDING.
20 Q. DID YOU HAVE ANY REALISTIC WAY OF TAKING ON NEW CLIENTS
21 AT THAT TIME?

A. NO, WE DID NOT.
Q. DID THIS TIME FRAME INCLUDE THE EARLY WEEKS OF OCTOBER 1989?
A. I THINK IT WENT INTO THE SECOND WEEK OF OCTOBER. WE WERE

[BECKETT 236]

TRYING TO OPERATE MINIMALLY BECAUSE OF THE DAMAGE TO THE BUILDINGS.
Q. YOU HAVE DESCRIBED HAVING ATTENDED A MEETING WHEN THERE WAS DISCUSSION ABOUT THE FORMULATION OF A WORKING AGREEMENT BETWEEN THE PARTIES THAT WERE AT THAT MEETING?
A. UMM-HMM.
Q. DID YOU HAVE OCCASION TO LEARN THAT A WORKING OPERATION WAS IN PLACE?
A. MR. JOHNSON INFORMED US OF THAT. AND AT THAT POINT THAT HE DID INFORM US THAT WE NEEDED TO ESTABLISH A COUNSELING ARM OR ESTABLISH PERSONS TO DO THE COUNSELING OF WOMEN WHO WOULD BE REFERRED.
Q. WHEN DID YOU - WHEN DID YOU PERSONALLY LEARN OF THE FIRST EVENT, ARREST BEING USED UNDER THIS POLICY?
A. ON TELEVISION. ACTUALLY THE FIRST THAT I HEARD OF IT WAS ON TELEVISION. I DID NOT HEAR FROM THE STAFF AT MUSC.
Q. HAD THERE BEEN ANY CONTACT MADE DIRECTLY, YOU KNOW, WITH

YOU TO LET YOU KNOW THIS PERSON MIGHT BE ON HER WAY?
A. THE PERSONS WHO WERE ARRESTED?
Q. YES.
A. NO
Q. HOW DID THEY GET TO YOU?
A. ONE PERSON WHO WAS ARRESTED GOT TO US THROUGH A REFERRAL FROM THE COUNTY JAIL.
Q. DID CCSAC IN FACT DO WHAT IT COULD TO RESPOND TO THESE

[BECKETT 237]

REFERRALS?
A. PERSONALLY I SAW TWO WOMEN IN THE HOSPITAL PRIOR TO DELIVERY TO DO ASSESSMENTS AND INFORM THEM OF THE PLACEMENT. AND GAVE THEM THE PLACEMENT AFTER THEY DELIVERED IN ORDER FOR THEM TO COME OVER TO OUR OFFICE,WHICH IS RIGHT ACROSS THE STREET FROM MUSC UPON THEIR RELEASE TO MEET THEIR COUNSELOR. ON SATURDAY I WAS CALLED IN TO COME AND DO AN ASSESSMENT. AND THAT WAS THE INITIATING STAGES OF OUR INVOLVEMENT. BEYOND THAT, WE GOT OUR INTAKE PERSON ESTABLISHED WE HAD TO SET ASIDE EXTRA HOURS TO DO THAT. WE HAD TO PULL TWO COUNSELORS WHO WERE DOING OTHER COUNSELING TO OFFER SERVICES SPECIFICALLY TO THE POPULATION THAT WAS BEING REFERRED.
SO WITHIN THE FIRST SIX MONTHS OF US ASSUMING

RESPONSIBILITY FOR THOSE REFERRALS, THERE WERE TWO OF US INVOLVED. AND AFTER THAT THERE WERE FOUR OF US INVOLVED.

Q. IN OCTOBER OF 1989, WAS THERE A PROGRAM IN PLACE THAT WAS SPECIFICALLY DESIGNED FOR WOMEN WHO WERE PREGNANT AND HAD COCAINE PROBLEMS?

A. NO.

Q. WHAT WAS - WHAT WAS IT?

A. OUR SERVICES AT THAT TIME WERE GENERIC. WE OFFERED COUNSELING, INDIVIDUAL FAMILY, GROUP TO ANYONE WITH ANY ADDICTIONS. QUITE CANDIDLY, WE WERE GREEN. WE DIDN'T KNOW THAT COCAINE ADDICTION WAS SO SEVERE. AND LEARNED THROUGH THE PROCESS OF WORKING WITH THE CLIENTS EXACTLY WHAT WE WERE UP

[BECKETT 238]

AGAINST IN TERMS OF HAVING TO OFFER DAILY CONTACT IN ORDER TO ARREST THE ADDICTION. SO WE WERE FLYING AT THE SEAT OF OUR PANTS FOR AWHILE THERE.

Q. DID CCSAC HAVE ANY INPATIENT, LONG-TERM INPATIENT TREATMENT THAT WAS AVAILABLE?

A. YES, WE DID. OUR FAMILY CARE UNIT WAS IN MORRIS VILLAGE IN COLUMBIA. ALSO DEPENDED, THOUGH, AT THAT TIME ON TWO ISSUES. FIRST INVOLVED MEDICAID WAS NOT REIMBURSING

SERVICES. AND, SECONDLY, IT DEPENDED ON IF THE WOMEN WERE IN THE LAST TRIMESTER, MOST PLACES WOULD NOT TAKE THEM. THE CONCERN OF COURSE WAS THE HAZARD TO THE MOTHER AND THE CHILD.

SO IT WAS REALLY DIFFICULT FOR US TO GET PEOPLE INTO INPATIENT CARE IF THEY WERE SEVEN OR EIGHT MONTH INTO THEIR PREGNANCY.

Q. IN THE FALL OF 1989, WERE SERVICES AT CCSAC FREE?

A. YES AND NO. OUR SERVICES HAVE ACTUALLY NEVER BEEN FREE. YOU QUALIFY FOR SERVICES BY INDIGENCY OR EVIDENCE OF MINIMAL INCOME. SERVICES WERE OFFERED TO THESE WOMEN MAINLY BECAUSE THEY HAD MEDICARE OR MEDICAID OR BECAUSE THEY HAD ZERO INCOME.

Q. DURING THE TIME THAT THE POLICY WAS IN PLACE, DID THE SERVICES THAT WERE AVAILABLE IN THIS COMMUNITY CHANGE?

A. OURS INCREASED. WE HAD DEVELOPED A NEW PROGRAM SPECIFICALLY FOR THE WOMEN WE WERE TREATING, AND IT HAPPENED WITHIN A COUPLE OF YEARS THAT ALSO THERE WERE MEN REFERRED BY

* * *

[BECKETT 240]

A. NO, I DID NOT. FROM PHYSICIANS AND PRIVATE ENTITIES AND THOSE -

MS. COMPANION: YOUR HONOR, I DON'T SEE WHY IT'S RELEVANT.

THE COURT: I DON'T SEE WHY IT RELEVANT. IF YOU'VE GOT RELEVANT QUESTIONS, LET'S ASK THEM.

MS. DUNN: I HAD TO ESTABLISH WHAT SHE WAS DOING

THE COURT: NO, I DON'T THINK THAT'S RELEVANT. YOU DIDN'T NEED TO ESTABLISH, THAT'S NOT RELEVANT. LET'S GO TO SOMETHING ELSE.

MS. DUNN: I BELIEVE THAT IT WAS. I BELIEVE THAT IT WILL-

THE COURT: LET'S PROCEED.

Q. (BY MS. DUNN, CONTINUING) IN YOUR DOCUMENTATIONOF THE REFERRALS, DID YOU KEEP TRACK OF WHICH REFERRALS CAME UNDER THE POLICY FROM THE MEDICAL UNIVERSITY?

A. WE DID.

Q. DID YOU GET REFERRALS UNDER THE POLICY FROM THE MEDICAL UNIVERSITY IN THE - IN THE TIME PERIOD THAT YOU WERE COLLECTING THE DOCUMENTATION, DID YOU GET ANY REFERRALS UNDER THE POLICY FROM ANY SERVICE AT THE MEDICAL UNIVERSITY OTHER THAN THE HIGH-RISK OB/GYN CLINIC?

A. THERE WAS SOME NURSES WHO REFERRED OTHER THAN OB/GYN.

Q. DID THEY COME UNDER THE POLICY?

A. NO.

[BECKETT 241]

Q. HOW DID THEY COME?
A. PERSONS WHO KNEW THEM AT THE HOSPITAL OR SOMEONE THEY MAY HAVE RUN INTO THAT THE HOSPITAL REFERRED THEM. BUT THEY HAD NOT SIGNED THE DOCUMENT, THEY WERE NOT REFERRED THROUGH THE POLICY.
Q. WHEN YOU SAY THEY HAVEN'T SIGNED THE DOCUMENT, WHAT ARE YOU REFERRING TO?
A. THE DOCUMENT THAT WAS REQUIRED AT THAT POINT STATED THAT THEY HAD REVIEWED THE FILM, THAT THEY WERE INFORMED OF THE RISK TO THE PREGNANCY. THAT THEY WERE ALSO AWARE THAT THEY COULD BE ARRESTED IF THEY DID NOT FOLLOW THROUGH.
Q. AND WITH WOMEN WHO WERE REFERRED UNDER THE POLICY FROM THE MEDICAL UNIVERSITY, WAS THERE A PROGRAM IN PLACE TO REPORT WHETHER OR NOT THEY WERE CONTINUING IN SUBSTANCE ABUSE TREATMENT?
A. I DON'T REMEMBER WHAT THE ACRONYM WAS FOR, BUT IT'S CALLED SCAN, IT'S A CASE CONSULTATION BETWEEN PROFESSIONALS WHO WERE INVOLVED WITH THE TREATMENT OF THE PERSONS REFERRED.
Q. AND WHAT - CAN YOU TELL ME WHAT IS A SCAN?
A. WE MET ONCE A MONTH AND DURING THAT PERIOD OF TIME THERE

WAS A DSS WORKER, SOMEONE FROM CHARLESTON COUNTY HEALTH DEPARTMENT, SOMEBODY FROM CHARLESTON COUNTY MEMORIAL HOSPITAL, AN OB/GYN CLINIC NURSE, SOCIAL WORKER, I -AND OUR AGENCY DISCUSSING THE TREATMENT BEING OFFERED, WHETHER IT BE OUR

[BECKETT 242]

SERVICES OR OB/GYN SERVICES OR DSS SERVICES COALESCING IN A SENSE TO BE SURE THAT WE WERE AIDING OTHERS TO HELP THE PERSONS REFERRED. AND SO MONTHLY WE GAVE REPORTS. EACH OF US GAVE REPORTS ON WHAT THE ENTITIES WERE DOING TO ASSIST. AND MY RESPONSIBILITY WAS TO INFORM WHETHER THE PERSONS WERE ATTENDING OR NOT ATTENDING, THE RESULT OF URINALYSIS.

Q. AND TO WHOM DID YOU INFORM? WHO WERE YOU REPORTING?

A. THE PERSON INITIALLY IN CHARGE OF THE MEETING WAS SHIRLEY BROWN BUT WITHIN FIVE OR SIX MONTHS, THE SOLICITOR'S OFFICE HAD SOMEONE THERE WHO WAS TAKING THE INFORMATION. SOCIAL WORKER ASSIGN THROUGH THE SOLICITOR'S OFFICE.

Q. DID YOU, IN YOUR WORK WITH REFERRALS UNDER THIS POLICY, DID YOU EVER MAKE REPORTS OF FAILURE TO PARTICIPATE IN THE

SUBSTANCE ABUSE DIRECTLY TO THE POLICE?
A. NO.
Q. DID - WHAT ROLE, IF ANY, DID YOU HAVE, ANY DETERMINATION AS TO WHETHER SOMEONE WAS SUBJECT TO ARREST UNDER THE POLICY?
A. WE DID NOT. THAT WAS - THAT WAS NOT UNDER OUR JURISDICTION.
MS. DUNN: BEG THE COURT'S INDULGENCE.
Q. (BY MS. DUNN, CONTINUING) MS. BECKETT, ARE YOU FAMILIAR WITH THE FEDERAL DRUG CONFIDENTIALITY STATUTES?
A. YES, I AM.
Q. AS THEY APPLY TO SUBSTANCE ABUSE TREATMENT FACILITIES?
A. YES.

* * *

[BECKETT 269]

THE COURT: I DIDN'T KNOW WHAT THE POLICY WAS.
MR. WHERRY: THAT'S ONE OF THE THINGS THAT DR. SHAPIRO TESTIFIED TO BEFORE I BUY HER A PLANE TICKET FROM SAN FRANCISCO TO COME BACK, I'M JUST INQUIRING TO WHETHER IT WOULD BE APPROPRIATE IN THE TIME FRAME OF THE TRIAL TO HAVE HER BACK ON MONDAY. SHE IS NOT AVAILABLE TOMORROW AND FRIDAY.
THE COURT: I THINK SO.
MR. WHERRY: I CAN HAVE HER HERE ON MONDAY.

THE COURT: THERE WERE SOME OTHER REASONS.

MR. WHERRY: WHICH WAS DR. SHAPIRO'S.

THE COURT: THERE WERE JUST - BUT THE RECORD WILL SHOW WHAT THEY WERE. BUT I THINK MONDAY WOULD BE FINE.

MR. WHERRY: FINE.

MS. DUNN: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: CROSS-EXAMINATION?

CROSS-EXAMINATION

BY MS. COMPANION:

Q. GOOD AFTERNOON, MS. BECKETT.

A. YES.

Q. IT WAS YOUR JOB TO SET UP THE PROGRAM INITIALLY OVER AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION TO HELP MEET THE GOALS OF THE POLICY AT MUSC AND TO TREAT THE WOMEN WHO WERE REFERRED TO SUBSTANCE ABUSE; ISN'T THAT CORRECT?

A. CORRECT.

Q. AND YOU COUNSELED SOME OF THOSE WOMEN YOURSELF

[BECKETT 270]

INDIVIDUALLY, DIDN'T YOU?

A. YES, I DID.

Q. AND SOME OF THOSE INDIVIDUALS REFERRED FROM MUSC DID SUCCESSFULLY COMPLETE TREATMENT AT CHARLESTON COUNTY SUBSTANCE ABUSE TREATMENT?

MS. DUNN: OBJECTION, YOUR HONOR. I DON'T KNOW WHAT THIS IS RELEVANT TO.

THE COURT: WHAT?

MS. DUNN: I OBJECT TO THE RELEVANCE.

THE COURT: NO. NO. I OVERRULE THE OBJECTION.

Q. BY (MS. COMPANION, CONTINUING) I'LL REPEAT MY QUESTION. SOME OF THE INDIVIDUALS REFERRED FROM THE MEDICAL UNIVERSITY, DID SUCCESSFULLY COMPLETE SUBSTANCE ABUSE TREATMENT, DIDN'T THEY?

A. YES, THEY DID.

Q: AND IT'S YOUR OPINION THAT THE TREATMENT AVAILABLE AT CHARLESTON COUNTY SUBSTANCE ABUSE IN 1989 WAS ADEQUATE TO MEET THE NEEDS OF THOSE SUBSTANCE-ABUSING PREGNANT WOMEN?

MS. DUNN: OBJECTION,.

THE COURT: I OVERRULE THE OBJECTION. IT'S NOT ONLY RELEVANT, IT'S - IT'S SOMETHING THAT YOU HAVE OFFERED EVIDENCE ON.

MS. DUNN: THIS PERSON HAD NOT BEEN QUALIFIED AS AN EXPERT IN GIVING THAT SORT OF OPINION. I DIDN'T ELICIT-

THE COURT: YOU OBJECTED ON THE GROUND OF RELEVANCE

* * *

[BECKETT 272]

MEET THE LEVEL OF BEING ABLE TO EXPRESS OPINIONS BECAUSE THEY KNOW BASICALLY MORE ABOUT THE SUBJECT THAN WE AS LAY PEOPLE DO. AND IT'S PRESUMED THAT THEY MAY BE ABLE TO HELP YOU IN DECIDING SOME ISSUES UNDER THIS CASE.

OKAY. YOU MAY PROCEED.

Q. (BY MS. COMPANION, CONTINUING) YOU TESTIFIED EARLIER ABOUT ATTENDING THE SCAN MEETINGS, DIDN'T YOU?

A. YES, I DID.

Q. AND YOU FOUND THESE SCAN MEETINGS HELPFUL IN PROVIDING A MORE COMPREHENSIVE TREATMENT TO THE CLIENTS THAT YOU SERVED; ISN'T THAT TRUE?

A. I STATED THAT EARLIER, YES.

Q. YOU FELT THAT THE SCAN MEETINGS WERE A SUPPORTIVE-TYPE OF THING, SOMETHING TO HELP TO MAKE SURE THAT THESE INDIVIDUALS GOT ALL THE SERVICES THAT WOULD BE HELPFUL TO THEM?

A. YES. AND HELPFUL IN COORDINATING THE SERVICES, YES.

Q. THIS POLICY WAS NOT DESIGNED TO DISCRIMINATE AGAINST BLACKS, WAS IT?

A. I DON'T THINK SO.

MS. COMPANION: THANK YOU. NOTHING FURTHER.

REDIRECT EXAMINATION

BY MS. DUNN

Q. YOU DESCRIBED THE SCAN MEETINGS AS COORDINATING SERVICES?

A. YES.

Q. I BELIEVE THAT YOU SAID A REPRESENTATIVE WAS THERE FROM

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF MELVIN BERLINKSY

[BERLINSKY 600]

WAS INITIATED BY PRESIDENT NIXON IN 1969 WHEN HE INTRODUCED THE CRIME AND SAFE STREET ACTS.

Q. ALL RIGHT, SIR. GIVE US - SPELL YOUR LAST NAME FOR THE BENEFIT OF THE JURORS, PLEASE.

A. B E L I N S K Y.

Q. WHAT IS YOUR FULL NAME?

A. MELVIN.

Q. AND WHAT HAS BEEN YOUR OCCUPATION?

A. I HAVE BEEN IN MY FAMILY BUSINESS.

Q. WHAT IS THAT?

A. THAT WAS IN MANUFACTURING.

Q. AND WHAT DO Y'ALL MAKE?

A. MEN'S TROUSERS. MANUFACTURING.

Q. KHAKI PANTS THAT WE ALL WEAR FROM TIME TO TIME?

A. THAT AND MANY OTHER THINGS.

Q. IS YOUR PLANT HERE IN CHARLESTON?

A. YES, SIR.

Q. ALL RIGHT. I PUT YOU AS A NAMED DEFENDANT ON THE STAND FOR FIVE QUESTIONS TO BE ANSWERED BY YOU AS A BOARD MEMBER AND DEFENDANT IN THIS CASE. AND AS TO THE SEQUENCE OF EVENTS THAT

LED UP TO THE APPROVAL AND IMPLEMENTATION OF THIS POLICY, WERE THEY ANY DIFFERENT FOR THIS POLICY AS OPPOSED TO WHAT YOU HAVE SEEN FOR 25 YEARS FOR OTHER POLICIES?
A. ABSOLUTELY NOT.
Q. ANY DEPARTURE FROM THE NORMAL PROCEDURE AND SEQUENCE OF

[BERLINSKY 601]

EVENTS IN ADMITTING AND APPROVING THIS POLICY?
A. NO, SIR.
Q. HAS THE MEDICAL UNIVERSITY, IN YOUR 25 YEARS, ALWAYS COMPLIED WITH MANDATORY REPORTING OF CHILD ABUSE?
A. AS FAR AS I KNOW IT HAS.
Q. IS THIS INTERAGENCY POLICY, WHICH IS THE SUBJECT OF THIS LAWSUIT, AND ITS CONTENTS, CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS, STANDARDS AND PHILOSOPHY?
A. YES, I THINK IT IS.
Q. AND WHAT, AS YOU UNDERSTAND IT, I KNOW YOU'RE NOT A PHYSICIAN LIKE SOME OF THE OTHER MEMBERS OF THE BOARD, BUT WHAT IS IT, AS YOU UNDERSTOOD IT, IS THE GOAL OF THIS POLICY, MR. BERLINSKY?
A. WELL THE GOAL OF EVERYBODY WAS TO PROTECT THE UNBORN CHILD AND HOPEFULLY HAVE THE MOTHER GO INTO TREATMENT AND GET HER OFF OF THE DRUG COCAINE.

Q. DID THE POLICY DISCRIMINATE AGAINST BLACKS?

MR. WHERRY: OBJECTION.

THE COURT: THAT CALLS FOR A CONCLUSION. HE CAN ASK WHETHER HE INTENDED IT TO.

MR. HOOD: THAT'S FINE.

Q. (BY MR. HOOD, CONTINUING) FOR A CHANGE I'LL ACCEPT HIS QUESTION. WAS THERE AN INTENT BY THIS POLICY TO DISCRIMINATE AGAINST BLACKS?

A. ABSOLUTELY NOT.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CAROL BING

[BING 653]

Q. AND AS SOON AS YOU GET THESE QUESTIONS OVER, YOU'RE ON YOUR WAY BACK?
A. YES.
Q. THANK YOU FOR COMING. I WANT TO ASK YOU A FEW THINGS. BASICALLY WITH REGARD TO THE SEQUENCE OF EVENTS THAT LED UP TO THE APPROVAL AND IMPLEMENTATION OF THE INTERAGENCY POLICY, WAS THERE ANY DEVIATION FROM THE HOSPITAL'S NORMAL STANDARDS AND PROTOCOLS?
A. NOT AS I KNOW OF.
Q. WERE THERE ANY DEPARTURES FROM THE NORMAL PROCEDURAL SEQUENCE OF EVENTS IN THE ADOPTION OF THIS POLICY, DR. BING?
A. NOT AS I KNOW IT.
Q. HOW DO YOU SPELL YOUR LAST NAME?
A. B I N G.
Q. HAS THE MEDICAL UNIVERSITY, AS YOU SAT ON ITS BOARD AND OBSERVED, ALWAYS COMPLIED WITH MANDATORY REPORTING OF CHILD ABUSE?
A. YES.
Q. HAS THE POLICY AT THE MEDICAL UNIVERSITY, THIS

INTERAGENCY POLICY, WAS IT ADOPTED CONSISTENTLY WITH THE HOSPITAL'S NORMS, STANDARDS AND PHILOSOPHY?
A. YES.
Q. WHAT WAS THE GOAL, AS YOU UNDERSTOOD IT, AS A BOARD MEMBER, TO BE OBTAINED BY THIS POLICY?
A. THE GOAL WAS TO TRY TO HELP THE UNBORN AND RECENTLY BORN

[BING 654]

BABIES.
Q. DOCTOR BING, WAS THERE ANY INTENTION TO DISCRIMINATE UNDER THIS POLICY AGAINST BLACKS?
A. NO.
MR. HOOD: THANK YOU FOR COMING.
MR. WHERRY: SIDEBAR, PLEASE, YOUR HONOR.
THE COURT: YES, SIR.
(SIDEBAR.)
MR. WHERRY: HE HAD THE WITNESS SPELL HIS LAST NAME, WHICH HAPPENS TO BE IDENTICAL TO THE LAST NAME OF ONE OF OUR JURORS. AND THERE IS A RACIAL IDENTITY BETWEEN THE TWO OF THEM. I WOULD LIKE TO ASK THE WITNESS, JUST SO WE CAN BE ABUNDANTLY CLEAR SO THERE CAN BE NO INFERENCE. HE ASKED ONLY ONE OTHER TRUSTEE TO SPELL HIS NAME, AND I WOULD LIKE TO ASK THE WITNESS, SO WE CAN BE ABUNDANTLY CLEAR, HE HAS NO

RELATIONSHIP TO THE JUROR. I THINK THAT'S PROBABLY AN IMPROPER QUESTION BECAUSE HE IS IMMEDIATELY REFERRING TO SOMETHING ABOUT THE JUROR. I DON'T KNOW HOW ELSE TO HANDLE IT.

THE COURT: LET ME SAY THIS, I DON'T THINK THAT YOU SHOULD BE REQUIRED TO DO THAT IN THE PRESENCE OF THE JURY. AND I THINK THAT IF YOU DO IT, YOU COULD DAMAGE YOUR CASE WITH THE JURY, BECAUSE IT'S BASICALLY ACCUSATORY TO ASK THE QUESTION.

MR. WHERRY: YES, SIR.

THE COURT: BUT I DO THINK THAT YOU'RE ENTITLED TO

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF SHIRLEY BROWN 11/21/96

[SHIRLEY BROWN 4]

A. NO, IT'S NOT.
Q. YOU ARE, HOWEVER, A REGISTERED NURSE, ARE YOU NOT?
A. YES, I AM.
Q. IN THE FALL OF '89, YOU HAD BEEN EMPLOYED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA FOR HOW LONG?
A. I STARTED TO WORK FOR THE MEDICAL UNIVERSITY IN 1985.
Q. SO YOU HAVE BEEN THERE APPROXIMATELY FOUR YEARS?
A. I WAS AT THE COLLEGE OF NURSING FIRST AND THEN MOVED INTO THE HOSPITAL.
Q. MS. BROWN, SOMETIME IN THE LATE SUMMER OR EARLY FALL OF '89 YOU HEARD A RADIO BROADCAST, DIDN'T YOU, ABOUT A PARTICULAR POLICY TAKING PLACE IN ANOTHER LOCATION IN SOUTH CAROLINA?
A. YES, I DID.
Q. AND THAT POLICY EFFECTIVELY IN SUMMARY WAS USING THE PROSECUTORIAL PROCESS TO ADDRESS SUBSTANCE ABUSE AMONG PREGNANT WOMEN?

A. THE NEWS I HEARD IS THAT ACCORDING TO THE SOUTH CAROLINA LAW, THAT WOMEN WERE BEING ARRESTED FOR CHILD ABUSE.
Q. IN WHERE?
A. IN GREENVILLE, SOUTH CAROLINA.
Q. HAVING HEARD THAT, WHILE DRIVING INTO WORK, MS. BROWN, YOU WENT TO THE OFFICE OF MR. GOOD, WHO IS THE GENERAL COUNSEL OF THE UNIVERSITY, DIDN'T YOU?
A. NO, I DID NOT.

[SHIRLEY BROWN 5]

Q. YOU WROTE TO HIM? YOU CALLED HIM?
A. MR. GOOD AND I JUST HAPPENED TO BE WALKING IN TOGETHER THAT MORNING.
Q. EXCUSE ME, MY MISSTATEMENT. BUT YOU HAD THAT MORNING A CONVERSATION WITH GENERAL COUNSEL FOR THE MEDICAL UNIVERSITY OF SOUTH CAROLINA CONCERNING THAT POLICY, DIDN'T YOU?
A. YES, I DID.
Q. AS A RESULT OF THAT MEETING OR THAT CONVERSATION WITH MR. GOOD, THERE WAS EVENTUALLY, BUT NOT TOO LONG OFF, A MEETING SCHEDULED AMONG, AMONG OTHERS, THAT IS I DON'T MEAN TO BE ALL INCLUSIVE, MR. GOOD, COUNTY SOLICITOR CONDON, CHARLESTON, POLICE CHIEF RUEBEN GREENBERG AND SOME MEMBERS OF THE OBSTETRICAL STAFF, MEDICAL STAFF OF THE MEDICAL UNIVERSITY OF

SOUTH CAROLINA TO DISCUSS THIS ISSUE? FAIR?
A. THERE WAS ONLY ONE PERSON THERE FROM OB. THERE WERE MORE PEOPLE FROM NEONATOLOGY AND THE DEPARTMENT OF SOCIAL SERVICES AND THE CHARLESTON COUNTY SUBSTANCE ABUSE.
Q. AND THE OTHER PEOPLE I MENTIONED, SOLICITOR CONDON, CHIEF GREENBERG, MR. GOOD, YOURSELF?
A. RIGHT.
Q. FROM THAT MEETING - AND BY THE WAY, APPROXIMATELY WHEN WAS THAT MEETING?
A. IT OCCURRED THE MONDAY BEFORE HUGO.
Q. I APOLOGIZE TO YOU, BUT I DON'T LIVE IN SOUTH CAROLINA, YOU'LL HAVE TO REFRESH ME AS TO WHEN THAT WAS?

[SHIRLEY BROWN 6]

A. WHENEVER THE DATE HUGO HIT CHARLESTON.
THE COURT: HUGO HIT CHARLESTON ON SEPTEMBER THE 22ND, 1989.
Q. (BY MR. WHERRY, CONTINUING) THIS WAS THE MONDAY FOLLOWING THAT?
A. THE MONDAY BEFORE.
Q. OKAY. NOW, FROM THAT MEETING, THERE CAME AN INITIAL AGREEMENT THAT THIS GROUP WOULD GO FORWARD ON AN AD HOC BASIS TO DEVELOP SOME POLICY OR PROGRAM; IS THAT FAIR?

A. TO THE BEST OF MY RECOLLECTION, IT WOULD BE.
Q. AT THAT TIME, SEPTEMBER OF '89, IS IT TRUE AND FAIR TO SAY THAT YOUR RESPONSIBILITIES AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WERE THAT YOU WERE RESPONSIBLE FOR THE COLLABORATION AND MANAGEMENT OF HIGH-RISK PATIENTS IN THE CLINIC AS WELL AS THE HOSPITAL AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. THAT'S CORRECT.
Q. WAS THE MEDICAL UNIVERSITY OF SOUTH CAROLINA A HIGH-RISK PREGNANCY CENTER?
A. IT'S A LEVEL 3 CENTER, WHICH IS A TERTIARY CENTER FOR HIGH-RISK OB.
Q. I'M SURE THAT YOU HAVE ANSWERED MY QUESTION. I'M SURE THAT I DID NOT UNDERSTAND THAT ANSWER. LEVEL 3 AND TERTIARY CARE CENTER, WHAT DOES THAT MEAN IN THE GREAT SCHEME OF THINGS?

[SHIRLEY BROWN 7]

A. HOSPITALS ARE RANKED LEVEL 1, 2 AND 3. THREE BEING THE HIGHEST LEVEL OF CARE THAT YOU CAN RECEIVE. MEDICAL UNIVERSITY IS A LEVEL 3 CENTER WHICH SERVES THE LOW COUNTRY. THE DISTRICT.
Q. AND THEREFORE IN GOOD MEDICAL PRACTICE A HIGH-RISK

PREGNANCY WHICH WAS BEING HANDLED BY SOME OTHER INSTITUTION, NOT A LEVEL 3 CENTER, WOULD REFER THAT PATIENT TO MUSC, FAIR?

A. THEY COULD.

Q. OR TO SOME OTHER LEVEL 3 HOSPITAL?

A. THAT'S CORRECT.

Q. NOW, AT THAT TIME, ALSO, YOU WERE A MEMBER, WERE YOU NOT, OF THE MATERNAL INFANT CHILD HEALTH SUBCOMMITTEE OUT OF THE GOVERNOR'S OFFICE OF THE STATE OF SOUTH CAROLINA?

A. NOT AT THE TIME OF THE INITIATION OF THIS POLICY I WAS NOT.

Q. SUBSEQUENTLY YOU WERE?

A. SUBSEQUENTLY I WAS.

Q. APPOINTED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. THAT IS CORRECT.

Q. YOU WERE THEIR REPRESENTATIVE. FAIR?

A. THAT IS CORRECT.

Q. IN GENERAL TERMS, MS. BROWN, WOULD YOU DESCRIBE FOR THE COURT AND THE JURY, PLEASE, WHAT IT WAS DECIDED WOULD BE DONE FOLLOWING THIS INITIAL MEETING OF WHAT I WILL CALL AN AD HOC GROUP, IF YOU WOULD LIKE TO ATTACH SOME OTHER NAME TO IT

[SHIRLEY BROWN 8]

THAT'S FINE WITH ME, BUT AFTER THIS INITIAL MEETING THE MONDAY BEFORE HUGO, WHAT WAS DETERMINED?

A. IT WAS DETERMINED THAT WE WERE GOING TO MEET AGAIN, BUT THAT ACCORDING TO THE LAWS OF THE STATE OF SOUTH CAROLINA CHILD ABUSE AND NEGLECT, THAT CHILDREN THAT WERE BORN POSITIVE OR WOMEN THAT WERE USING DRUGS WERE TO BE REPORTED.
Q. WERE TO BE REPORTED?
A. UMM-HMM.
Q. BY WHOM?
A. BY THE MEDICAL UNIVERSITY.
Q. TO WHOM?
A. TO DSS AND THE SOLICITOR'S OFFICE AND THE POLICE.
Q. ALL RIGHT. NOW YOUR VOICE KIND OF TRAILED OFF AT THE END BUT LET ME TAKE EACH ONE OF THE THREE ONE AT A TIME.
TO DSS, DIVISION OF SOCIAL SERVICES?
A. THAT'S CORRECT.
Q. DEPARTMENT OF SOCIAL SERVICES?
A. DEPARTMENT OF SOCIAL SERVICES.
Q. AND DEPARTMENT OF SOCIAL SERVICES, WHEN A REPORT IS MADE FOR THEM, THEY INTERVENE FOR THE PROTECTION OF THE CHILD?
A. THAT IS CORRECT.
Q. OFTEN, NOT ALWAYS, OFTEN TAKING CUSTODY OF THE CHILD TEMPORARILY?
A. THAT CAN OCCUR.
Q. MAKING A FOSTER HOME PLACEMENT?

[SHIRLEY BROWN 9]

A. THAT CAN OCCUR.

Q. ASSESSING THE HOME?
A. YES.
Q. ASSESSING THE PATERNAL AND MATERNAL INVOLVEMENT?
A. YES.
Q. AND FITNESS?
A. I DON'T KNOW WHAT THEIR WHOLE ASSESSMENT INCLUDES, BUT THEY'RE RESPONSIBLE FOR THE WELL-BEING OF THE CHILD IN THE HOME.
Q. BUT PRIMARILY THEY'RE NOT A PROSECUTORIAL DIVISION, THEY DON'T GO THROUGH A CRIMINAL PROCESS, THEY GO THROUGH PROBATE COURT IN SOUTH CAROLINA?
A. I CAN'T TESTIFY TO THAT.
Q. OKAY. THE OTHER PLACE WHERE IT GOT REPORTED, I THINK YOU INDICATED WAS THE SOLICITOR'S OFFICE?
A. YES.
Q. SOLICITOR'S OFFICE IS THE PROSECUTOR FOR A GIVEN GEOGRAPHIC AREA IN SOUTH CAROLINA?
A. THAT IS CORRECT.
Q. A DISTRICT AREA MAY INCLUDE MORE THAN ONE COUNTY?
A. I CAN'T SPEAK TO THAT.
Q. IS THIS AREA KNOWN AS THE NINTH -
A. JUDICIAL CIRCUIT.
Q. DISTRICT.
A. YES.

[SHIRLEY BROWN 10]

Q. AND THAT COVERS THIS COUNTY AND ONE OTHER COUNTY?
A. BERKELEY. I THINK THAT'S THE ONLY TWO COUNTIES.

Q. NOW THE THIRD PLACE THAT YOU SAID IT WAS DETERMINED THAT YOU SHOULD REPORT IS THE POLICE?
A. THAT IS CORRECT.
Q. WHAT POLICE DEPARTMENT?
A. THAT DETERMINATION WAS MADE BY THE SOLICITOR'S OFFICE.
Q. OKAY. I BELIEVE THAT YOU SAID THAT THE OUTCOME OF THIS COMMITTEE MEETING WAS THAT WOMEN WHO TESTED POSITIVE - WAS IT JUST COCAINE, BY THE WAY?
A. IT COULD HAVE BEEN HEROIN OR ANY ILLEGAL DRUG THAT WAS KNOWN TO CAUSE HARM. THE WAY THE LAW WAS EXPLAINED TO US IS THAT ANY PERSON HAVING KNOWLEDGE OF ABUSE OR NEGLECT THAT HAS OCCURRED OR MAY OCCUR TO A CHILD WAS TO REPORT IT TO THE POLICE AND/OR DSS. AND FAILURE TO DO THAT WAS A FIVE HUNDRED DOLLAR FINE AND SIX MONTHS IMPRISONMENT FOR THE HEALTH CARE PROFESSION.
Q. SO I TAKE IT THE ANSWER TO MY QUESTION WAS: COCAINE WAS NOT THE ONLY DRUG YOU HAD THE OBLIGATION TO REPORT, IT WAS ANY ILLEGAL SUBSTANCE THAT WOULD HARM THE CHILD?
A. THAT IS CORRECT.
Q. AND WHAT - YOU INDICATED, I THINK, AND - WELL, YOU WERE EXPLAINING TO ME THE OUTCOME OF THIS COMMITTEE MEETING. YOU SAID I BELIEVE THAT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA

WAS TO REPORT IT TO DSS, SOLICITOR OR POLICE, FAIR?

[SHIRLEY BROWN 11]

A. RIGHT.
Q. WHAT POLICE DEPARTMENT?
A. THE POLICE DEPARTMENT THAT WAS NOTIFIED WAS BASED ON WHAT AREA THE PERSON LIVED IN.
Q. IN ORDER TO LAY A FOUNDATION FOR MY NEXT QUESTION LET ME JUST ASK A BROAD ONE. IS IT FAIR TO SAY THERE WERE VARIOUS CHANGES IN THIS POLICY OVER A PERIOD OF TIME?
A. YES, IT WAS.
Q. SO, NOW MY NEXT QUESTION, WHEN I SAY POLICY, I'M GOING TO BE REFERRING TO THE GENERAL POLICY, WITH ALL OF THE CHANGES, OKAY?
A. OKAY.
Q. AT ANYTIME DID YOU EVER, DID MUSC, TO YOUR KNOWLEDGE, EVERY REPORT ANY SUBSTANCE ABUSE BY A PREGNANT WOMEN TO ANY POLICE DEPARTMENT OTHER THAN THE CITY OF CHARLESTON?
A. YES, IT DID.
Q. WHICH POLICE DEPARTMENT?
A. NORTH CHARLESTON.
Q. ALL RIGHT. NOW, MS. BROWN, WAS THERE A - I'M SORRY. LET ME GO BACK ON THIS SUBJECT.
YOU SAID ANY DRUG THAT WOULD CAUSE HARM TO THE PREGNANT WOMAN OR THE FETUS?
A. ANY ILLEGAL DRUG.

Q. THAT WOULD INCLUDE, AND YOU CORRECT ME IF I'M WRONG AS I AM SAYING THEM: HEROIN?

[SHIRLEY BROWN 12]

A. THAT'S CORRECT.
Q. ANY OPIATE?
A. THAT'S CORRECT.
Q. ANY ANALOG, EITHER HEROIN OR AN OPIATE?
A. WOULD YOU - I MEAN, GIVE AN EXAMPLE.
Q. AN ANALOG IS A CHEMICALLY CREATED DESIGNER DRUG IN WHICH ONE MOLECULE IS ALTERED TO TRY TO AVOID CRIMINAL PROSECUTION?
A. YOU'RE TALKING ABOUT LIKE ICE AND SYNTHETIC?
Q. SURE.
A. THAT'S CORRECT.
Q. BARBITURATES?
A. IF IT WAS PROVEN THAT IT COULD CAUSE HARM TO THE CHILD.
Q. WERE BARBITURATES IN THE CLASS OF THINGS, MS. BROWN, THAT YOU PERCEIVED AT THAT TIME, THE FALL OF '89, TO REQUIRE REPORTING TO DSS, THE SOLICITOR OR A POLICE DEPARTMENT?
A. ANY ILLEGALLY OBTAINED DRUG WAS SUPPOSED TO BE REPORTED.
Q. ARE BARBITURATES AN ILLEGAL DRUG?
A. CAN BE IF THEY WERE OBTAINED ILLEGALLY.
Q. AND AMPHETAMINES, METHAMPHETAMINES OR ANY ANALOG THEREOF?

A. THAT'S CORRECT.
Q. WHETHER OBTAINED LEGALLY OR ILLEGALLY WHETHER IT WAS TAKEN COULD HARM THE FETUS?
A. I DIDN'T MAKE THAT DECISION.
Q. HALLUCINOGENS, PCP, ANGEL DUST, LSD?

[SHIRLEY BROWN 13]

THE COURT: IF YOU'RE GOING TO ANSWER THE QUESTION.
LET HER ANSWER AFTER HALLUCINOGENS.
A. IF THEY HAD TAKEN IT, IT WOULD HAVE BEEN REPORTED.
Q. DEPRESSANTS, MARIJUANA, QUALUDES, LIKE THAT?
A. MARIJUANA WAS NOT REPORTED BECAUSE THERE WAS NOT ENOUGH IN THE LITERATURE AT THAT TIME TO SHOW THAT IT CAUSED HARMFUL EFFECTS TO THE UNBORN CHILD. IF MARIJUANA ALONE WAS THE ONLY DRUG.
Q. WAS ONE OF THE CONCERNS ABOUT A MOTHER GIVING BIRTH AND RETURNING TO THE HOME IN AN ENVIRONMENT WHERE ILLEGAL DRUG USE WAS TAKING PLACE, ONE OF THE CRITERIA THAT YOU EVENTUALLY USED TO REPORT TO DSS, IS THAT ONE OF THE THINGS THAT YOU CONSIDERED?
A. I'M SORRY, COULD YOU REPEAT THAT.
Q. SURE. IT WASN'T WELL WORDED.
ONE OF THE THINGS THAT CONCERNED YOU THROUGHOUT THE COURSE OF THIS POLICY WAS SENDING THIS BABY HOME TO A CRACK-

SMOKING MOTHER IN THE HOUSE, RIGHT?
A. THE LITERATURE SAID THAT CHILDREN IN HOMES OF ABUSE AND NEGLECT WERE AT A GREATER RISK OF ABUSE AND NEGLECT WHERE DRUGS WERE BEING USED.
Q. AND MARIJUANA BEING A DRUG WAS USED IN THE HOME BUT YOU DID NOT FEEL IT NECESSARY TO REPORT MARIJUANA USE, RIGHT?
A. I DIDN'T MAKE THE POLICY.
Q. WELL YOU SAY THAT, MS. BROWN, YOU DIDN'T MAKE THE

[SHIRLEY BROWN 14]

POLICY. IN FACT, IT WAS YOU WHO FIRST BROUGHT IT TO THE ATTENTION OF MUSC, MR. GOOD, FAIR?
A. THAT'S CORRECT.
Q. YOU WERE AT THE FIRST COMMITTEE MEETING, FAIR?
A. THAT'S CORRECT.
Q. YOU WERE DESIGNATED BY MUSC AS THE PERSON TO WHOM ALL THE PEOPLE IN THE OBSTETRICAL DIVISION OR DEPARTMENT SHOULD NOTIFY IF THEY HAD SUSPECTED NARCOTIC ABUSE, FAIR?
A. THAT'S TRUE.
Q. YOU WERE THE PERSON WHO WOULD ORDER THE UDS, THE URINE DRUG SCREEN?
A. THAT'S NOT TRUE.
Q. YOU WERE THE PERSON WHO WOULD CONTACT DSS, THE SOLICITOR OR THE POLICE?
A. I FOLLOWED MUSC POLICY IN WHICH I WAS DIRECTED TO DO.

Q. THAT BEING TRUE, I'M SURE THE ANSWER TO MY QUESTION THEN IS, YES, YOU WERE THE ONE WHO WOULD CONTACT THE SOLICITOR, DSS OR THE POLICE?
A. IT WAS NOT ALWAYS ME. THE POLICY SAID THAT IT WAS THE OB CASE MANAGER OR DESIGNEE.
Q. WHOM - WHO OR WHOM, I DON'T KNOW WHAT IS THE CORRECT ENGLISH, DID YOU DESIGNATE AS YOUR DESIGNEE?
A. DESIGNEES WERE ANY OF THE PATIENT CARE COORDINATORS THAT WORKED FOR THE HOSPITAL. AND THAT WAS NOT DESIGNATED BY ME, IT WAS DESIGNATED BY THE CLINICAL DIRECTOR THAT I WORKED

[SHIRLEY BROWN 15]

WITH. WHEN ANOTHER OB CASE MANAGER CASE MANAGER WAS HIRED, SHE WAS ONE OF THE DESIGNEES. THE PERSON WHO WAS IN CHARGE OF THE CHILD ABUSE AND NEGLECT AT THE MEDICAL UNIVERSITY WAS ONE OF THE PEOPLE. SOME OF THE NURSE MANAGERS. IT WAS A GROUP OF PEOPLE WHO WERE THAT DESIGNEE.
Q. WHAT PERCENTAGE WOULD YOU HAZARD A GUESS WERE REPORTED BY YOU AS OPPOSED TO THIS WHOLE LIST OF OTHER PEOPLE MOST?
A. I'M SORRY, REPORTED TO DSS OR?
Q. OR THE SOLICITOR OR THE POLICE? MOST WERE REPORTED BY YOU?

A. I DIDN'T MAKE ANY REPORTS TO DSS, THEY WERE ALL MADE BY THE SOCIAL WORKER.
Q. YOU WERE THE PERSON WHO KEPT IN YOUR OFFICE LETTERS FROM SOLICITOR CONDON ADVISING PATIENTS THAT THEY WOULD BE ARRESTED IF THEY CONTINUED TO ABUSE SUBSTANCES, FAIR?
A. THAT'S FAIR.
Q. AND YOU WERE THE ONE WHO HANDED THOSE LETTERS OUT TO THE PATIENTS?
A. IF I WAS THE ONE ON - WORKING THAT DAY OR A DESIGNEE. IT WAS NOT ALWAYS ME.
Q. MOST OF THE TIME IT WAS YOU, FAIR?
A. I CAN'T SAY THAT.
Q. YOU WERE THE ONE WHO WAS PRESENT WHEN A LOT OF THE PLAINTIFFS IN THIS CASE WERE TAKEN INTO CUSTODY, FAIR?
A. THAT'S CORRECT.

[SHIRLEY BROWN 16]

MR. WHERRY: YOUR HONOR - WELL, LET ME WITHDRAW THAT.
Q. (BY MR. WHERRY, CONTINUING) DID THERE COME A POINT IN TIME IN WHICH THIS FIRST POLICY WAS REDUCED TO WRITING? TO WRITTEN FORM?
A. YES, IT DID.
Q. AND APPROXIMATELY WHEN WAS THAT?
A. THE INITIAL POLICY WAS WRITTEN AND I THINK APPROVED BY

THE EXECUTIVE COMMITTEE.
Q. NO, JUST WRITTEN?
A. WRITTEN.
Q. WE'LL GET TO THE APPROVAL LATER.
A. I THINK IT WAS LATE OCTOBER, FIRST PART OF NOVEMBER OF
Q. OF '89?
A. OF '89.
Q. OKAY. NOW WITHIN THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, THEY HAVE BINDERS THAT HAVE THE HOSPITAL POLICIES IN THEM, DON'T THEY?
A. THAT IS CORRECT.
Q. AFTER TWO YEARS WORKING YOU GET FOUR SICK DAYS KIND OF THING, BUT ALL THE HOSPITAL POLICIES?
A. THAT'S CORRECT.
Q. AND IN ORDER TO BE INCLUDED IN THAT BINDER AS OFFICIAL POLICY OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, IT HAS TO BE APPROVED BY THE HOSPITAL BODY, DOESN'T IT?

[SHIRLEY BROWN 17]

A. THAT IS CORRECT.
Q. NOW THIS INITIAL - THIS INITIAL DOCUMENT THAT CAME OUT SOMETIME IN OCTOBER OF '89, WAS THAT APPROVED BY WHATEVER HOSPITAL COMMITTEE HAD TO APPROVE IT TO MAKE IT OFFICIAL?
A. I WASN'T ONE WHO TOOK THE POLICY THROUGH THE COMMITTEE. AND I DON'T KNOW THE COMMITTEE DATE. I WOULD HAVE TO LOOK AT THE POLICY TO BE ABLE TO SAY THAT.

Q. SUBSEQUENTLY - I WITHDRAW THAT. I'M SORRY, I'M THINKING AHEAD OF MYSELF.
BEFORE THE APPROVAL OF THIS, IF I MAY CALL IT THE FIRST POLICY, THE FIRST DRAFT OF THE POLICY, BEFORE IT WAS APPROVED WHICH THE COMMITTEE APPROVING IT TO GO IN THE POLICY MANUAL, WERE ANY WOMEN ARRESTED AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA FOR DISTRIBUTION OF A CONTROLLED SUBSTANCE TO THEIR BORN OR UNBORN CHILDREN?
A. THERE WERE WOMEN ARRESTED BEFORE THE POLICY WAS A FORMAL POLICY.
Q. AND ONE OF THE WOMEN ARRESTED AND BEFORE THE POLICY WAS LAVERNE SINGLETON, WASN'T SHE?
A. I COULDN'T TELL YOU WHO WAS OR WAS NOT.
Q. WERE YOU THERE WHEN LAVERNE SINGLETON WAS ARRESTED? YOU HEARD HER TESTIFY HERE YESTERDAY DIDN'T YOU?
A. THAT'S CORRECT.
Q. WERE YOU THERE AS SHE SAID THAT YOU WERE?
A. I WOULD HAVE TO LOOK AT THE RECORD. I MEAN, THAT

[SHIRLEY BROWN 18]

OCCURRED IN 1989 AND I CAN'T REMEMBER EVERYTHING THAT I HAVE EVER DONE.
Q. IS IT YOUR TESTIMONY HERE THAT YOU DO NOT RECALL WHETHER

OR NOT YOU WERE PRESENT AT THE ARREST OF LAVERNE SINGLETON?
A. I WOULD NEED TO SEE HER RECORD AND I WOULD HAVE A NOTE IN HER RECORD STATING THAT I WAS PRESENT. I WAS NOT PRESENT FOR EVERY WOMEN THAT WAS ARRESTED. SO I CANNOT TELL YOU UNEQUIVOCALLY THAT I WAS THERE WHEN SHE WAS ARRESTED.
Q. THAT WAS NOT MY QUESTION. AND MY QUESTION WAS: IS IT YOUR TESTIMONY THAT YOU DO NOT RECALL WHETHER OR NOT YOU WERE PRESENT FOR THE ARREST OF LAVERNE SINGLETON AFTER SHE HAD HER BABY AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. I WOULD NEED TO SEE THE MEDICAL RECORD. I'M NOT GOING TO SAY I WAS PRESENT.
THE COURT: NO, THAT IS NOT THE QUESTION. THE QUESTION IS: CAN YOU RECALL WHETHER OR NOT YOU WERE THERE?
THE WITNESS: I CANNOT RECALL THAT.
THE COURT: ISN'T THAT THE QUESTION?
MR. WHERRY: EXACTLY, SIR. THANK YOU.
Q. (BY MR. WHERRY, CONTINUING) ANOTHER PATIENT THAT WAS ARRESTED BEFORE THE POLICY WAS APPROVED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WAS LORI GRIFFIN, WASN'T SHE?
A. THAT IS CORRECT.

Q. AND YOU HEARD HER TESTIMONY HERE YESTERDAY?
A. YES.

[SHIRLEY BROWN 19]

Q. YOU HEARD HER TESTIMONY ABOUT YOU BEING PRESENT WHEN SHE WAS ARRESTED?
A. THAT IS CORRECT.
Q. DO YOU RECALL WHETHER OR NOT YOU WERE PRESENT WHEN SHE WAS ARRESTED BEFORE THERE WAS ANY FORMAL POLICY AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. I DO NOT RECALL HER ARREST.
Q. I DIDN'T HEAR THE LAST WORD?
A. I DO NOT RECALL HER ARREST. I ONLY RECALL THE ARREST OF THE VERY FIRST PERSON THAT WAS EVER ARRESTED.
Q. WITH RESPECT TO LORI GRIFFIN AND LAVERNE SINGLETON, THEY WERE ARRESTED BY THE CHARLESTON POLICE?
A. IF THAT'S WHO THEY SAID THEY WERE ARRESTED BY. I CAN'T REMEMBER. I DON'T REMEMBER THEM INDIVIDUALLY.
Q. MS. BROWN, YOU HAVE BEEN INVOLVED IN THIS CASE SINCE IT BEGAN, CORRECT?
A. THAT IS CORRECT.
Q. AND IN FACT, MA'AM, YOU WERE DEPOSED FOR FIVE OR SIX DAYS, WEREN'T YOU?
A. THAT IS CORRECT.
Q. AND YOU HAVE REVIEWED EITHER IN THE COURSE OF THE

DEPOSITION OR IN CONNECTION WITH YOUR ASSISTANCE OR YOUR COOPERATION IN THE PROGRESS OF THIS CASE, VIRTUALLY EVERY MEDICAL RECORD ON EVERY PLAINTIFF AND EVERY PIECE OF PAPER IN THIS CASE, HAVEN'T YOU?

[SHIRLEY BROWN 20]

A. NO, SIR, I HAVEN'T.
Q. WELL CERTAINLY EVERY MEDICAL RECORD OF EVERY PLAINTIFF WAS SHOWN DURING THE COURSE OF THOSE DEPOSITIONS, WEREN'T YOU?
A. I DID, BUT SOME OF THEM WERE REVIEWED IN 1990 AND '91.
Q. MS. BROWN, IF YOU KNOW, LORI GRIFFIN OR LAVERNE SINGLETON, HOW THE POLICE CAME TO BE AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA TO TAKE THEM AWAY IN HANDCUFFS?
A. THEY WERE NOTIFIED.
Q. BY WHOM?
A. PROBABLY BY ME, BUT IF IT WAS ON THE WEEKEND IT WOULD HAVE BEEN BY THE DESIGNEE.
Q. WHEN THEY WERE NOTIFIED, BY YOU OR BY YOUR DESIGNEE, THEY WERE TOLD, WEREN'T THEY, OF, AMONG OTHER THINGS, A POSITIVE DRUG SCREEN?
A. THEY WERE TOLD OF A POSITIVE DRUG SCREEN.
Q. NOW, MS. BROWN, ALLOW ME IF YOU WILL TO DIGRESS.
PATIENTS WHO COME INTO THE MEDICAL UNIVERSITY OF SOUTH

CAROLINA ARE PROVIDED WITH A PAMPHLET, A BOOK, A LITTLE THING WHICH I'M GOING TO SHOW YOU IN A MINUTE, I PROMISE - THAT TELLS THEM WHAT THEIR RESPONSIBILITIES ARE WITH RESPECT TO THE UNIVERSITY AND WHAT THEIR RIGHTS ARE. AND IT'S PUBLISHED BY THE UNIVERSITY AND PROVIDED TO PATIENTS AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. YOU HAVE SEEN THAT BOOK, HAVEN'T YOU?

A. I HAVE SEEN IT.

[SHIRLEY BROWN 21]

Q. AND IT IS TRUE, THAT BOOK WAS FOR THE PURPOSE OF DISTRIBUTION TO PATIENTS, WASN'T IT?

A. YES, IT WAS.

Q. AND IN FACT THE CONTENTS OF THAT BOOK WERE, AS FAR AS THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WENT, AND YOU WENT, WERE TRUE?

A. I'M SORRY.

Q. I SPOKE TOO FAST. I DO THAT. I APOLOGIZE.

THAT BOOK AND THE CONTENTS OF IT, AS FAR AS YOU WERE CONCERNED, AND THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, WERE TRUE, WEREN'T THEY? WHAT THE BOOK SAID WAS TRUE?

A. I DIDN'T HELP WRITE THAT BOOK NOR HAD I REALLY READ THAT BOOK UNTIL I WAS SHOWN IT IN MY DEPOSITION.

Q. HAVING BEEN SHOWN IT IN YOUR DEPOSITION, IT IS TRUE, ISN'T IT?
A. YES, IT IS.
Q. AND IN THERE
MR. WHERRY: JUDGE, WE'RE LOOKING FOR IT, BY THE WAY. I WILL GET IT. I THINK WE JUST FOUND IT.
Q. (BY MR. WHERRY, CONTINUING) IN THAT BOOK IT SPEAKS TO PATIENT PRIVACY, DOESN'T IT?
A. TO THE BEST OF MY RECOLLECTION IT DOES.
MR. WHERRY: YOUR HONOR, I WOULD LIKE TO HAVE MARKED AS EXHIBIT, I DON'T KNOW WHETHER IT'S PLAINTIFFS 1 OR WHETHER IT'S NUMBER 16. IT'S NOT JOINT. IT'S A PLAINTIFF'S EXHIBIT,

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[SHIRLEY BROWN 27]

CONSEQUENCES. SHOULD YOU LEAVE THE HOSPITAL AGAINST MEDICAL ADVICE NEITHER THE HOSPITAL NOR THE PRIMARY PHYSICIAN WILL BE RESPONSIBLE FOR ANY HARM THAT ACTION MAY CAUSE YOU OR ANY OTHER PERSON."
Q. THANK YOU, MA'AM. MAY I TAKE THAT BACK, PLEASE. THANK YOU.
NOW, MS. BROWN -
THE COURT: YOU CAN MOVE THE EASEL.
MR. WHERRY: YES, I WILL.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, WHAT YOU HAVE JUST READ, PART OF 105, 105 IS, MS. BROWN, AN APPROVED DOCUMENT BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, APPROVED BY WHATEVER COMMITTEE HAD TO APPROVE IT, FAIR?
A. THAT'S CORRECT.
Q. NOW LET'S GO BACK TO WHAT WE TALKED ABOUT AT LEAST WITH RESPECT TO THE PLAINTIFFS LORI GRIFFIN AND LAVERNE SINGLETON. WOULD YOU AGREE WITH ME THAT A DRUG SCREEN OR RESULTS OF LABORATORY ANALYSIS OF ONES' URINE IS MEDICAL INFORMATION?
A. YES, IT IS.
Q. AND IF IN FACT YOU RELAYED THAT INFORMATION ON TO ANYONE IT WOULD HAVE BEEN BECAUSE YOU GOT THE RESULTS OF THE LAB TESTS FROM THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. THAT IS CORRECT.
Q. OKAY. NOW, LET'S GO FORWARD - I'M SORRY.
MR. WHERRY: YOUR HONOR, I WOULD LIKE TO SHOW THE

[SHIRLEY BROWN 28]

WITNESS WHAT HAS BEEN MARKED AS EXHIBIT 106. PLAINTIFF'S 106 FOR TRIAL FOR IDENTIFICATION ONLY. I'M SHOWING MY ADVERSARY.
(PAUSE IN PROCEEDINGS.)
MR. HOOD: YOUR HONOR, AS TO THIS EXHIBIT WE HAVE AN

OBJECTION TO ITS RELEVANCY.

THE COURT: LET ME SEE IT.

MR. WHERRY: I'M NOT OFFERING IT YET.

THE COURT: IF YOU'RE NOT OFFERING IT.

MR. WHERRY: NO, SIR, I'M NOT. I WANT TO SHOW IT TO THE WITNESS TO SEE IF SHE CAN MAKE IT RELEVANT.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, YOU REFERRED TO EARLIER IN YOUR TESTIMONY A WRITING OF FIRST DRAFT OF A POLICY.

MS. BROWN, LET ME WITHDRAW THAT QUESTION AND I'LL LEAVE THE DOCUMENT THERE WITH YOU FOR A MOMENT. IT'S NOT WHAT I THOUGHT IT WAS.

DID THERE COME A POINT IN TIME, MS. BROWN, AT WHICH - AT WHICH YOU ATTENDED OR PARTICIPATED IN ANOTHER MEETING, A FURTHER DEVELOPMENT OF WHAT I WILL CALL THE INTERAGENCY POLICY?

A. YES IT WAS.

Q. WITH RESPECT TO THE ONE THAT WAS ADOPTED IN OCTOBER OF '89, WERE THERE A LIST OF CRITERIA THAT WOULD LEAD TO THE HOSPITAL OBTAINING A UDS, URINE DRUG SCREEN?

A. YES, IT WAS.

[SHIRLEY BROWN 29]

Q. AND WOULD YOU TELL THE JURY, PLEASE, WHAT THOSE CRITERIA

WERE THAT WOULD LEAD TO THE HOSPITAL RUNNING A UDS, A URINE DRUG SCREEN?

A. A PERSON HAD NO PRENATAL CARE.

Q. NO PRENATAL CARE?

A. CORRECT. IF THEY HAD LATE PRENATAL CARE, THAT WOULD BE AFTER 24 WEEKS GESTATION.

Q. LATE PRENATAL CARE?

A. IF THEY HAD INCOMPLETE PRENATAL CARE, I.E., THEY CAME IN ONE VISIT AND THEN DIDN'T COME BACK UNTIL JUST BEFORE THEY DELIVERED.

Q. INCOMPLETE PRENATAL CARE.

A. IF THEY CAME IN WITH AN ABRUPTO PLACENTA, THAT IS WHENEVER THE PLACENTA SEPARATES FROM THE INSIDE OF THE UTERUS WHICH CAN CAUSE THE BABY TO DIE AND OR PUT THE MOTHER'S HEALTH IN SERIOUS JEOPARDY.

IF SHE CAME IN AND HER BABY HAD DIED INSIDE OF HER KNOWN AS INTRAUTERINE FETAL DEATH.

Q. MS. BROWN, I PROMISE YOU I'M GOING TO LET YOU CONTINUE WITH THAT. WITH THE INTRAUTERINE FETAL DEATH THAT WOULD TRIGGER A UDS?

A. YES, IT WOULD.

Q. IF THEIR THERE WAS INTRAUTERINE FETAL DEATH, THE HOSPITAL, I TAKE IT THE HEALTH CARE PROFESSIONALS HAD NO FURTHER INTEREST IN PROTECTION OF THE FETUS, DID THEY? THE

BABY'S DEAD, THEY HAD NOTHING LEFT TO PROTECT, RIGHT?
A. BUT OUR URINE DRUG SCREENS WERE DONE TO LOOK FOR REASONS.
Q. I UNDERSTAND. CONTINUE WITH YOUR LIST AND THEN LET US RETURN TO THAT.
A. IF THEY WERE IN PRETERM LABOR.
Q. PRETERM LABOR.
A. IF - AND OF NO OBVIOUS CAUSE. IF A LADY HAD TWINS, TRIPLETS, A LONG HISTORY OF CERVICAL INCOMPETENCE OR SOMETHING LIKE THAT, SHE MIGHT NOT BE SCREENED.
INTRAUTERINE GROWTH RETARDATION. THAT'S WHEN THE BABY IS NOT THE SIZE THAT IT SHOULD BE AND THERE WAS NO OBVIOUS CAUSE FOR THAT.
AND UNEXPLAINED CONGENITAL ANOMALIES.
Q. WHICH I TAKE IT MEANS A BIRTH DEFECT?
A. A BIRTH DEFECT.
Q. OKAY. NOW, MS. BROWN, LET'S GO BACK TO THAT INTRAUTERINE FETAL DEATH. AND IN CONJUNCTION WITH THAT THE INTENT OF THE POLICY, THE REASON THAT WE DECIDED ON THIS POLICY, AT THE FIRST MEETING, WAS BECAUSE OF OUR CONCERN, AND AS MR. HOOD SAID IN HIS OPENING, FOR THE HEALTH AND SAFETY AND CARE OF THESE FETUSES AND SOON TO BE CHILDREN; FAIR?
A. THAT IS CORRECT.

Q. SO, HOW DID A TAKING A URINE SAMPLE FROM THE MOTHER OF A CHILD WHO WAS ALREADY DEAD, HOW DID THAT PROTECT UNBORN CHILDREN? IT DIDN'T, DID IT?

[SHIRLEY BROWN 31]

A. IT DIDN'T.
Q. WHEN WE GOT A POSITIVE URINE SCREEN ON THE UNFORTUNATE WOMEN WHO EXPERIENCED THE INTRAUTERINE DEATH, THAT LIKEWISE WAS TURNED OVER TO THE POLICE FOR HER TO BE ARRESTED, WASN'T IT?
A. NO, IT WASN'T.
Q. WHAT WAS DONE WITH IT? WHY DID YOU TAKE IT?
A. UNDER THE SOUTH CAROLINA LAW AS EXPLAINED TO ME BY THE LEGAL COUNSEL AT THE MEDICAL UNIVERSITY, THAT WAS A WRONGFUL DEATH AND HAD TO BE REPORTED TO THE MEDICAL EXAMINER. SO THE MEDICAL EXAMINER.
Q. I'M SURE, MS. BROWN, EVERYTHING THAT YOU JUST TOLD ME IS TRUE. WHAT DOES THAT HAVE TO DO WITH YOUR REPORTING OF THE INTRAUTERINE FETAL DEATH TO THE MEDICAL EXAMINER FOR HER EXAMINATION OF THE CAUSE OF DEATH, WHAT DOES THAT HAVE TO DO WITH YOU TAKING A URINE SCREEN OF THE UNFORTUNATE MOTHER? NOTHING, DOES IT, MA'AM?
A. IT WAS THE POLICY.

Q. MS. BROWN, I UNDERSTAND THAT IT WAS THE POLICY. IT HAS NOTHING TO DO WITH FETAL PROTECTION, DOES IT?
A. NO, IT DOESN'T.
Q. THANK YOU. NOW -
MR. WHERRY: IF THE COURT WILL BEAR WITH ME FOR JUST A MOMENT.
Q. (BY MR. WHERRY, CONTINUING) WHILE MR. HOOD IS LOOKING AT

[BROWN 32]

IT, I'M GOING TO IN A MOMENT SHOW YOU A COPY OF PLAINTIFF'S EXHIBIT NUMBER 25 FOR TRIAL FOR IDENTIFICATION. AND ASK YOU WHETHER IT IS, AND I WON'T KNOW THE ANSWER, WHETHER IT IS A COPY OF WHATEVER DOCUMENT CAME OUT OF THIS FIRST MEETING. DO YOU UNDERSTAND MY QUESTION?
A. I SURE DO.
MR. HOOD: WE HAVE NO OBJECTION. I THINK THERE ARE BETTER QUALITY POLICIES THAN THIS ONE.
MR. WHERRY: I WOULD WELCOME IT.
THE COURT: OKAY. LET'S PROCEED.
MR. WHERRY: IF THERE IS NO OBJECTION, WOULD YOU MARK THAT IN EVIDENCE, PLEASE.
THE COURT: PLAINTIFF'S EXHIBIT NUMBER 25 IN EVIDENCE.
MR. WHERRY: THANK YOU.
Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, AND I DO

APOLOGIZE FOR THE COPY, IS THIS THE DOCUMENT THAT WAS GENERATED BY THAT FIRST AD HOC MEETING IN SEPTEMBER OF '89?

A. THERE WERE - FROM THAT FIRST MEETING IN SEPTEMBER THERE WERE LIKE SOME GENERAL NOTES. IT WAS NOT A FORMALIZED POLICY WRITTEN UP LIKE THIS AT THAT POINT IN TIME.

Q. SO THE ANSWER IS NO, THIS IS NOT WHAT CAME OUT OF THAT?

A. RIGHT.

Q. OKAY. CAN I HAVE IT BACK, PLEASE. THANK YOU.

IN THAT FIRST POLICY - LET ME - I SAY THAT IT

[BROWN 33]

WASN'T A FORMALIZED DOCUMENT LIKE THIS, SOMETHING RATHER FORMAL HAD TO GO TO WHATEVER COMMITTEE IT GOES TO TO BE MADE PART OF THE POLICY MANUAL, FAIR?

A. THAT'S RIGHT.

Q. IS THAT WHAT I JUST SHOWED YOU OR IS THERE SOMETHING ELSE? HOW CAN YOU KNOW WHAT I'M SHOWING YOU WITHOUT ME SHOWING YOU. SHOWING YOU P-25, IS THAT WHAT WENT TO THAT COMMITTEE OR DID SOMETHING ELSE GO?

A. THERE WAS A MEETING IN SEPTEMBER. YOU ASKED IF THIS WAS A DOCUMENT THAT CAME FROM THE MEETING IN SEPTEMBER. AND I SAID, NO, IT WASN'T. YOU KNOW, THERE WERE SUBSEQUENT MEETINGS

AND AFTER A NUMBER OF MEETINGS, THIS WAS DEVELOPED.
Q. OKAY. THAT'S FAIR. AND I WILL GET TO THAT. WHAT WENT TO THE COMMITTEE THAT APPROVED THIS FIRST POLICY IN SEPTEMBER OF '89? I THINK YOU SAID THAT WAS APPROVED TO BECOME PART OF THE MEDICAL UNIVERSITY POLICY IN OCTOBER. WAS THERE A DOCUMENT THAT WAS APPROVED OR DID SOMEBODY JUST GO AND TALK TO THEM?
A. TOWARD THE END OF OCTOBER OR NOVEMBER, BECAUSE I TOLD YOU I DIDN'T TAKE THE POLICY TO THE COMMITTEE, SO I DON'T KNOW EXACTLY WHEN IT WENT, IT WAS A POLICY THAT, TO THE BEST OF MY KNOWLEDGE, LOOKED VERY MUCH LIKE THIS. BUT I DID NOT WRITE THE FINAL COPY NOR DID I TAKE IT TO THE COMMITTEE. SO -
Q. IS WHAT YOU HAVE THERE, P-25, IS THAT REFLECTIVE OF THE FIRST POLICY, THE FIRST THING THAT THE - THE FIRST THING THAT

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[SHIRLEY BROWN 35]

THE COURT: LET'S MAKE IT VERY CLEAR SO THE JURY CAN UNDERSTAND.
MR. WHERRY: YOU'RE ABSOLUTELY CORRECT.
Q. (BY MR. WHERRY, CONTINUING) IS WHAT YOU'RE HOLDING IN

YOUR HAND APPROXIMATELY WHAT WAS ADOPTED FORMALLY IN OCTOBER OR IN NOVEMBER OF '89 BY THE HOSPITAL?
A. SOMETIME LATE OCTOBER OR MIDDLE OF NOVEMBER.
Q. YEAH.
A. THIS APPEARS TO BE THE DOCUMENT.
Q. GOOD. THANK YOU.
THE COURT: AND THAT'S EXHIBIT 25?
MR. WHERRY: YES, SIR, EXHIBIT 25.
Q. (BY MR. WHERRY, CONTINUING) PRIOR TO THAT, WAS THE POLICY THAT IS CONTAINED IN PLAINTIFF'S 25 BEING APPLIED WHETHER OR NOT IT HAD BEEN ADOPTED? WAS IT BEING USED ON AN INFORMAL BASIS BETWEEN SEPTEMBER AND MID-NOVEMBER?
A. BUT NOT IN ITS FULLEST EXTENT BECAUSE ALL OF THE LETTERS AND VIDEOTAPES, ET CETERA, WERE NOT AVAILABLE AT THAT TIME.
Q. WAS THERE IN - PRIOR TO OCTOBER 12 OF '89, WAS THERE INTERACTION BETWEEN MUSC, THE OBSTETRICS DEPARTMENT, THE HIGH-RISK PREGNANCY PEOPLE AND THE CITY OF CHARLESTON POLICE DEPARTMENT, PARTICULARLY CAPTAIN ROBERTS?
A. THERE WAS A MEETING HELD SOMETIME IN OCTOBER.
Q. AND FROM THAT MEETING A DOCUMENT WAS GENERATED WHICH WAS MARKED JOINT EXHIBIT NUMBER 1, A DOCUMENT WAS GENERATED BY

[SHIRLEY BROWN 36]

CAPTAIN ROBERTS, WHICH WAS COPIED TO YOU, THAT SET FORTH IN WRITING THE, QUOTE, "POLICY OF THE CHARLESTON POLICE DEPARTMENT FOR ARRESTING WOMEN REFERRED TO THEM OR COMPLAINED OF TO THEM BY MUSC"?

A. THAT IS CORRECT.

Q. AND THAT JOINT EXHIBIT NUMBER 1 FROM CAPTAIN ROBERTS, A COPY TO YOU, IS WHAT THE CHARLESTON POLICE DEPARTMENT PROGRAM OF COMPLIANCE WAS?

A. TO THE BEST OF MY KNOWLEDGE, IT WAS.

Q. LET ME JUMP MUCH AHEAD.

A. OKAY.

Q. YOU DID RECEIVE, DIDN'T YOU, MS. BROWN, A COPY OF A LETTER FROM THE CHARLESTON POLICE DEPARTMENT INDICATING THAT THEY WISHED THAT SOMEBODY WOULD GET SEARCH WARRANTS FOR THE MEDICAL RECORDS OF THESE PEOPLE BEFORE THEY USED THEM TO ARREST AND PROSECUTE THEM?

A. I PERSONALLY RECEIVED THE LETTER?

Q. YES, YOU PERSONALLY RECEIVED IT. DO YOU REMEMBER THAT?

A. I DON'T REMEMBER THAT.

Q. OKAY. WHEN WAS THE FIRST REVISION OF THIS FIRST POLICY? WHEN DID WE FIRST CHANGE IT? OR ITS IMPLEMENTATION. I MEAN NOT ONLY THE POLICY BUT HOW IT WORKED?

A. IN JANUARY OF '90.
Q. IN JANUARY OF '90 WHO MET TO CAUSE THE CHANGE? DID I WORD THAT WELL? DO YOU UNDERSTAND MY QUESTION?

[SHIRLEY BROWN 37]

A. YOU'RE ASKING WHO WAS AT THE MEETING THAT CHANGED THE POLICY?
Q. YEAH. BUT LET ME CHANGE IT BECAUSE I DON'T THINK IT WAS WORDED WELL.
HOW COME THE POLICY CHANGED? HOW DID IT GET CHANGED?
A. IT WAS DECIDED INITIALLY THAT, YOU KNOW, IT WOULD BE REVIEWED. AND IN JANUARY THE DEPARTMENT OF SOCIAL SERVICES AND THE SOLICITOR'S OFFICE AND REPRESENTATIVES FROM THE MEDICAL UNIVERSITY, AND I DON'T REMEMBER WHO ELSE WAS THERE, I DON'T REMEMBER IF CAPTAIN ROBERTS OR ANYONE WAS THERE, MET, AND THE PEOPLE FROM CHARLESTON COUNTY SUBSTANCE ABUSE.
Q. AND THE RESULT OF THAT MEETING. CAUSED SOME CHANGES IN THE POLICY, RIGHT?
A. THAT IS CORRECT.
Q. I'M SORRY, MS. BROWN, I'M SURE THAT YOU TOLD ME WHEN THIS WAS THAT HAPPENED. JANUARY OF '90?
A. THE BEST OF MY RECOLLECTION IT WAS AROUND JANUARY OF

1990. I DON'T REMEMBER THE EXACT DATE.
Q. LET ME SHOW YOU - YOU WILL NOTICE A LOOSE-LEAF RIGHT IN FRONT OF YOU, MS. BROWN. WOULD YOU TURN THAT TO JOINT EXHIBIT NUMBER 3. I THINK THERE ARE TABS ON IT. AND LOOKING AT THAT, MS. BROWN, IS THAT MINUTES, IF YOU WILL, OR A SUMMARY OF THAT MEETING IN JANUARY OF '90 IN WHICH THERE WERE DEVELOPED REVISIONS TO THE POLICY?

[SHIRLEY BROWN 38]

A. YES, IT IS.
Q. NOW, WOULD YOU DESCRIBE FOR THE JURY, PLEASE -
WELL, FIRST OF ALL, WHEN WERE THE REVISIONS TO THE POLICY IMPLEMENTED? IT WASN'T UNTIL MARCH OF '90, WAS IT?
A. I DON'T RECALL THE EXACT DATE. I DON'T THINK THE WRITTEN POLICY CAME OUT UNTIL MARCH OF '90, BUT IF I REMEMBER CORRECTLY WE BASICALLY STARTED FOLLOWING THIS GUIDELINE AS SOON AS PEOPLE MET AND AGREED UPON IT.
Q. OKAY. WHAT WERE THE DIFFERENCES BETWEEN THE ONE MARKED P-25, POLICY ONE, AND JOINT NUMBER 3, WHICH I TAKE IT IS THE FIRST REVISION THERE FOR POLICY NUMBER 2? WHAT WERE THE DIFFERENCES?
A. THE FIRST POLICY IF A WOMAN WAS PREGNANT AND TESTED

POSITIVE SHE RECEIVED THE EDUCATIONAL BENEFITS AND WAS REFERRED TO SUBSTANCE ABUSE. IF SHE CAME IN AND DELIVERED A BABY THAT WAS POSITIVE, THE POLICY WAS LIKE GREENVILLE'S POLICY WHERE THE PERSON WAS ARRESTED AT DELIVERY. AS THE POLICY EVOLVED, WE WANTED TO INCREASE THE EDUCATIONAL EFFORTS TO ALL PREGNANT WOMEN, SO WE GOT VIDEOS ON THE HARMFUL EFFECTS OF SMOKING, DRINKING AND DRUGS. AND THESE WERE SHOWN TO ALL WOMEN COMING TO MUSC FOR CARE. EVERYONE RECEIVING THE PRENATAL CARE WAS GIVEN A LETTER ON THE HARMFUL EFFECTS AND OUTLINING, YOU KNOW, THAT WE WANTED TO PROTECT THEM AND THEIR UNBORN CHILD. AND THAT WE - IF THEY WERE USING DRUGS, TO PLEASE LET US KNOW AND THAT WE WOULD REFER THEM TO TREATMENT.

[SHIRLEY BROWN 39]

BUT IF THEY CONTINUED TO USE DRUGS AND DIDN'T USE - AND DIDN'T GET TREATMENT, THAT, YOU KNOW, WE WOULD HAVE TO PROTECT THEIR CHILD AND A REPORT WOULD BE MADE TO THE POLICE.

IN JANUARY, FEBRUARY, RIGHT AFTER THAT INITIAL MEETING, IT WAS DECIDED THAT WOMEN WHO CAME IN WITHOUT - AND THE FIRST TIME THAT THEY EVER TESTED POSITIVE FOR COCAINE WAS

AT DELIVERY, THAT THEY WOULD BE ENTERED INTO SUBSTANCE ABUSE TREATMENT AND AN AMNESTY-TYPE PROGRAM TO TRY TO HELP THEM GET OFF OF THE DRUGS.

MR. WHERRY: YOUR HONOR, AT THIS POINT I INTEND TO ASK A SERIES OF ABOUT FOUR QUESTIONS THAT I AM CERTAIN WILL BE CHALLENGED AND THAT THERE WILL BE A REQUIREMENT THAT I SHOW A GOOD FAITH BASIS FOR ANSWERING.

THE COURT: WELL IT'S 11:30 AND I NORMALLY WOULD TAKE A BREAK AT THIS TIME AND LET'S GO AHEAD AND TAKE ONE AND WE'LL MAKE IT ABOUT 20 MINUTES AND THAT WAY WE CAN DISCUSS THIS EVIDENCE WHILE YOU'RE GONE. LET'S TAKE ABOUT 20 MINUTES.

(RECORD SEALED BY ORDER OF COURT).

THE COURT: ALL RIGHT, SIR.

MR. WHERRY: THANK YOU.

Q. (BY MR. WHERRY, CONTINUING) ALL RIGHT, MS. BROWN, I THINK WE HAVE THE FIRST TWO VERSIONS OF THE POLICY THAT WE HAVE IDENTIFIED. DID THERE COME A TIME WHEN THERE WAS YET ANOTHER VERSION OF THE POLICY OR ANOTHER ARTICULATION OF IT?

[SHIRLEY BROWN 40]

A. A POLICY IS PUT IN A MANUAL FOR THE GENERAL GUIDELINES.

THEN THERE ARE - YOU CAN HAVE, JUST LIKE IF IT WAS A POLICY RELATED TO A MEDICAL CONDITION, YOU CAN HAVE LIKE A TEXTBOOK OF GUIDELINES OR STEPS 1, 2, 3 TO FOLLOW. THIS POLICY HAD LIKE A GUIDELINE STEP 1, 2, 3 THAT WAS FOLLOWED.

Q. BUT MY QUESTION IS: WAS THERE YET ANOTHER VERSION OF - A THIRD VERSION OF THE POLICY?

A. NOTHING EXCEPT THE WAY THE GUIDELINES KIND OF CHANGED, SOME OF THE WORDING.

Q. AND WERE CHANGES IN GUIDELINES APPROVED BY THE MUSC COMMITTEE THAT APPROVES POLICIES?

A. THEY WENT THROUGH THE LEGAL OFFICE AT THE MEDICAL UNIVERSITY.

Q. NOW, WHAT WERE THE CHANGES THEN THAT OCCURRED AFTER MARCH OF 1990 IN THE GUIDELINES?

A. THE GUIDELINES WERE REALLY JUST A CLEAR WRITE-UP OF WHAT OCCURRED IN JANUARY OF '90. AND IT WENT THROUGH ALL OF THE STEPS ABOUT NOTIFYING, WHEN TO NOTIFY AND WHAT TO DO.

Q. WHAT ARE THOSE GUIDELINES AS THEY EXISTED? WHEN DID THE GUIDELINES FIRST COME INTO BEING? WHEN IS THE FIRST SET OF GUIDELINES?

A. SOMETIME BETWEEN JANUARY OF '90 AND MARCH OF '90.

Q. AND DOES EITHER PLAINTIFF'S EXHIBIT 25 - WELL, DOES

PLAINTIFF'S 25 SET FORTH WHAT THOSE GUIDELINES WERE BETWEEN JANUARY AND MARCH OF 1990?

[SHIRLEY BROWN 41]

A. WHERE IT SAYS ON HERE ABOUT PROTOCOL AFTER IDENTIFICATION OF DRUG ABUSE FOR PATIENT WHO IS DELIVERING AN INFANT, IT MIRRORS THE FIRST POLICY OF WHERE, YOU KNOW, IF THEY HAVEN'T SEEN THE VIDEO, THEY WOULD SEE THE VIDEO. THAT THEY WOULD BE GIVEN AND APPOINTMENT FOR SUBSTANCE ABUSE. THAT DSS WOULD BE NOTIFIED. ALL OF THE EDUCATIONAL EFFORTS THAT WERE PUT INTO PLACE, AS WELL AS A LETTER FROM THE NEONATOLOGIST WOULD BE GIVEN EXPLAINING SOME OF THE THINGS THAT COULD HAPPEN TO THE BABY AFTER THEY GOT HOME AND SOME OF THE INTERVENTIONS THAT THEY COULD USE IN CARING FOR THE BABY.

Q. IS WHAT YOU HAVE JUST SAID THINGS THAT THE LATER GUIDELINES CONTAINED, THAT NUMBER 25, P-25 DOES NOT CONTAIN?

A. THAT IS CORRECT.

Q. OKAY. SO WHAT YOU HAVE JUST TOLD US ARE THINGS THAT WOULD MODIFY P-25 TO FORM THE POLICY AND THIS IMPLEMENTATION AS IT EXISTED AFTER MARCH OF '90, FAIR?

A. THAT IS CORRECT.

Q. AND IS THAT REDUCED TO WRITING ANYPLACE?

A. YES, IT IS.

Q. AND WHERE, MA'AM, IS THAT REDUCED TO WRITING?
A. IT WAS IN LIKE THE NURSING BOOKS THAT ARE KEPT ON THE UNITS THAT OUTLINE, STEPS OF WHAT IS TO BE DONE.
Q. WOULD YOU LOOK IN THE BOOK YOU HAVE IN FRONT OF YOU AND SEE WHETHER YOU HAVE JOINT EXHIBIT NUMBER 4 IN THERE. IT MAY HAVE BEEN TAKEN OUT BY ACCIDENT. I'M NOT SUGGESTING THAT YOU

[SHIRLEY BROWN 42]

HAVE IT.
A. IT'S - NUMBER 4 IS IN HERE.
Q. OKAY. AND IS NUMBER 4 A REFLECTION OF THE GUIDELINES AS THEY CAME TO BE AFTER MARCH OF 1990 OR IN MARCH OF 1990?
A. THAT IS CORRECT.
Q. NOW, IS THIS THE VERSION OF THE GUIDELINES THAT CONTINUED THROUGH THE END OF '90 AND INTO '91?
A. YES, IT IS.
Q. AND THERE WERE NO SUBSTANTIAL CHANGES THEN IN THE GUIDELINES FOR A PERIOD OF A YEAR OR MORE, FAIR?
A. THAT'S CORRECT.
Q. AND IF YOU WILL, LET'S TALK ABOUT THESE GUIDELINES TOGETHER. THE WAY THAT WE WOULD IDENTIFY WOMEN FOR UDS, FOR URINE DRUG SCREENS NOW HAS NINE, DOESN'T IT, INDICATORS, FOR LACK OF A BETTER WORD?
A. THAT IS CORRECT.

Q. AND ONE OF THEM ONLY HAS SIX, THERE IS NO PRENATAL CARE, FAIR?
A. THAT IS CORRECT.
Q. LATE PRENATAL CARE?
A. THAT IS CORRECT.
Q. AND INCOMPLETE PRENATAL CARE?
A. THAT IS CORRECT.
Q. ABRUPTIO PLACENTAE, IF I'M SAYING THAT CORRECTLY?
A. THAT IS CORRECT.

[SHIRLEY BROWN 43]

Q. INTRAUTERINE FETAL DEATH?
A. THAT'S CORRECT.
Q. THE INTRAUTERINE FETAL DEATH, WAS IT EVER DISCUSSED AT ANY OF THESE COMMITTEES THAT IT HAD NOTHING TO DO WITH FETAL PROTECTION?
A. PART OF THE POLICY WAS –
Q. NO, MA'AM. WAS IT EVER DISCUSSED THAT HAD NOTHING TO DO WITH FETAL PROTECTION?
A. NO, IT DIDN'T.
Q. PRETERM LABOR IF NO OBVIOUS CAUSE?
A. THAT IS CORRECT.
Q. WHAT IS IUGR?
A. IT MEANS THAT THE GROWTH OF THE BABY IS NOT WHAT IT SHOULD BE AT THAT POINT IN HER PREGNANCY.
Q. AND NUMBER 9 IS UNEXPLAINED CONGENITAL ANOMALIES, RIGHT?
A. THAT'S CORRECT.
MR. WHERRY: BEAR WITH ME FOR JUST A MOMENT, YOUR

HONOR.

THE COURT: CERTAINLY.

Q. (BY MR. WHERRY, CONTINUING) IT ALSO ADDED A CLASS OF INDICATORS THAT CAME FROM SCREENING THE INFANT THAT WAS BORN, RIGHT?

A. THAT IS CORRECT.

Q. AND I WILL GO OVER THOSE. BY THE WAY, IT SEEMS TO ME AT THIS POINT IN TIME WE'RE ONLY CONCERNED WITH WOMEN POST-24

[SHIRLEY BROWN 44]

WEEKS OF PREGNANCY? 24 WEEKS OF PREGNANCY OR LATER; IS THAT RIGHT?

A. ALL WOMEN WERE SCREENED NO MATTER WHAT GESTATIONAL AGE THEY WERE.

Q. WELL, WASN'T THERE AND UNDERSTANDING THAT THE POLICY WOULD NOT BE IMPLEMENTED, AT LEAST THE PUNITIVE PARTS OF IT, TO ANY WOMEN WHO WERE LESS DEVELOPED, FOR LACK OF A BETTER WORD, THAN 24 WEEKS?

A. AS IT WAS EXPLAINED TO ME, IT WAS THE - DEFINED BY THE STATE THAT AT 25 WEEKS THAT A CHILD THAT AND UNBORN CHILD WAS A PERSON.

Q. WELL, YEAH. MY QUESTION OF COURSE WAS: NOT WHY OR NOT THE MEANS THAT YOU HAD, BUT THAT THE POLICY WAS NOT APPLIED OR IMPLEMENTED WITH PREGNANT WOMEN WHO WERE LESS THAN 25 WEEKS

PREGNANT, FAIR?
A. YOU MEAN NOT ARRESTED?
Q. YEAH, NOT ARRESTED, GIVEN SOLICITOR'S LETTERS OR ANY OF THOSE THINGS?
A. THEY WERE GIVEN SOLICITOR'S LETTERS BEFOREHAND.
Q. IS IT YOUR POSITION THAT NO WOMEN WERE ARRESTED UNDER THE INTERAGENCY POLICY WHO WERE LESS THAN 25 WEEKS PREGNANT?
A. TO THE BEST OF MY KNOWLEDGE EVERYONE WAS OVER 25 WEEKS PREGNANT IF THEY WERE ARRESTED.
Q. THE THREAT OF ARREST, THE GIVING OF THE SOLICITOR'S LETTER, YOU WOULD THREATEN TO ARREST THEM IF THEY DIDN'T GO TO

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[SHIRLEY BROWN 49]

THE COURT: THAT'S THE LETTER THAT I WAS TALKING ABOUT. IS THAT LETTER IN EVIDENCE?
MR. WHERRY: THAT'S IN THE BOOK ALSO. THAT'S 10.
THE WITNESS: I CAN LOOK.
THE COURT: LOOK AT IT. I WANT TO BE SURE THAT I UNDERSTAND WHAT YOU'RE SAYING.
THE WITNESS: THAT'S NUMBER 10.
THE COURT: OKAY.
MR. WHERRY: YOUR HONOR, I WOULD ASK THAT ALL OF HER ANSWERS THAT PURPORTED TO BE AN EXPLANATION BE STRICKEN AS BEING NOT RESPONSIVE.

THE COURT: GO AHEAD.
MR. WHERRY: MY QUESTION ASKED DIDN'T YOU THINK - REQUIRED A YES OR NO.
THE COURT: I'LL PERMIT IT. GO AHEAD.
Q. (BY MR. WHERRY, CONTINUING) WHEN POLICY NUMBER 1, POLICY NUMBER 2, THE MODIFICATION OF THE GUIDELINES WERE ADOPTED, IT WAS ALWAYS THE INTENTION OF YOU AND THE PEOPLE AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, AND IN FACT FROM WHAT YOU LEARNED AT THESE MEETINGS, CHARLESTON POLICE DEPARTMENT, MR. CONDON THE SOLICITOR, TO HELP THE WOMEN GET TREATMENT, NOT TO ARREST THEM, NOT TO PROSECUTE THEM, NOT TO CAUSE THEM TO GO TO JAIL, FAIR?
A. THAT'S CORRECT.
Q. NOW, IF YOU WILL LOOK IN THAT BOOK, JOINT EXHIBIT NUMBER

[SHIRLEY BROWN 50]

6, THERE IS A LETTER SIGNED BY MR. CONDON HANDED OUT BY YOU, RIGHT?
A. NUMBER 6? THAT IS CORRECT.
Q. AND THAT IS WHAT IS KNOWN AS THE SOLICITOR LETTER, ISN'T IT?
A. THAT IS CORRECT.
Q. NOW, FOR THE JURY, WOULD YOU READ THE ENTIRE DOCUMENT TO THE JURY SO THAT THEY KNOW WHAT - WAS THIS LETTER GIVEN TO

ALL PATIENTS BEFORE THEY WERE CRIMINALLY CHARGED?
A. THIS LETTER WAS ONE OF TWO LETTERS AND THIS WAS ONE THAT WAS GIVEN AT DELIVERY.
Q. OKAY.
A. AND AFTER THE POLICY WAS ESTABLISHED, THIS LETTER WAS GIVEN TO EVERYONE BEFORE - THAT TESTED POSITIVE.
Q. NOW WOULD YOU READ THAT LETTER TO THE JURY, PLEASE.
THE COURT: NOW THIS IS EXHIBIT 6?
MR. WHERRY: YES, SIR.
A. "REFERENCE SUBSTANCE ABUSE DURING PREGNANCY. TO WHOM IT MAY CONCERN. DURING YOUR RECENT MEDICAL EXAMINATION CONDUCTED IN CONNECTION WITH THE BIRTH OF YOUR CHILD YOU TESTED POSITIVE FOR DRUGS. BEFORE YOUR RELEASE FROM THE HOSPITAL YOU WILL BE COUNSELED ON THE HARMFUL EFFECTS OF DRUG USAGE TO YOU AND YOUR CHILD AND REFERRED TO SUBSTANCE ABUSE COUNSELING. THIS REFERRAL WILL GIVE YOU THE OPPORTUNITY TO REHABILITATE YOURSELF FOR THE GOOD OF YOURSELF AND YOUR CHILD. A REFERRAL

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WILL ALSO BE MADE TO THE CHARLESTON COUNTY DEPARTMENT OF SOCIAL SERVICES UNDER SOUTH CAROLINA CHILD PROTECTION LAW.

DSS WILL DETERMINE WHETHER THE BEST INTERESTS OF YOUR CHILD REQUIRE THE REMOVAL OF THAT CHILD FROM YOUR CUSTODY DURING YOUR REHABILITATION. IF YOU FAIL TO COMPLETE SUBSTANCE ABUSE COUNSELING, FAIL TO COOPERATE WITH THE DEPARTMENT OF SOCIAL SERVICES IN THE PLACEMENT OF YOUR CHILD AND SERVICES TO PROTECT THAT CHILD, OR IF YOU FAIL TO MAINTAIN CLEAN URINE SPECIMENS DURING YOUR SUBSTANCE ABUSE REHABILITATION, YOU WILL BE ARRESTED BY THE POLICE AND PROSECUTED BY THE OFFICE OF THE SOLICITOR." SINCERELY YOURS, CHARLES MALONEY CONDON SOLICITOR. IT SAYS CMCFV. IT SAYS THEN I HAVE READ AND RECEIVED A COPY OF THIS LETTER. THERE IS A PLACE FOR THE PATIENT TO SIGN IT. THE DATE AND TO WITNESS SIGNATURES.

Q. AND THE PURPOSE OF THAT LETTER WAS NOT TO ARREST THEM AND PROSECUTE THEM, BUT WAS TO ASSURE THEY GOT TREATMENT AND THAT THEIR BABIES WERE TAKEN CARE OF, FAIR?

A. THAT IS CORRECT.

Q. OKAY. AND FROM TIME TO TIME VARIOUS WOMEN WERE ARRESTED PURSUANT TO THE THREAT, MY LANGUAGE, THAT IS IN THAT LETTER, FAIR?

A. THAT IS CORRECT.

Q. BUT THE PURPOSE OF THE ARREST, MS. BROWN, WAS NOT TO PUT

THEM INTO THE CRIMINAL JUSTICE SYSTEM, TO EXACT WHATEVER THE CRIMINAL JUSTICE SYSTEM DOES, THE PURPOSE OF THE ARREST WAS TO

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GET THEM TREATMENT AND TO PROTECT THE BABY, FAIR?
A. THAT IS CORRECT.
Q. AND WHEN THEY WENT TO JAIL, AS LORI GRIFFIN DID, YOU HEARD HER TESTIMONY YESTERDAY?
A. THAT IS CORRECT.
Q. FOR THREE WEEKS, 80,000 DOLLARS BAIL, THE PURPOSE OF THAT WAS NOT TO PROSECUTE HER CRIMINALLY BUT TO GET HER TREATMENT AND TO PROTECT THE BABY? FAIR?
A. SHE WAS ACTUALLY ARRESTED BEFORE THE POLICY WENT INTO EFFECT.
Q. WITH THAT HAVING BEEN SAID, THE PURPOSE OF HER ARREST AND INCARCERATION WAS FOR - TO CAUSE HER TO GET TREATMENT AND FOR THE PROTECTION OF THE BABY, FAIR?
A. I REPORTED IT AS THE LEGAL DEPARTMENT TOLD ME TO, AND THAT WAS BEFORE THE DEVELOPMENT OF THE POLICY. IT WAS OUR HOPE OF THE MEDICAL UNIVERSITY THAT EVERYONE WAS GOING TO GET TREATMENT.
Q. SO THE ANSWER TO MY QUESTION IS YES?
A. YES.
Q. RIGHT. NOW, RETURN TO THE GUIDELINES FOR -

THE COURT: LET ME INTERRUPT YOU AGAIN SO I CAN BE SURE THAT THERE IS A CLEAR DISTINCTION BETWEEN THESE LETTERS.

NOW EXHIBIT 6, THE LETTER THAT YOU JUST READ, WHEN WAS THAT DELIVERED? WHEN WAS THAT GIVEN TO THE PATIENT?

THE WITNESS: WHEN THEY DELIVERED A CHILD THAT

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TESTED POSITIVE FOR DRUGS. BUT THIS LETTER ACTUALLY DIDN'T GO INTO EFFECT UNTIL MARCH OF '90.

THE COURT: SO THAT LETTER WAS NOT DELIVERED TO ANY PATIENT UNLESS THEY DELIVERED A BABY THAT TESTED POSITIVE?

THE WITNESS: RIGHT.

THE COURT: OKAY.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, THAT DIDN'T CONTINUE FOREVER, DID IT? THIS LETTER WAS GIVEN TO A LOT OF PATIENTS BEFORE THEY HAD THEIR BABIES, ISN'T THAT SO?

A. NOT THIS LETTER. THEY WAS ANOTHER LETTER GIVEN.

Q. A DIFFERENT LETTER OR WAS IT EXACTLY THE SAME?

A. IT WAS A DIFFERENT LETTER.

Q. AND DID THAT LETTER ALSO PROMISE OR THREATEN PROSECUTION IF THEY DID NOT SEEK TREATMENT?

A. YES, IT DID.

Q. SO INSOFAR AS THE BOTTOM, THE LAST SENTENCE?

THE COURT: LET'S IDENTIFY THAT LETTER. WHAT'S ITS NUMBER?

MR. WHERRY: YES, SIR. IF I MAY HAVE THE BOOK.

THE COURT: I DON'T WANT TO BE SO PRECISE AND INTERFERE WITH THE INTRODUCTION OF EVIDENCE, BUT - BUT I HAVE CERTAIN DECISIONS TO MAKE IN THIS CASE AND I WANT TO BE SURE THAT I UNDERSTAND EXACTLY WHERE THESE PIECES FIT SO THAT I CAN INTELLIGENTLY OR MORE INTELLIGENTLY MAKE THOSE DECISIONS.

Q. (BY MR. WHERRY, CONTINUING) JOINT EXHIBIT 5 WAS GIVEN TO

[SHIRLEY BROWN 54]

THE WOMEN DURING PREGNANCY, FAIR?

A. THAT IS CORRECT.

Q. AND THE END OF IT IS EXACTLY THE SAME AS 6, ISN'T IT?

A. IT SAYS IF YOU FAIL TO ATTEND SUBSTANCE ABUSE AND PRENATAL CARE YOU WILL BE ARRESTED BY THE CHARLESTON CITY POLICE AND PROSECUTED BY THE OFFICE OF SOLICITOR.

Q. NOW LET ME REPHRASE.

THE COURT: AGAIN, WHAT TRIGGERS THAT LETTER? WHO GOT THAT LETTER?

THE WITNESS: ANYBODY WHO TESTED POSITIVE, DURING THEIR PREGNANCY BUT HAD NOT DELIVERED YET.

THE COURT: OKAY.

Q. (BY MR. WHERRY, CONTINUING) THAT WAS A JOINT EXHIBIT NUMBER 7, ISN'T IT?
A. THIS HAS A 5 ON IT.
Q. YES, AND THE ONE FOLLOWING THAT HAS A 6 ON IT?
A. RIGHT.
Q. AND THE ONE FOLLOWING THAT HAS A 7 ON IT, RIGHT?
A. RIGHT.
Q. JOINT EXHIBIT NUMBER 7 IS ALSO A SOLICITOR'S LETTER, ISN'T IT?
A. YES, IT IS.
Q. AND THAT SOLICITOR'S LETTER IS SUBSTANTIALLY THE SAME INSOFAR AS THE THREAT OF PROSECUTION AS 5 AND 6 ARE EXCEPT THAT THERE CAME TO BE A NEW SOLICITOR, RIGHT?

* * *

[SHIRLEY BROWN 58]

Q. (BY MR. WHERRY, CONTINUING) DO YOU RECOGNIZE THE IMPORTANCE OF KEEPING PATIENTS' RECORDS CONFIDENTIAL?
A. YES, I DO.
Q. AND I TAKE IT THAT PARTICULARLY BECAUSE OF THE NATURE OF SUBSTANCE ABUSE RECORDS, THAT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, AND YOU, WERE EVEN MORE AWARE OF THAT CONFIDENTIALITY REQUIREMENT?
A. ALL MEDICAL RECORDS ARE TO BE MAINTAINED CONFIDENTIAL.

Q. AND ARE YOU AWARE OF A PARTICULAR CLASS OF MEDICAL RECORDS THAT REQUIRES MORE CONFIDENTIALITY PURSUANT TO FEDERAL LAW?

A. I UNDERSTAND THAT THE RECORDS IN THE INSTITUTE OF PSYCHIATRY ARE KEPT SEPARATE FROM OURS AND GO UNDER DIFFERENT RULES AND REGULATIONS.

Q. MS. BROWN, YOU'RE AWARE NOW AS YOU SIT THERE OF THE FACT THAT RECORDS OF SUBSTANCE ABUSE DIAGNOSIS, TREATMENT OR COUNSELING MUST RECEIVE SPECIAL CONFIDENTIALITY ATTENTION ALSO?

A. IN THE CONTEXT OF SUBSTANCE ABUSE COUNSELING.

Q. AND DIAGNOSIS AND TREATMENT, FAIR?

A. DIAGNOSIS AND TREATMENT IS MY BASIC UNDERSTANDING.

Q. SO YOU WOULD AGREE WITH ME THAT MEDICAL RECORDS CONCERNING SUBSTANCE ABUSE DIAGNOSIS, TREATMENT AND COUNSELING MUST RECEIVE SPECIAL CONFIDENTIALITY ATTENTION?

A. AS EXPLAINED TO ME FROM THE INSTITUTE OF PSYCHIATRY, THEY

[SHIRLEY BROWN 59]

WOULD HAVE TO HAVE THAT TYPE OF CONFIDENTIALITY.

Q. BUT, IN '89 AND '90, WHEN THIS POLICY WAS, WHATEVER

VERSION OF IT WE'RE DEALING WITH WAS IMPLEMENTED, YOU WEREN'T EVEN AWARE OF THAT, WERE YOU?
A. NO, I WAS NOT.
Q. AND IN YOUR OFFICE BEGINNING AT THAT TIME OR MAYBE EVEN BEFORE THAT, YOU KEPT A ROLODEX, DIDN'T YOU?
A. THAT IS CORRECT.
Q. AND ON THAT ROLODEX YOU KEPT THE NAMES AND PHONE NUMBERS OF INDIVIDUALS WHO TESTED POSITIVE FOR SUBSTANCE - FOR CONTROLLED SUBSTANCES, FAIR?
A. I KEPT NAMES BUT NO PHONE NUMBERS.
Q. AND YOU ALSO KEPT INFORMATION ABOUT POSITIVE DRUG SCREENS, DIDN'T YOU?
A. THAT IS CORRECT.
Q. AND THAT ROLODEX WAS NOT IN A FILE CABINET OR A MEDICAL RECORDS ROOM OR ANYTHING LIKE THAT, WAS IT?
A. IT WAS LOCKED UP IN MY OFFICE.
Q. I THINK MY QUESTION WAS: IT WASN'T IN A FILE CABINET OR A SPECIAL RECORD ROOM, WAS IT?
A. NO, IT WASN'T..
Q. YOU SHARED YOUR OFFICE AT THAT TIME WITH SOMEONE ELSE, DIDN'T YOU?
A. NOT IN 1989 AND '90. I DID LATER ON.
Q. AND WHO DID YOU SHARE IT WITH?

[SHIRLEY BROWN 60]

A. THE SOCIAL WORKER AND MELESIA HENRY, ANOTHER OUTCOME

MANAGER.
Q. NOW THE SOCIAL WORKER AND OUTCOME MANAGER, WERE THEY PEOPLE WHO HAD A NEED TO HAVE ACCESS TO THE SUBSTANCE ABUSE RECORDS OF PATIENTS?
A. THAT IS CORRECT. SOCIAL WORKER SAW ALL PATIENTS.
Q. BUT THERE ALSO CAME A POINT IN TIME AT WHICH REPRESENTATIVES FROM THE SOLICITOR'S OFFICE, THE PROSECUTOR OF THIS COUNTY, WOULD COME TO YOUR OFFICE, SIT AT YOUR DESK WHERE THAT ROLODEX WAS AND GO THROUGH YOUR SUBSTANCE ABUSE DIAGNOSIS, TREATMENT AND COUNSELING RECORDS FOR THEIR PROSECUTORIAL PURPOSES, ISN'T THAT SO?
A. I DID NOT KEEP ANY RECORD RELATED TO ANY COUNSELING OR THAT TYPE THING IN MY OFFICE.
Q. LET ME TAKE COUNSELING OUT OF MY QUESTION. REPRESENTATIVES FROM THE SOLICITOR'S OFFICE WOULD COME TO YOUR OFFICE, SIT AT YOUR DESK, GO THROUGH, AMONG OTHER THINGS, YOUR ROLODEX, AND SOMETIMES YOUR FILES WHERE YOU KEPT SOLICITOR'S LETTERS, TO GATHER INFORMATION FOR THEIR PROSECUTORIAL PURPOSES; ISN'T THAT RIGHT?
A. THERE WAS A REPRESENTATIVE FROM THE SOLICITOR'S OFFICE THAT CAME TO GET THE NAMES OF THE PEOPLE THAT LETTERS HAD BEEN ISSUED ON.

Q. THAT'S THE ONLY PURPOSE ANYONE FROM THE SOLICITOR'S OFFICE WOULD COME TO YOUR OFFICE FOR DURING THE ENTIRE COURSE

[SHIRLEY BROWN 61]

OF THIS POLICY WAS TO GET NAMES OF PEOPLE YOU HAD GIVEN SOLICITOR'S LETTERS TO?
A. IT WAS MY UNDERSTANDING FROM THE LEGAL OFFICE AT THE MEDICAL UNIVERSITY THAT THE SOLICITOR'S OFFICE WOULD BE THE ONE THAT WAS RESPONSIBLE FOR TRACKING THE COMPLIANCE. I.E., THE LETTERS. AND THAT THEY WERE TO BE KEPT IN MY OFFICE AND THAT THEY WOULD COME AND GET THE NAME OF THOSE PEOPLE.
Q. MY QUESTION WASN'T WHY. MY QUESTION WAS: WAS THAT THE ONLY REASON THAT THEY CAME TO YOUR OFFICE AND WENT THROUGH YOUR RECORDS TO FIND OUT WHO HAD BEEN GIVEN SOLICITOR'S LETTERS?
A. THAT WAS THE PURPOSE OF THEM COMING, YES, IT WAS.
Q. WAS THAT THE ONLY REASON?
A. YES IT WAS, TO MY KNOWLEDGE.
Q. AND THEY WOULD COME AS FREQUENTLY AS ONCE A WEEK AND COME INTO YOUR OFFICE AND GO THROUGH THE ROLODEX AND SOLICITOR'S LETTERS, RIGHT?
A. THAT IS CORRECT.
Q. AND IN FACT, THE PERSON FROM THE SOLICITOR'S OFFICE WHO

REGULARLY CAME WAS A PERSON WHO USED TO WORK WITH YOU AS A SOCIAL WORKER, RIGHT?
A. NO. SHE WORKED FOR THE SOLICITOR'S OFFICE BEFORE SHE GOT A JOB AT THE MEDICAL UNIVERSITY.
Q. SO SHE WORKED WITH THE SOLICITOR'S OFFICE AND THEN CAME TO WORK FOR THE HOSPITAL?

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A. I THINK SHE WENT TO WORK SOMEWHERE ELSE BEFORE SHE CAME TO WORK FOR THE HOSPITAL, BUT I DON'T KNOW THE EMPLOYMENT HISTORY.
Q. WHEN THE SOLICITOR'S OFFICE CAME TO GET THIS INFORMATION, DID YOU HAVE ANY AUTHORIZATION, ANY PERMISSION SIGNED BY ANY PATIENT, THAT AUTHORIZED YOU TO RELEASE THAT INFORMATION TO THE SOLICITOR?
A. NO, I DIDN'T.
Q. WHEN YOU CONTACTED OR HAD DEALINGS WITH THE CHARLESTON POLICE DEPARTMENT, AND TOLD THEM ABOUT POSITIVE URINE SCREENS, DRUG URINE SCREENS, DID YOU HAVE ANY PERMISSION, SIGNED BY ANY PATIENT TO RELEASE THAT INFORMATION TO THE POLICE?
A. JUST THE UNDERSTANDING FROM THE LEGAL COUNSEL THAT ANYTIME THERE WAS AND ABUSE OR NEGLECT CASE THAT WE HAD TO RELEASE THE INFORMATION.

Q. AND THAT IS NO DOUBT YOUR REASON FOR WHY YOU DID HAVE IT, I'M NOT ASKING FOR THAT. I'M ASKING: DID YOU HAVE A MEDICAL RELEASE FORM, A PIECE OF PAPER SIGNED SAYING I AUTHORIZE MUSC TO TELL THE POLICE ABOUT MY UDS?

A. NO, I DIDN'T.

Q. NOW THE MEDICAL RECORDS DEPARTMENT OF MUSC AND THE ENTIRE HOSPITAL POLICY IS SUCH THAT MEDICAL RECORDS WILL NOT BE RELEASED FROM THE HOSPITAL TO ANY THIRD PERSON WITHOUT AND AUTHORIZATION SIGNED BY THE PATIENT OR OTHER AUTHORIZING DOCUMENTS?

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[SHIRLEY BROWN 72]

STATE LAW OF INSTANCES OF CHILD ABUSE AND NEGLECT TO THE APPROPRIATE STATE AND LOCAL AUTHORITIES. SO ON THIS ISSUE OF PRIVACY, WE HAVE A SPECIFIC STATE AND FEDERAL STATUTE REQUIRING IT AND WAIVING ANY PURPORTED PRIVILEGE.

THE COURT: YOUR STATEMENT IS IN THE RECORD FOR WHATEVER RELEVANCE IT MAY HAVE.

MR. HOOD: YES, SIR.

THE COURT: I HAD INTENDED MAKING THAT FINDING OF FACT BEFORE LUNCH AND WE REALLY GOT SO TIED UP IN CONSIDERING THE EVIDENCE AND RULING ON IT THAT I DIDN'T HAVE AN

OPPORTUNITY TO DO SO. BUT OBVIOUSLY THOSE WERE THE CONCERNS THAT I HAD WHEN I TOOK THE ACTION THAT I DID.

MS. BROWN, I BELIEVE THAT YOU'RE ON THE WITNESS STAND. YOU MAY RETURN AND I WILL REMIND YOU THAT YOU ARE STILL UNDER OATH.

(JURY ENTERS AT 3:00 P.M.)

THE COURT: ALL RIGHT, SIR, YOU MAY CONTINUE.

MR. WHERRY: THANK YOU.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, IN '89 AND '90, AT THE BEGINNING OF THE POLICY, YOU WERE NOT FAMILIAR WITH THE CONCEPT "INFORMED CONSENT", WERE YOU?

A. NO, SIR, I WAS NOT.

Q. NOW I TAKE IT THAT YOU ARE FAMILIAR WITH THAT CONCEPT?

A. YES, I AM.

Q. AND WOULD YOU AGREE WITH ME THAT INFORMED CONSENT MEANS

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WE NEED TO GET SOME EVIDENCE IN BEFORE WE START USING INNUENDO TO PROVE SOMETHING THAT IMPORTANT AND THAT'S WHY I'M SUSTAINING THE OBJECTION AT THIS TIME.

MR. WHERRY: VERY WELL, SIR.

THE COURT: BUT AS FAR AS WHO THE PATIENT IS AND THE REST OF IT, YOU CAN GO INTO THAT.

Q. (BY MR. WHERRY, CONTINUING) PRIOR TO THE IMPLEMENTATION OF THE PROGRAM, WHICH BEGAN IN THE FALL OF '89, I THINK?
A. THAT'S CORRECT.
Q. WAS A NEEDS ASSESSMENT DONE BY MUSC OR ANYONE THAT YOU'RE AWARE OF WITH RESPECT TO SUBSTANCE ABUSING PREGNANT WOMEN?
A. IN DEFINING NEEDS ASSESSMENT, ARE YOU TALKING ABOUT WHAT THEY NEEDED AS FAR AS TREATMENT OR A NEEDS ASSESSMENT ABOUT THEIR MEDICAL CARE? I NEED FOR YOU TO CLARIFY NEEDS ASSESSMENT.
Q. ANY OF THOSE. AVAILABILITY OF SUBSTANCE ABUSE TREATMENT, MOST EFFECTIVE METHODS OF TREATMENT, ANY OF THOSE THINGS?
A. CITY OF CHARLESTON SUBSTANCE ABUSE WAS AT THE INITIAL MEETING AND THEY WERE THE ONES RESPONSIBLE FOR THE SUBSTANCE ABUSE TREATMENT IN THE BEGINNING IN 1989.
Q. IN FACT, MS. BROWN, HAVE YOU BEEN ASKED THAT QUESTION PREVIOUSLY, PAGE 131, LINE 23.YOU INDICATED THAT THERE WAS NO NEEDS ASSESSMENT PERFORMED, DIDN'T YOU?
MR. HOOD: I WOULD ASK THAT HE FOLLOW THE RULE.
MR. WHERRY: I UNDERSTAND THE RULES IN THIS

JURISDICTION.

THE COURT: I DON'T KNOW THE RULE IS DIFFERENT ANYWHERE. ANY WITNESS THAT IS BEING QUESTIONED ABOUT A PRIOR INCONSISTENT STATEMENT HAS A RIGHT TO SEE THAT INCONSISTENT STATEMENT OR EITHER ADMIT IT OR DENY IT. AND IF THAT RULE IS DIFFERENT SOMEWHERE ELSE, I DON'T KNOW ABOUT IT.

MR. WHERRY: I WILL BE PLEASED TO FOLLOW IT.

THE COURT: OKAY.

Q. (BY MR. WHERRY, CONTINUING) PAGE 131.

MR. HOOD: FIVE DAYS OF TESTIMONY, CAN WE GET THE DAY.

MR. WHERRY: VOLUME 1, PAGE 131, LINE 21.

Q. (BY MR. WHERRY, CONTINUING) WHEN ASKED: "OKAY, BUT DID YOU DO ANY SPECIFIC NEEDS ASSESSMENT FOR PREGNANT WOMEN WITH COCAINE PROBLEMS?"

WOULD YOU READ TO US PLEASE ON LINE 23 WHAT YOUR ANSWER WAS?

A. "NO SPECIFIC NEEDS ASSESSMENT."

Q. THANK YOU.

A. BUT THAT'S WHY I ASKED YOU TO DEFINE NEEDS ASSESSMENT, WHAT DATE AND TIME.

Q. MS. BROWN, MY QUESTION SIMPLY WAS WOULD YOU READ WHAT YOUR ANSWER WAS.

THE COURT: SHE HAS A RIGHT TO EXPLAIN THAT ANSWER.

I DON'T KNOW WHAT HER EXPLANATION WAS, BUT YOU'RE ENTITLED TO

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A. I DO NOT KNOW. I WASN'T IN CHARGE OF THAT COMMITTEE.
Q. OKAY. THE SCAN COMMITTEE, MS. BROWN, YOU WERE A MEMBER OF THE SCAN COMMITTEE, WEREN'T YOU?
A. YES, I WAS.
Q. AND YOU WERE THE PERSON WHO WOULD OFTEN DO THE REPORTING AT THE SCAN COMMITTEE, WEREN'T YOU?
A. ON THE CASES THAT RELATED TO COCAINE ABUSE, YES.
Q. SO APPROXIMATELY WHEN DID THE SCAN COMMITTEE FIRST FORM? APPROXIMATELY WHEN DID IT BEGIN TO MEET?
A. I WAS NOT ON THE INITIAL SCAN COMMITTEE. IT - I DO NOT KNOW WHAT DATE IT BEGAN. I HAVE NO IDEA. I WASN'T ON THE INITIAL COMMITTEE.
Q. THE SOLICITOR'S LETTERS WHICH WE HAVE LOOKED AT AND COMPARED, JOINT EXHIBIT 5, 6 AND 7, DO YOU RECALL THEM?
A. YES, I DO.
Q. THE SOLICITOR'S LETTERS WERE GIVEN TO YOU SIGNED FOR YOUR DISTRIBUTION TO PATIENTS AT YOUR DISCRETION; IS THAT FAIR?
A. THEY WERE GIVEN TO ME TO GIVE TO PATIENTS WHO MET THE CRITERIA.

Q. AND AFTER YOU GAVE A SOLICITOR'S LETTER TO A PATIENT,
AFTER YOU GAVE A SOLICITOR'S LETTER TO THEM YOU WERE NOT
REQUIRED-TO NOTIFY THE SOLICITOR'S OFFICE THAT YOU HAD DONE
THAT, WERE YOU?
A. WHEN THE POLICY WAS DEVELOPED IT WAS THE RESPONSIBILITY
OF THE SOLICITOR'S OFFICE TO COME TO THE MEDICAL UNIVERSITY

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AND GET THE NAMES.
Q. THE ONLY TIME IN WHICH YOU NOTIFIED THE SOLICITOR'S
OFFICE THAT YOU HAD GIVEN PATIENTS ONE OF THESE LETTERS IS
WHEN YOU DETERMINED THAT THE PERSON HAD NOT RECEIVED
APPROPRIATE TREATMENT; IS THAT FAIR?
A. IF A PATIENT - THAT'S NOT FAIR. BECAUSE A PATIENT COULD
HAVE RECEIVED A LETTER AND OR CONTINUING TO HAVE POSITIVE
URINE DRUG SCREENS, BUT WAS IN TREATMENT, AND THE CITY OF
CHARLESTON SUBSTANCE ABUSE SAID THAT, YOU KNOW, THEY FELT THAT
THIS PERSON WAS MAKING PROGRESS, ETCETERA, THEN I WOULD NOTIFY
- ASK THE SOLICITOR'S OFFICE NOT TO HAVE TO TURN THEM OVER
TO THE POLICE BECAUSE THE SUBSTANCE ABUSE PEOPLE SAID THEY
WERE TRYING.
Q. OKAY. BUT WHEN IN YOUR OPINION THERE WAS NON-COMPLIANCE,

YOU WERE THE ONE WHO NOTIFIED THE SOLICITOR'S OFFICE; IS THAT FAIR?

A. I DID NOT MAKE THE OPINION ABOUT NON-COMPLIANCE. WHEN A LETTER WAS SENT TO ME BY WHOEVER WAS DOING THE SUBSTANCE ABUSE TREATMENT STATING THAT THE PERSON WAS NOT COMPLIANT WITH TREATMENT AND WAS DROPPED OUT OF TREATMENT IS WHEN THEY WOULD BE NOTIFIED, OR IF. THEY NEVER WENT INTO TREATMENT.

Q. I WILL COME BACK TO THIS AREA IN JUST A MOMENT, BUT LET ME CLEAR SOMETHING UP. BEFORE THEY WENT INTO TREATMENT WHEN A SUBSTANCE ABUSE LETTER WAS GIVEN, AT ABOUT THAT TIME THEY WERE ALSO SHOWN A VIDEO WEREN'T THEY?

[SHIRLEY BROWN 84]

A. YES.

Q. AND THE VIDEOTAPE THEY WERE SHOWN WAS ON THE BAD EFFECTS OF SUBSTANCE ABUSE AND PREGNANCY?

A. ON THE HORRIBLE EFFECTS OF SMOKING CIGARETTES, TAKING OVER-THE-COUNTER DRUGS AND ANY OTHER ILLEGAL DRUGS.

Q. AND THEY WERE GIVEN A LETTER FROM THE MEDICAL STAFF AT MUSC ABOUT THE HARMFUL EFFECTS OF USING DRUGS PRENATAL, FAIR?

A. THAT'S CORRECT.

Q. IN ADDITION TO THAT, EACH ONE OF THEM WAS MET BY YOU AND

WAS GIVEN SUBSTANCE ABUSE COUNSELING, EXPLAINING THE IMPORTANCE OF TREATMENT, THE IMPORTANCE OF CARE FOR THEIR UNBORN CHILD. IS THAT FAIR?

A. I NEVER GAVE SUBSTANCE ABUSE COUNSELING.

Q. WELL, DID YOU TELL THE PATIENT THE IMPORTANCE OF TREATMENT?

A. I DISCUSSED WITH THE PATIENT THE HARMFUL EFFECTS OF COCAINE USE TO THEM AND THEIR UNBORN CHILD, TOLD THEM OF THE DIFFERENT PROGRAMS THAT WERE AVAILABLE IN THE CHARLESTON AREA. AND THEY SELECTED WHETHER THEY WANT INPATIENT OR OUTPATIENT. AND THEN A REFERRAL WAS MADE. AND THAT AGENCY WOULD THEN DO AN ASSESSMENT AS TO WHAT THEY NEEDED.

Q. I TAKE IT, MS. BROWN THAT THE PURPOSE OF YOU DOING THAT WAS TO TRY TO ENCOURAGE THEM TO GET TREATMENT, BECAUSE THAT WAS THE WHOLE PURPOSE OF THE POLICY, RIGHT?

A. THAT IS CORRECT.

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Q. AND SO IN TRYING TO ENCOURAGE THEM TO GET TREATMENT, DID YOU FORM A THERAPEUTIC ALLIANCE WITH THEM TO TRY TO - TO TRY TO ENCOURAGE THEM TO GET THAT TREATMENT?

A. I ENCOURAGED EVERYONE TO DO ANYTHING THAT THEY COULD TO HELP THEMSELVES AND THAT LITTLE BABY, AND GETTING TREATMENT WAS AN IMPORTANT THING.
Q. BUT IT IS YOUR POSITION THAT THAT IS NOT SUBSTANCE ABUSE COUNSELING; IS THAT RIGHT?
A. THAT IS NOT SUBSTANCE ABUSE COUNSELING.
Q. YOU WOULD AGREE THAT THE RECOGNITION OF A POSITIVE UDS FOR SUBSTANCE ABUSE IS A DIAGNOSIS?
A. NO, I WOULD NOT.
Q. AS YOU CAN SEE, A SOLICITOR'S LETTER WAS REFERRED TO THE SOLICITOR'S OFFICE FOR PROSECUTION BECAUSE OF NONSUCCESSFUL COMPLETION OF SUBSTANCE ABUSE TRAINING. HOW WOULD THE SOLICITOR'S OFFICE LEARN THAT?
A. IF I OR ONE OF THE DESIGNEES, WHOEVER WAS WORKING, WAS NOTIFIED OR RECEIVED A LETTER FROM THE PLACE THAT THEY WERE SUPPOSED TO BE GETTING TREATMENT SAYING THAT THE PERSON WAS NONCOMPLIANT WITH TREATMENT, THEN IT WOULD BE TURNED OVER.
Q. SO THE SUBSTANCE ABUSE OF - CHARLESTON COUNTY SUBSTANCE ABUSE PROGRAM WOULD TELL YOU THE PATIENT WAS NONCOMPLIANT?
A. IT COULD HAVE BEEN THEM OR ANY OF THE OTHER PROGRAMS THAT THE PATIENTS WENT INTO.
Q. DID YOU EVER RECEIVE, FROM ANY OF THE PATIENTS, THEIR

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WRITTEN CONSENT FOR YOU TO REDISCLOSE THAT INFORMATION TO THE SOLICITOR'S OFFICE?

A. NO, I DID NOT.

Q. THE POSITIVE DRUG SCREEN WAS A DETERMINING FACTOR TO YOU DETERMINING WHETHER THEY NEEDED SUBSTANCE ABUSE TREATMENT, RIGHT?

A. WHENEVER THERE WAS A POSITIVE URINE DRUG SCREEN THEN WE WERE TO REFER ANYONE WITH A POSITIVE URINE DRUG SCREEN FOR SUBSTANCE ABUSE EVALUATION AND TREATMENT DEEMED NECESSARY BY THE PEOPLE WHO SPECIALIZED IN SUBSTANCE ABUSE.

Q. IN THE FALL OF '89, THE ONLY REASONABLE AVAILABLE DRUG TREATMENT PROGRAM IN THE CHARLESTON AREA WAS THE CHARLESTON COUNTY SUBSTANCE ABUSE TREATMENT PROGRAM, ISN'T THAT FAIR, FOR INDIGENT WOMEN?

A. THAT IS CORRECT.

Q. SO WHEN YOU INDICATED THAT THEY WERE GIVEN THE OPTIONS OF WHERE TO GET SUBSTANCE ABUSE TREATMENT, THE OPTION WAS REALLY THE CHARLESTON COUNTY PROGRAM, OR NONE, FOR INDIGENT WOMEN?

A. INITIALLY THAT WAS THE ONLY PROGRAM AVAILABLE.

Q. AT SOME LATER POINT IN TIME SOME OTHER PROGRAMS BEGAN TAKING MEDICAID; IS THAT RIGHT?

A. THAT IS CORRECT.

Q. AS A MATTER OF FACT, EVEN IN THE EARLY STAGES OF THE PROGRAM, MUSC PSYCHIATRIC DEPARTMENT DIDN'T GIVE SUBSTANCE ABUSE COUNSELING TO INDIGENT WOMEN, DID THEY?

[SHIRLEY BROWN 87]

A. AT THAT POINT IN TIME THE FEDERAL GOVERNMENT WOULD NOT PAY FOR INPATIENT TREATMENT IN THE STATE OF SOUTH CAROLINA.
Q. SO I TAKE IT THE ANSWER IS NO?
A. THAT'S RIGHT.
Q. AND THE MUSC DEPARTMENT OF PSYCHIATRY DIDN'T HAVE ANY OUTPATIENT SUBSTANCE ABUSE TREATMENT PROGRAM DID THEY?
A. NO, THEY DID NOT AT THAT TIME, TO MY KNOWLEDGE.
Q. NOW AT SOME POINT IN TIME MEDICAID OR SOME OTHER PROGRAMS BEGAN TO ACCEPT MEDICAID FUNDING OR MEDICAID PAYMENT, RIGHT?
MEDICAID CLIENTS?
A. THAT IS CORRECT.
Q. AND APPROXIMATELY WHEN DID THAT BEGIN TO HAPPEN? WHEN WAS THE FIRST?
A. I'M SORRY, I DON'T REMEMBER. I THINK IT WAS IN THE NINETIES, BUT IT COULD HAVE BEEN '91. I REALLY DO NOT RECALL.
Q. JUST IN CASE I LEFT SOMETHING OUT, BESIDES REPRESENTATIVES OF MUSC AND THE SOLICITOR'S OFFICE AND

SOMETIMES THE POLICE DEPARTMENT AND DSS, WHAT OTHER KIND OF PEOPLE ATTENDED THESE SCAN MEETINGS?
A. PEOPLE FROM THE DEVELOPMENTAL CLINIC AND THERE WAS USUALLY A PEDIATRICIAN THERE THAT SPECIALIZED IN ABUSE AND NEGLECT.
Q. YOU INDICATED, MS. BROWN, THAT YOU WEREN'T GIVING SUBSTANCE ABUSE COUNSELING. WAS ANYONE IN THE MUSC OB DEPARTMENT GIVING SUBSTANCE ABUSE COUNSELING?

[SHIRLEY BROWN 88]

A. NOT TO MY KNOWLEDGE, NOT IN THE DEPARTMENT OF OB.
MR. WHERRY: IF I MAY, YOUR HONOR. PAGE 262, LINE 4.
Q. (BY MR. WHERRY, CONTINUING) AT PAGE 262, MS. BROWN, LINE 4, YOU REFER TO - YOU GIVE AN ANSWER TO A QUESTION. WHICH IS NOT GOING TO BE A RELEVANT QUESTION TO ANYBODY, BUT WHAT - ON PAGE 261, LINE 23:
QUESTION: "WHAT IS THE LANGUAGE IN THE NEXT TO LAST PARAGRAPH IN THE RIGHT-HAND COLUMN OF PAGE 530, CAN YOU TELL ME IN YOUR OWN WORDS WHAT THAT MEANS TO YOU?"
YOUR ANSWER. WOULD YOU READ YOUR ANSWER TO THAT QUESTION.

A. "I THINK THAT IS SELF-EXPLANATORY. IT SAYS THAT IT WAS NOT DESIGNED AS A PUNITIVE MEASURE AND THE POLICY WAS NOT. IT WAS TO GIVE SOME TEETH TO OUR COUNSELING EFFORTS. COUNSELING EFFORTS RELATED TO THE PATIENT UNDERSTANDING THE RISK TO HER AND HER UNBORN CHILD OR TO HER CHILD IN RELATION TO HARM THAT COULD COME TO HER, INCLUDING HER OWN DEATH. WE WERE CONCERNED ABOUT PATIENTS ABRUPTING. AND THAT IS THE COUNSELING EFFORTS WE WERE TALKING ABOUT, TO THE BEST OF MY RECOLLECTION."

Q. THE ANSWER DOES GO ON. YOU'RE FREE TO READ IT IF YOU WOULD LIKE TO. IF YOU WOULD RATHER STOP YOU CAN.

A. "AND LOOKING AT THE NUMBER OF PEOPLE WHO WERE GOING INTO TREATMENT AND THE GOAL OF OUR PROGRAM WAS FETAL PROTECTION, AND THE FETUS TURNS INTO A CHILD AS SOON AS ITS FEET COME OUT

[SHIRLEY BROWN 89]

AT THE TIME OF BIRTH, AND NOT MATERNAL PROSECUTION. I MEAN, WE WERE NOT INTERESTED IN HEALTH CARE PROVIDERS AND MATERNAL PROSECUTION, WE WERE INTERESTED IN PROTECTING THE UNBORN CHILD AND THE CHILD FROM FURTHER ABUSE AND NEGLECT."

Q. MY FOCUS, MS. BROWN, IS UP AT THE START OF THAT ANSWER.

YOU INDICATED THAT IT WAS TO GIVE SOME TEETH TO OUR COUNSELING EFFORTS. COUNSELING EFFORTS RELATED TO THE PATIENT'S UNDERSTANDING THE RISK TO HER, DOT, DOT, DOT.

IF YOU OR NO ONE ELSE WAS DOING ANY SUBSTANCE ABUSE COUNSELING AT MUSC, TO WHAT WERE YOU REFERRING WHEN YOU REFERRED TO "OUR COUNSELING EFFORTS RELATED TO THE PATIENT'S UNDERSTANDING OF THE RISK TO HER"?

A. THE PROBLEMS THAT CAN OCCUR TO HER RELATED TO HER PREGNANCY AND COCAINE ABUSE, THAT IS AN EDUCATIONAL COUNSELING EFFORT. WE DO NOT GO INTO AND I CANNOT EVEN DISCUSS SUBSTANCE ABUSE COUNSELING, YOU KNOW, STEP PROGRAMS AND ALL OF THE THINGS THAT THEY DO. WE -

Q. THAT WHO DOES?

A. THAT SUBSTANCE ABUSE COUNSELORS DO OR INSTITUTE OF PSYCHIATRY AND VARIOUS PLACES. THIS WAS TRULY COUNSELING DEFINED IN THIS TERMS AS OUR EDUCATIONAL EFFORTS. I TALKED TO THEM AND TRIED TO LET THEM UNDERSTAND ALL OF THE MEDICAL PROBLEMS THAT COULD OCCUR TO THEM FOR CONTINUED USE INCLUDING THEIR DEATH. AND TO ME, THAT IS NOT SUBSTANCE ABUSE COUNSELING, THAT IS JUST TRYING TO EDUCATE A PERSON ABOUT ALL

OF THE THINGS THAT CAN HAPPEN TO THEM.
Q. WHEN THEY USE ILLEGAL SUBSTANCES DURING THEIR PREGNANCY?
A. THAT IS CORRECT. OR AT ANY POINT IN TIME BECAUSE SOME OF THESE WOMEN HAD ALREADY DELIVERED.
Q. LET ME REFER YOU TO JOINT EXHIBIT NUMBER 2, WHICH IS IN EVIDENCE. MS. BROWN, THAT APPEARS TO BE YET A THIRD VERSION OF THE POLICY. IS IT?
A. IT APPEARS TO BE THE - THEY REDID THE POLICY MANUALS AND NOW IT'S AN M-7 POLICY. TO ME IT SAYS THE BASIC SAME THINGS, BUT THE FORMAT OF THE MEDICAL UNIVERSITY POLICY AND PROCEDURES CHANGED. WHAT HAD TO BE INCLUDED IN THE POLICY.
Q. I UNDERSTAND THAT IT'S YOUR POSITION THAT THERE IS NO SUBSTANTIVE DIFFERENCE, BUT INSOFAR AS THERE IS SOME DIFFERENCE, SUBSTANTIVE OR NOT, IT IS YET A THIRD VERSION OF THE POLICY; IS THAT RIGHT?
A. THAT IS CORRECT.
Q. AND WHEN WAS THIS THIRD VERSION OF THE POLICY APPROVED OR IMPLEMENTED?
A. I'LL HAVE TO LOOK ON THE BACK TO SEE WHAT DATE.
Q. WHEREVER YOU WOULD LIKE, MA'AM.
A. IT SAID THE DATE REVIEWED WAS MARCH OF '93. AND THE LEGAL REVIEW DATE WAS IN MARCH OF '93.

Q. THANK YOU. DID ANYONE AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA KEEP OR MAKE STATISTICAL RECORDS OF THE RACIAL MAKEUP OF THOSE WHO WERE SELECTED FOR DRUG SCREENING PURSUANT TO THE

[SHIRLEY BROWN 91]

INTERAGENCY POLICY?
A. NOT TO MY KNOWLEDGE.
Q. WHEN YOU RECEIVED WRITTEN NOTIFICATION OF NONCOMPLIANCE FROM THE CITY OF CHARLESTON SUBSTANCE ABUSE TREATMENT PROGRAM, IT WOULD BE YOU WHO WOULD PICK UP THE PHONE AND CALL THE POLICE AND NOTIFY THEM, FAIR?
A. THAT IS CORRECT.
Q. AND YOUR CONTACT PERSON WITH THE CHARLESTON POLICE DEPARTMENT WAS DETECTIVE WARING, WARING, RIGHT?
A. THAT IS CORRECT.
Q. AND DETECTIVE WARING, AFTER YOUR PHONE CONVERSATION, WOULD COME TO THE HOSPITAL EITHER ALONE OR WITH OTHERS AND CONSUMMATE THE ARREST OF PEOPLE WHO WERE GOING TO BE ARRESTED, FAIR?
A. THAT IS CORRECT.
Q. FOR MANY OF THOSE ARRESTS YOU WERE PRESENT?
A. I WAS.
Q. DID YOU EVER NOTIFY, EVER NOTIFY A PATIENT BEFORE THE ARREST WAS TO TAKE PLACE THAT THEY WERE GOING TO BE ARRESTED?

A. I DO NOT EVER RECALL TELLING A PATIENT THAT THEY WERE GOING TO BE ARRESTED.
Q. DO YOU KNOW OF ANY PROCEDURE IN PLACE FOR ANYONE ELSE TO NOTIFY A PATIENT THAT THEY WERE GOING TO BE ARRESTED BEFORE IT ACTUALLY HAPPENED?
A. I DON'T KNOW OF ANY PROCEDURE AND I DON'T RECALL. I

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[SHIRLEY BROWN 102]

POSITIVE DRUG SCREENS THEY HAD, WOULDN'T YOU?
A. I THINK SO.
Q. YOU THINK SO OR YOU KNOW SO, MS. BROWN?
A. IT'S BEEN SO LONG, YOU KNOW, I CAN'T REMEMBER THE QUESTIONS THAT THEY ASKED.
Q. WHO ASKED?
A. THE POLICE.
Q. WELL, VOLUME 2, PAGE 349, LINE 23. LINE 25. LET ME SHOW YOU THE DEPOSITION YOU GAVE THURSDAY SEPTEMBER 28, 1995, LESS THAN A YEAR AGO, AT 9:30 IN THE MORNING. DO YOU RECALL GIVING THAT DEPOSITION?
A. YES, I DO.
Q. AND DO YOU RECALL THAT YOU WERE PLACED UNDER OATH BEFORE YOU GAVE THE DEPOSITION?
A. THAT IS CORRECT.
Q. SAME AS YOU ARE IN THE COURT ROOM HERE?
A. THAT IS CORRECT.

Q. AND LET ME SHOW YOU PAGE 349. AND I'M GOING TO START READING THE QUESTION TO YOU, MS. BROWN, BEGINNING AT LINE 22. "WOULD YOU REPORT TO THEM THAT THIS PATIENT HAD, LET'S SAY A PATIENT WHO HAD THREE POSITIVE DRUG SCREENS AND YOU KNEW THAT?"

WOULD YOU READ TO THE JURY, PLEASE, WHAT YOUR ANSWER WAS IN SEPTEMBER OF 1995.

A. "I WOULD REPORT NUMBER OF POSITIVE DRUG SCREENS."

[SHIRLEY BROWN 103]

Q. OKAY. NOW, DID ANY PATIENT EVER GIVE YOU PERMISSION OR AUTHORIZATION OR CONSENT TO REPORT TO THE POLICE OR TO ANYONE ELSE THAT A NUMBER OF TIMES THEY TESTED POSITIVE FOR DRUGS?

A. NO, SHE DID NOT.

Q. BUT IS IT YOUR POSITION THAT THE GENERAL COUNSEL FOR MUSC ADVISED YOU AND AUTHORIZED YOU TO REPORT THAT INFORMATION WITHOUT THE PATIENT'S AUTHORIZATION, CONSENT?

A. I WAS TOLD UNDER THE STATUTES FOR CHILD ABUSE AND NEGLECT THAT WE WERE TO REPORT.

Q. THE NUMBER OF POSITIVE SCREENINGS, MS. BROWN, THAT'S WHAT MR. GOOD THE GENERAL COUNSEL TOLD YOU?

A. THE REASON FOR THE SUSPECTED CHILD ABUSE AND NEGLECT.

MY QUESTION WAS: DID MR. GOOD, GENERAL COUNSEL FOR THE HOSPITAL, TELL YOU TO REPORT TO THE POLICE THE NUMBER OF POSITIVE DRUG SCREENS?
A. I WAS TO REPORT THE POSITIVE URINE DRUG SCREENS. I DO NOT REMEMBER HIM SAYING STATE THE NUMBER. HE SAID THAT I HAD TO REPORT THE POSITIVE DRUG SCREENS.
Q. IN ADDITION TO THE NUMBER OF POSITIVE DRUG SCREENS, YOU WOULD TELL DETECTIVE WARING OTHER THINGS ABOUT THE PATIENT, WOULDN'T YOU?
A. THAT IS CORRECT.
Q. YOU WOULD TELL DETECTIVE WARING ABOUT YOUR PATIENT'S ADDRESS?
A. THAT IS CORRECT.

[SHIRLEY BROWN 104]

Q. DATE OF BIRTH?
A. THAT IS CORRECT.
Q. WHAT DID DATE OF BIRTH HAVE TO DO WITH FETAL PROTECTION OR CARE AND TREATMENT OF A MOTHER OR CHILD ABUSE?
A. I HAVE NO IDEA.
Q. YOU ALSO TOLD DETECTIVE WARING THE SOCIAL SECURITY NUMBER, DIDN'T YOU?
A. THAT IS CORRECT.
Q. WHAT DID THE PATIENT'S SOCIAL SECURITY NUMBER HAVE TO DO WITH FETAL PROTECTION, CARE AND TREATMENT OF THE MOTHER,

TREATMENT FOR SUBSTANCE ABUSE OR CHILD ABUSE?
A. I WAS INSTRUCTED BY LEGAL COUNSEL TO GIVE IDENTIFYING NAME AS WELL AS SOCIAL SECURITY NUMBER. SOME PEOPLE USED MULTIPLE NAMES.
Q. IN FACT - OKAY. WHAT DOES THE USE OF MULTIPLE NAMES HAVE TO DO WITH SUBSTANCE ABUSE, FETAL PROTECTION AND CHILD ABUSE?
A. I DON'T KNOW. I GAVE THE INFORMATION I WAS SUPPOSED TO GIVE.
Q. IN FACT, WHAT HAPPENED WAS, THE CHARLESTON CITY POLICE DEPARTMENT, CAPTAIN ROBERTS, DETECTIVE WARING SAID THESE THINGS WOULD BE REAL HELPFUL TO US, WE'RE GOING TO DEVELOP A LITTLE FORUM AND IF YOU COULD HAVE THIS INFORMATION READY FOR US WHEN WE CALL, WE'LL BE GRATEFUL TO YOU OR SOMETHING LIKE THAT, ISN'T THAT THE WAY IT HAPPENED? AND THEN YOU - LET ME

[SHIRLEY BROWN 105]

STOP THERE. ISN'T THAT THE WAY IT HAPPENED?
A. I WAS GIVEN THE INFORMATION THAT I WAS SUPPOSED TO GIVE.
Q. ISN'T THAT THE WAY IT HAPPENED, YOU GOT THAT INFORMATION AS TO WHAT WOULD BE HELPFUL FROM THE CHARLESTON POLICE DEPARTMENT?

A. THEY DID NOT GIVE ME A FORM, THEY SAID WE NEED THE FOLLOWING INFORMATION.
Q. YES.
A. BUT NO MEDICAL RECORDS WERE RELEASED TO THE CHARLESTON POLICE DEPARTMENT.
Q. MS. BROWN, I DIDN'T ASK YOU WHETHER MEDICAL RECORDS WERE. THAT REQUEST FOR THAT INFORMATION CAME FROM THE POLICE, IT WASN'T BECAUSE MR. GOOD TOLD YOU HAD TO GIVE THIS, IT WAS BECAUSE THE POLICE SAID WE WOULD LIKE TO HAVE THAT, FAIR?
A. FAIR.
Q. WOULD YOU EXPLAIN TO ME WHY YOU TOLD US THEN, WITHIN THE LAST THREE MINUTES, IT WAS BECAUSE MR. GOOD TOLD YOU TO DO IT?
A. I DIDN'T RELEASE ANY INFORMATION TO ANYONE WITHOUT FIRST DISCUSSING IT WITH THE LEGAL COUNSEL AT THE MEDICAL UNIVERSITY.
Q. WITH EACH OF THE PATIENTS WHO WERE ARRESTED, YOU INDICATED THAT YOU DIDN'T TELL THEM WHETHER THEY WOULD BE ARRESTED. DID YOU TELL THEM THAT YOU WERE NOTIFYING THE SOLICITOR'S OFFICE AND/OR THE POLICE ABOUT THEIR COCAINE USE WHILE PREGNANT? DID YOU TELL THEM THAT BEFORE YOU NOTIFIED

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EMPLOYEE OF THE SOLICITOR'S OFFICE, FAIR?
A. I THINK THE SOLICITOR'S OFFICE TRACKING STOPPED BEFORE THE SCAN MEETING STOPPED.
Q. ALL RIGHT. BUT AT SOME POINT IN TIME THE SOLICITOR'S OFFICE WAS TRACKING THE PROGRESS OF THE SUBSTANCE ABUSING PREGNANT WOMEN, FAIR?
A. THAT IS CORRECT.
Q. AT THE HOSPITAL, RIGHT?
A. THAT IS CORRECT.
Q. WITH THE HOSPITAL RECORDS AND DOCUMENTS?
A. ONLY WITH THE SOLICITOR'S LETTER AND THE ROLODEX LITTLE SHEET AND STUFF KEPT IN MY OFFICE, NOT THE ACTUAL HOSPITAL RECORD.
Q. SPEAKING OF THE ROLODEX, MS. BROWN, LET ME SHOW YOU WHAT HAS BEEN MARKED EXHIBIT 180-A AND ASK YOU, MA'AM, WHETHER THIS IS A PHOTOSTATIC COPY, ALBEIT POOR, OF THE CONTENTS OF THE ROLODEX THAT EXISTED ON YOUR DESK AT MUSC FROM THE PERIOD '89 TO '90, '91, '92?
A. THIS LOOKS LIKE MY ROLODEX, XEROXED COPIES.
Q. AND THE WAY I GOT THAT WAS THAT YOU PROVIDED IT TO YOUR LAWYERS TO GIVE TO ME?
A. THAT IS CORRECT.
MR. WHERRY: YOUR HONOR, AT THIS POINT I WOULD MOVE INTO EVIDENCE EXHIBIT 180-A.

MR. HOOD: WE HAVE NO OBJECTION AS TO THE TEN

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[SHIRLEY BROWN 112]

SUSTAIN IT. HE DIDN'T OBJECT TO THE OTHER.

MR. WHERRY: I UNDERSTAND.

THE COURT: THAT INVOLVING THE PLAINTIFFS IS ADMITTED WITHOUT OBJECTION.

MR. WHERRY: THANK YOU, SIR.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, IN THE COURSE OF BEING THE MANAGER OF THIS POLICY INSOFAR AS IT AFFECTED THE OB-GYN DEPARTMENT, DID YOU EVER MAKE DECISIONS - DID YOU EVER MAKE DECISIONS ABOUT THE DISCHARGE OF THE INFANT THAT WAS BORN?

A. THE NEONATOLOGIST MADE THE DECISION ON THE DISCHARGE OF THE INFANT. THEY MIGHT WAIT UNTIL I OR THE SOCIAL WORKER HAD HEARD FROM DSS, ETCETERA, BEFORE THEY WROTE THEIR FORMAL DISCHARGE.

Q. SO YOU WOULD HAVE INPUT ON WHETHER A BABY GOT TO LEAVE THE HOSPITAL, FAIR?

A. THE WAY IT WAS EXPLAINED TO ME BY LEGAL COUNSEL, THAT DSS HAS 48 HOURS ONCE THEY HAVE BEEN NOTIFIED ABOUT A CASE OF ABUSE OR NEGLECT. AND THAT ONCE WE HAVE MADE THAT REPORT TO

THE DEPARTMENT OF SOCIAL SERVICES, THAT WE HAVE TO KEEP THE BABY AT THE HOSPITAL UNTIL DSS GIVES US PERMISSION THAT THE CASE IS EITHER INDICATED OR IT ISN'T. AND DSS WOULD EITHER CALL ME OR THE SOCIAL WORKER OR WHOEVER WAS COVERING FOR ONE OF US, TO STATE WHETHER THE CASE WAS INDICATED OR NOT INDICATED.

[SHIRLEY BROWN 113]

Q. BUT IT WAS YOU WHO WOULD MAKE THAT DECISION NOT MR. GOOD, THE GENERAL COUNSEL FOR THE HOSPITAL, RIGHT?

A. MAKE THE DECISION ABOUT CALLING DSS?

Q. YEAH. AND NOT DISCHARGE THE BABY FOR 48 HOURS, MR. GOOD WOULDN'T MAKE THAT DECISION, YOU WOULD MAKE IT, FAIR?

A. I WOULD WAIT UNTIL WE HEARD FROM DSS, THAT IS CORRECT.

Q. IT WAS NOT MR. GOOD THAT WAS DOING THAT, IT WAS YOU WHO WAS DOING THAT?

A. BUT IT WAS MR. GOOD WHO EXPLAINED THE LAW TO ME AS TO WHAT THE HOSPITAL WAS REQUIRED TO DO IN RELATION TO NOT DISCHARGING THE BABY WHERE THERE WAS A POTENTIAL HARM THAT COULD OCCUR.

Q. DO YOU KNOW DR. TRIBBLE?

A. YES, I DO.

is Q. DR. TRIBBLE, IN THIS OPERATIVE TIME PERIOD, WAS EMPLOYED
16 BY THE HOSPITAL?
17 A. AS A FELLOW.
18 Q. AS ANYTHING. THE ANSWER, I TAKE IT, TO THE QUESTION IS
19 YES?
20 A. YES.
21 Q. TRIBBLE WAS A MEDICAL DOCTOR?
22 A. SPECIALIZING AS A NEONATOLOGIST.
23 Q. DR. TRIBBLE WAS A MEDICAL DOCTOR?
24 A. THAT'S RIGHT.
25 Q. DR. TRIBBLE HAD PRIVILEGES AT MUSC?

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[SHIRLEY BROWN 125]

1 MR. WHERRY: IN MY OPINION, THE ANSWER IS YES. I
2 HAVE BEEN ON THE FACULTY.
3 THE COURT: YOU SHOW ME SOME RULE OR REGULATION THAT
4 SETS THAT FORTH, AND I'LL BE GLAD TO CHANGE MY OPINION ABOUT
5 IT. LET'S GO ON TO SOMETHING ELSE.
6 MR. WHERRY: YES, SIR.
7 Q. (BY MR. WHERRY, CONTINUING) YOU AGREE WITH ME, MS.
8 BROWN, THAT A COCAINE BABY, A BABY WHO WAS BORN BY A
9 SUBSTANCE ABUSING MOTHER, LOOKS NO DIFFERENT FROM AN ORDINARY
10 BABY?
11 A. THAT'S CORRECT.
12 Q. NOW, MS. BROWN, THE ONLY WAY TO DETERMINE FROM THE BABY

WHETHER THERE HAS BEEN COCAINE ABUSE IS BY THE URINE DRUG SCREEN; IS THAT RIGHT?
A. THAT IS CORRECT.
Q. AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, PURSUANT TO THE INTERAGENCY POLICY, WERE MOTHERS OF THE CHILDREN THAT WERE TESTED ASKED FOR OR DID THEY GIVE PERMISSION TO DO URINE DRUG SCREENS ON THEIR CHILDREN?
A. ON THE BACK OF THE CONSENT FORM THAT THEY SIGNED FOR GIVING US PERMISSION TO GIVE CARE TO THE CHILD, IT STATES THAT WE CAN DO A URINE, DRUG SCREEN IF DEEMED NECESSARY BY THE PHYSICIAN.
Q. DOES IT SAY IN THAT CONSENT THAT YOU CAN DISCLOSE THE RESULTS OF IT TO THE POLICE?

[SHIRLEY BROWN 126]

A. NO, IT DOES NOT.
Q. IN FACT, THE CONSENTS THAT THEY SIGNED FOR TREATMENT OF THEM DOESN'T SAY THAT THE RESULTS OF WHATEVER TESTS YOU DO ON THEM WILL BE DISCLOSED TO THE POLICE, EITHER, DOES IT?
A. NO, IT DOESN'T.
Q. WERE THERE MONTHLY REPORTS DONE AT THE HOSPITAL OF WOMEN SUSPECTED OF SUBSTANCE ABUSE?
A. COULD YOU EXPLAIN MONTHLY REPORTS? I'M -
Q. SURE. YOU SAID THAT YOU HAD THIS SCAN COMMITTEE THAT MET

ONCE A MONTH; ISN'T THAT'S RIGHT?
A. YES.
Q. WAS THERE A REPORT THAT WAS GIVEN TO THAT SCAN COMMITTEE? WAS ALL OF THIS STUFF PUT TOGETHER IN A DOCUMENT FOR PRESENTATION TO THEM?
A. YES, IT WAS, BUT IT INCLUDED CHILDREN WHO HAD BEEN RAPED, BURNED, ANY TYPE OF ABUSE.
Q. AND IT DEALT WITH BOTH THE MOTHERS AND THE CHILDREN?
A. IT GAVE THE INFORMATION ON THE CHILDREN.
Q. THIS DOCUMENT, THIS SCAN REPORT, WENT TO, I TAKE IT, ALL OF THE MEMBERS OF THE SCAN COMMITTEE?
A. I'M ASSUMING. I WASN'T RESPONSIBLE FOR MAILING IT OUT.
Q. DID YOU GET A COPY OF IT EACH MONTH?
A. I GOT A COPY.
Q. WERE YOU ON THE SCAN COMMITTEE?
A. YES, I WAS.

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[SHIRLEY BROWN 159]

Q. HEROIN, WE HAVE KNOWN THE HARMFUL SIDE EFFECTS OF HEROIN SINCE THE EARLY SIXTIES, HAVEN'T WE?
A. YES, WE HAVE.
Q. WAS ANYTHING DONE BEFORE THE POLICY WAS STARTED WITH RESPECT TO HEROIN? WAS THERE ANY PROTOCOL FOR THAT?
A. I DO NOT RECALL ANYONE TESTING POSITIVE FOR HEROIN AT

THAT POINT IN TIME.
Q. NOT MY QUESTION. WAS THERE ANY PROTOCOL AT THE HOSPITAL, ANY PLAN, ANYTHING IMPLEMENTED WITH RESPECT TO HEROIN AND FETAL HEALTH?
A. IT WOULD HAVE BEEN REPORTED TO THE DEPARTMENT OF SOCIAL SERVICES.
Q. BUT NOT TO THE POLICE AND NOT TO THE SOLICITOR'S OFFICE?
A. THAT IS CORRECT.
Q. WHAT WAS DIFFERENT ABOUT COCAINE AND WHERE YOU REPORTED IT THAN HEROIN? NOTHING, WAS IT?
A. IT'S MY UNDERSTANDING THAT SOUTH CAROLINA LAW UNDER CHILD ABUSE AND NEGLECT, SAID THAT YOU WERE TO REPORT TO THE POLICE AND DSS.
Q. YES, MA'AM.
A. AND IT WAS DECIDED THAT WE SHOULD REPORT TO BOTH.
Q. WHY?
A. I CAN'T ANSWER THAT QUESTION.
Q. DID YOU HELP THEM MAKE THAT DECISION?
A. NO, I DID NOT. I WAS IN THE MEETINGS WHERE THE HARMFUL

[SHIRLEY BROWN 160]

EFFECTS OF COCAINE ABUSE WERE DISCUSSED, BUT THE LAW WAS EXPLAINED TO US BY THE PEOPLE WHO ARE EXPERIENCED IN LEGAL ISSUES.
Q. I'LL MOVE ON.

LET ME SHOW YOU WHAT HAS BEEN MARKED NUMBER 171 FOR IDENTIFICATION. LET ME WITHDRAW THAT FOR A MOMENT. LET ME SHOW YOU WHAT HAS BEEN MARKED 123 FOR IDENTIFICATION AND ASK YOU WHETHER YOU CAN RECOGNIZE THAT AS BEING ONE OF YOUR CHEAT SHEET FORMS?

A. YES, IT IS.

MR. HOOD: IT'S BEEN ASKED AND ANSWERED, YOUR HONOR, ON ALL OF THESE DOCUMENTS. THESE ARE THE SAME ONES THAT WE WENT OVER.

MR. WHERRY: I'M SORRY, I THOUGHT THEY WERE THE ONES THAT I JUST HANDED YOU A MOMENT AGO.

MR. HOOD: YOU HANDED THEM TO ME TWICE.

MR. WHERRY: THAT'S ABSOLUTELY CORRECT.

Q. (BY MR. WHERRY, CONTINUING) ON THAT CHEAT SHEET DOCUMENT ALCOHOL AND TOBACCO ARE LISTED, AREN'T THEY?

A. YES, THEY ARE.

Q. AND THAT'S BECAUSE THEY HAD A POTENTIAL ADVERSE EFFECT ON PREGNANCY AND FETAL HEALTH?

A. THEY CAN LEAD TO SOME PROBLEMS DURING FETAL HEALTH, THAT'S CORRECT.

Q. WITH RESPECT TO THE LIST OF THE IDENTIFYING

CHARACTERISTICS FOR URINE SCREENS, WOULD YOU TELL ME WHY NO PRENATAL CARE WAS IMPORTANT AS AN IDENTIFYING CHARACTER?

A. BECAUSE OF THE LITERATURE WHICH SUGGESTS THAT WOMEN WHO DID NOT SEEK PRENATAL CARE WERE AT RISK FOR COCAINE ABUSE.

Q. WHAT LITERATURE WAS THAT THAT SUGGESTED PEOPLE WHO DIDN'T GET PRENATAL CARE USED COCAINE?

A. SOME OF IT WAS PUBLISHED BY DOCTOR IRA CHASNOFF.

Q. AND IS THAT THE LITERATURE THAT YOU RELIED UPON, THE CHASNOFF LITERATURE TO MAKE THAT ONE OF THE CRITERIAS?

A. I DO NOT RECALL ALL OF THE LITERATURE THAT WAS REVIEWED AT THAT POINT IN TIME.

Q. LATE PRENATAL CARE AFTER 24 WEEKS, CHASNOFF AGAIN?

A. I DON'T RECALL THE REFERENCES ON THAT.

Q. INCOMPLETE PRENATAL CARE. CHASNOFF AGAIN?

A. I DO NOT RECALL THE REFERENCE.

Q. ABRUPTIO PLACENTAE?

A. THAT WAS OUT OF SOME OF DR. CHASNOFF'S WORK.

Q. INTRAUTERINE FETAL DEATH, CHASNOFF? THE BABY DIED IN UTERO WAS CAUSED BY COCAINE?

A. I CAN'T REMEMBER WHOSE ARTICLE THAT WAS FROM.

Q. PRETERM LABOR OF NO OBVIOUS CAUSE?

MR. HOOD: TO PIT A NURSE AGAINST A DOCTOR IN WHAT

HE WROTE IS UNFAIR. PLENTY OF DOCTORS WILL TESTIFY IN THE CASE.

MR. WHERRY: I ASKED WHAT SHE RELIED ON. I WASN'T

[SHIRLEY BROWN 162]

ASKING TO ARGUE WITH HER OR DISCUSS THEM OR TALK ABOUT THEM.

THE COURT: GO AHEAD. RELIED ON - SHE RELIED ON WHAT?

MR. WHERRY: IN SELECTING THESE CRITERIA. THAT WAS MY QUESTION.

THE COURT: DID SHE SELECT THEM?

MR. WHERRY: SHE WAS THERE IN THE SELECTION OF THEM.

MR. HOOD: SHE DIDN'T WRITE THE POLICY, SHE TESTIFIED TO THAT.

THE COURT: GO AHEAD. IT'S NOT A MATTER OF PITTING. I'LL PERMIT THE QUESTIONING. GO AHEAD.

Q. (BY MR. WHERRY, CONTINUING) LET ME CLEAR THAT UP. WHO WROTE THE POLICY? WHO PUT PEN TO PAPER AND WROTE THE POLICY?

A. IT WAS A - PEOPLE FROM THE DEPARTMENT OF OB, IT WAS PEOPLE FROM THE NEONATOLOGY, IT WAS PEOPLE FROM THE LEGAL OFFICE AT THE MEDICAL UNIVERSITY. IT WAS - IT WAS INPUT FROM DSS AND INPUT FROM CHARLESTON COUNTY SUBSTANCE ABUSE AND INPUT FROM THE SOLICITOR'S OFFICE.

Q. SO, NO ONE PERSON WROTE THE POLICY, FAIR?
A. THAT IS CORRECT.
Q. SO THERE WILL NEVER BE A WITNESS ON THIS WITNESS STAND WHO WILL SAY I WROTE THE POLICY?
A. I DON'T THINK SO.
Q. AND YOU WERE ONE OF THE PEOPLE WHO CONTRIBUTED TO FORMULATING THE POLICY?

[SHIRLEY BROWN 163]

A. I WAS ONE OF THE PEOPLE IN THE MEETINGS, YES, I WAS.
Q. WOULD IT BE FAIR TO SAY THAT YOU WERE ONE OF THE PEOPLE WHO WROTE THE POLICY INSOFAR AS NO ONE PERSON DID?
A. THAT'S CORRECT.
Q. PREVIOUSLY KNOWN DRUG AND ALCOHOL USE. CHASNOFF AGAIN?
A. I DON'T REMEMBER WHOSE, YOU KNOW, THE ALCOHOL AND DRUG ABUSE IS THROUGHOUT ALL OF THE LITERATURE RELATING TO CHILD ABUSE.
Q. SURE. CHILD ABUSE OR FETAL HEALTH, OR IS THERE NO DIFFERENCE?
A. I THINK THAT IT GETS TO BE A BUNCH OF SEMANTICS WHEN YOU TALK ABOUT THAT. I DON'T NORMALLY GO INTO A WOMEN AND SAY YOUR FETUS IS GETTING DAMAGED. I USUALLY SAY YOUR CHILD. IT TECHNICALLY IS NOT A CHILD UNTIL IT'S BORN, BUT YET THE STATE

OF SOUTH CAROLINA HAS RULED THAT IT IS A PERSON WITH RIGHTS AFTER 25 WEEKS.

Q. PRIOR TO THE ADOPTION OF THE POLICY, WHAT COUNSELING, WHAT REFERRALS FOR THERAPY WERE BEING DONE AND GIVEN BY YOUR UNIT AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. WHENEVER SOMEONE TESTED POSITIVE FOR DRUGS THEY WERE TALKED TO, COUNSELED, EDUCATED ABOUT THE HARMFUL EFFECTS OF DRUGS ON THEM AND THEIR UNBORN CHILD, OR THEIR CHILD IF IT HAD ALREADY BEEN BORN, AND A REFERRAL WAS MADE TO THE DEPARTMENT OF SOCIAL SERVICES WHEN THE CHILD WAS BORN.

MR. WHERRY: MAY I JUST A MOMENT, PLEASE, YOUR

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF SHIRLEY BROWN 11/22/96

[BROWN 171]

Q. OKAY. AND HOW LONG HAVE YOU WORKED AT THE MEDICAL UNIVERSITY HERE IN CHARLESTON?
A. I BEGAN WORKING AT THE MEDICAL UNIVERSITY IN 1985.
Q. SO ABOUT ELEVEN YEARS?
A. THAT'S CORRECT.
Q. AND WHAT DEPARTMENT DID YOU - DO YOU WORK IN OR HAVE WORKED IN?
A. I WORK FOR CLINICAL SERVICES THAT IS THE NURSING DEPARTMENT AT THE MEDICAL UNIVERSITY. PRIOR TO THAT I WAS ON FACULTY AT THE COLLEGE OF NURSING.
Q. AND WHAT ARE YOUR DUTIES AND RESPONSIBILITIES, PARTICULARLY AT THE TIME THAT WE'RE TALKING ABOUT IN '89, '90, '91, '92?
A. I WAS A CASE MANAGER FOR HIGH-RISK OBSTETRICS.
Q. AND WHAT DOES A CASE MANAGER FOR HIGH-RISK OBSTETRICS MEAN?
A. IT MEANS THAT PHYSICIANS, NURSING STAFF -
THE COURT: EXCUSE ME, SIR, CAN YOU SEE THE

WITNESS?
I DON'T KNOW HOW THAT TELEVISION GOT OUT THERE, BUT IT JUST OCCURRED TO ME IT WAS BETWEEN YOU AND THE JURY.
GOOD.
MR. HOOD: THANK YOU, YOUR HONOR.
Q. (BY MR. HOOD, CONTINUING) I CAN'T GET BACK THERE WHERE I WOULD LIKE TO BE, AND I DIDN'T REALIZE THE TV PROBLEM. GO

[BROWN 172]

AHEAD YOU WERE TELLING US WHAT YOU DO.
A. AS A CASE MANAGER AT THE MEDICAL UNIVERSITY AND NURSING STAFF, SOCIAL WORK STAFF, RESIDENTS, PHYSICIANS, DIETICIANS, ANYONE THAT WAS INVOLVED IN THE CARE OF THE PATIENT IN THE CLINIC OR IN THE HOSPITAL COULD CONSULT ME TO SEE THIS PATIENT TO LOOK AT WHAT THE PATIENT'S OVERALL NEEDS WERE, TO MAKE SURE THAT ALL OF THE RESOURCES THAT THE PATIENT NEEDED WERE IN PLACE. I COULD GET CALLED BECAUSE A PATIENT WAS HAVING PROBLEMS WITH THEIR FUNDING OR ETCETERA. AND I WOULD MAKE AN ASSESSMENT, MAKE A REFERRAL TO THE SOCIAL WORKER TO MAKE SURE THAT THE PATIENTS HAD THEIR WIC, FOOD STAMPS. SOME OF THE

PATIENTS DIDN'T HAVE HOMES, TO TRY TO GET THEM IN APPROPRIATE SHELTERS. I WOULD DO COUNSELING AFTER SOMEONE'S BABY HAD DIED, MAKE SURE THAT THEY GOT PUT IN THE PROPER FOLLOW-UP FOR THAT. PATIENTS WERE GIVEN MY CARD AND THEY COULD CALL ME AFTER THEY WERE DISCHARGED FROM THE HOSPITAL. IF THEY NEEDED SOMEONE TO TALK TO, I.E., ABOUT THEIR BABY DYING OR THEY WERE HAVING PRETERM LABOR AND ANY MEDICAL PROBLEM, I WAS KIND OF THE COORDINATOR. I WORE A LOT OF HATS AND I MIGHT NOT ALWAYS FIX THE PROBLEM, BUT I WOULD REFER THEM TO THE PEOPLE WHO WERE SUPPOSED TO BE ABLE TO HELP THEM.

Q. OKAY. NOW, WE TALKED ABOUT YESTERDAY THE POLICY THAT THIS LAWSUIT IS ABOUT. DID YOU WRITE THE POLICY?

A. NO, I DID NOT.

Q. DID YOU LIST - COME UP WITH A LIST OF THE MEDICAL

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CRITERIA BY WHICH WOMEN COME UNDERNEATH THE POLICY?

A. NO, I DID NOT.

Q. DID YOU - DID YOU - WELL, JUST EXPLAIN THEN WHAT YOUR ROLE WAS IN ADDITION TO THESE OTHERS JOBS YOU HAVE JUST DESCRIBED WITH REGARD TO THIS PARTICULAR SUBJECT, THE POLICY

AND DEALING WITH MOTHERS THAT USED COCAINE WHILE THEY WERE PREGNANT?

A. I ATTENDED THE INITIAL MEETING AS THE CASE MANAGER FOR OBSTETRICS AT THE MEDICAL UNIVERSITY WITH THE SOLICITOR'S OFFICE, THE POLICE, DSS, CHARLESTON COUNTY SUBSTANCE ABUSE, AND OTHER OFFICIALS FROM THE MEDICAL UNIVERSITY. AND I WAS AT SUBSEQUENT MEETINGS AS THE POLICY WAS DEVELOPED. IT WAS MY ROLE WHEN A PERSON TESTED POSITIVE TO COORDINATE ALL OF THEIR REFERRALS.

Q. OKAY. LET'S GO THROUGH THE STEPS OF THE POLICY, IF WE CAN. COME DOWN, MS. BROWN.

DEPUTY CLERK: DEFENDANT'S EXHIBIT 156.

Q. (BY MR. HOOD, CONTINUING) I JUST WANT THE JURY TO UNDERSTAND THIS POLICY I JUST WANT TO UNDERSTAND THE STEPS BY WHICH THE POLICY WAS UNDERTAKEN, OKAY? SO, LET'S WALK THROUGH IT POINT BY POINT. THE FIRST THING THAT WE HAVE ON HERE IS GENERAL CONSENT FORM SIGNED AT ADMISSION. WE HEARD FROM TWO PLAINTIFFS AND PUT INTO EVIDENCE TWO CONSENT FORMS. WHAT DOES THAT GIVE THE HEALTH CARE PROVIDERS A RIGHT TO DO AT THE MEDICAL UNIVERSITY?

MR. WHERRY: OBJECTION AS TO COMPETENCE.
THE COURT: THE OBJECTION IS SUSTAINED.
MR. WHERRY: THANK YOU, SIR.
THE COURT: THE DOCUMENT SPEAKS FOR ITSELF. YOU'RE WELCOME TO PUBLISH IT, BUT -
MR. HOOD: YES, SIR.
Q. (BY MR. HOOD, CONTINUING) WE HAVE DIFFERENT CONSENT FORMS HERE. JUST EXPLAIN TO THE JURY WHAT THE CONSENT FORM SAYS.
THE COURT: NO. I SUSTAIN THE OBJECTION. SHE CANNOT EXPLAIN IT. IT SPEAKS FOR ITSELF. SHE CAN READ IT.
MR. HOOD: I JUST ASKED HER TO. I'M SORRY.
THE COURT: YOU ASKED HER TO EXPLAIN IT.
MR. HOOD: JUST READ THE WORDS, PLEASE. I'M SORRY.
MR. WHERRY: YOUR HONOR, MAY I ASK WHAT NUMBER SHE IS READING?
MR. HOOD: THIS IS DEFENDANT'S 13-A. OKAY.
MR. WHERRY: YOUR HONOR, I'M GOING TO OBJECT I DON'T THINK 13-A HAS BEEN RECEIVED INTO EVIDENCE.
Q. (BY MR. HOOD, CONTINUING) THIS IS LORI GRIFFIN'S SIGNED CONSENT FORM PUT IN WITHOUT OBJECTION. I CONSENT TO THE TESTING FOR DRUGS IF DEEMED ADVISABLE AND SO FORTH. AND THEN

GOES ON TO SAY, THAT THEY HAVE MY PERMISSION TO REVEAL INFORMATION TO APPROPRIATE AGENCIES AND INDIVIDUALS WHERE IT BECOMES NECESSARY TO PROTECT THE WELFARE OF MYSELF, THE

[BROWN 175]

PATIENT, WHICH I GUESS IN THIS CASE WOULD BE THE CHILD AND OR THE COMMUNITY.

AND ARE SIMILAR FORMS SIGNED BY EACH PATIENT AS THE FIRST STEP OF COMING INTO THE MEDICAL UNIVERSITY?

A. THE ONE YOU READ IS THE CONSENT IF THEY COME IN FOR PRENATAL CARE.

Q. OKAY. AND THIS ONE, 106 IS A LONGER FORM AND HERE IT SAYS: I FURTHER CONSENT TO THE TESTING FOR INFECTIOUS DISEASES SUCH AS, AND IT LISTS THEM. AND I FURTHER CONSENT TO TESTING OF DRUGS IF DEEMED ADVISABLE BY MY PHYSICIAN.

AND WHEN IS THIS CONSENT FORM OBTAINED?

A. WHEN THEY COME INTO THE HOSPITAL FOR ANY DELIVERY OR ANY MEDICAL CARE.

Q. WE HAVE TWO FORMS, A LONG ONE FOR DELIVERY AND A SHORTER ONE YOU SAID THAT'S FOR PRENATAL CARE?

A. YES.

Q. GENERAL CONSENT FORM IS NUMBER 1. NOW THESE WOMEN, THE

TWO THAT HAVE TESTIFIED SO FAR, ARE THEY GIVEN THE MEDICAL UNIVERSITY PAMPHLET WHEN THEY COME IN?

A. THE MEDICAL UNIVERSITY PAMPHLET IS GIVEN AS YOU COME THROUGH THE ADMITTING OFFICE. THE OB PATIENT COMES DIRECTLY TO THAT UNIT SO THEY'RE NOT GIVEN THAT PAMPHLET UPON ADMISSION TO THE HOSPITAL.

Q. OKAY. NOW THE NEXT ITEM HERE IS A VIDEO IS VIEWED AND A LETTER IS SIGNED; IS THAT CORRECT?

* * *

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THERE MAY BE SOME DISAGREEMENT, AND I'M SURE THERE WILL BE DISAGREEMENT AS TO WHETHER THE STATEMENTS MADE THEREIN, FOR INSTANCE ABOUT THE HARM OF COCAINE, OR THE HARM OF CIGARETTES OR THE HARM OF ALCOHOL, OR THE EXTENT OF HARM OF ANY OF THOSE TO UNBORN BABIES, THERE MAY BE DEBATES ABOUT THAT. AND THEY WILL HAVE TO COME FROM THE WITNESS STAND, BECAUSE THIS TAPE YOU CANNOT CONSIDER FOR THE TRUTH OF ANY OF THOSE STATEMENTS, ONLY FOR THE FACT THAT THESE STATEMENTS WERE SHOWN TO CERTAIN PEOPLE AND ONLY TO THOSE PEOPLE WHO WILL BE IDENTIFIED AT SOME POINT IN TIME I'M SURE AS HAVING SEEN THEM.

HOPE YOU UNDERSTAND THAT. OKAY. GO AHEAD.
MR. HOOD: I'LL NOW SHOW THE VIDEOTAPE THAT MS. BROWN JUST IDENTIFIED THE SECOND STAGE OF THE POLICY.
(VIDEO TAPE PUBLISHED TO JURY.)
Q. (BY MR. HOOD, CONTINUING) MS. BROWN, AFTER THE VIDEO WAS SHOWN, IF A PATIENT MEETS THE MEDICAL CRITERIA UNDER THE POLICY, THE THINGS THAT WE JUST HEARD ABOUT, ABRUPTIO PLACENTAE AND THE DIFFERENT MEDICAL THINGS THAT CAN HAPPEN, THE NEXT ITEM IS A URINE DRUG SCENE IS PERFORMED. WHAT IS THAT?
A. THAT'S WHEN A URINE SAMPLE IS SENT TO THE LAB TO BE ANALYZED FOR COCAINE AND VARIOUS OTHER DRUGS.
Q. OKAY. AND IF THE URINE DRUG SCREEN COMES BACK POSITIVE INDICATING THE MOTHER HAS USED COCAINE, THE NEXT STEP IS TO SHOW THE VIDEO THAT WE HAVE JUST SEEN.

[BROWN 195]

MR. HOOD: AND I WOULD LIKE TO MARK IT AS AN EXHIBIT, PREMARKED IT AS DEFENDANT'S EXHIBIT 149.
Q. (BY MR. HOOD, CONTINUING) THEY'RE SHOWN THE VIDEO

AGAIN. AND THEN THEY MEET WITH THE OB CASE MANAGER. WHO IS THAT?

A. I WAS ONE OF THE OB CASE MANAGERS.

Q. OKAY. AND THEN THERE ARE A LIST OF FIVE THINGS THAT YOU AND THE OTHER CASE MANAGERS WERE TO DISCUSS. COME DOWN AND READ THESE AND EXPLAIN THEM TO THE JURY, PLEASE.

A. COMBINATION OF TAKING A HISTORY.

THE COURT: MS. BROWN, I'M GOING TO ASK YOU TO EXCHANGE SIDES WITH MR. HOOD. IT MAKES IT A LOT EASIER FOR HER TO TAKE IT DOWN.

THE WITNESS: OKAY.

A. A HISTORY WOULD BE TAKEN FROM THE PATIENT. FURTHER DISCUSS AND SEE WHAT TYPE QUESTIONS THEY HAD OF HARMFUL EFFECTS OF COCAINE OR ANY OTHER DRUGS THAT THEY ADMITTED TO USING COULD HAVE ON THEM. IT WAS AN EDUCATIONAL-TYPE THING. AT THAT POINT IN TIME WOULD TALK ABOUT THEM GOING INTO TREATMENT. DEPENDING ON WHEN IT WAS AND THE POLICY, THE VARIOUS OPTIONS EACH YEAR, MORE OPTIONS FOR PEOPLE OPENED UP. EXPLAIN THE REQUIREMENT TO REPORT THE URINE DRUG SCREEN AND OFFER AMNESTY BY THE SOLICITOR. THE SOLICITOR'S LETTER WAS REVIEWED AND SIGNED. IN READING THAT LETTER, EACH SENTENCE

WAS READ AND ASKED IF THEY HAD ANY QUESTIONS ABOUT THAT.

[BROWN 196]

THERE WAS A WITNESS IN THE ROOM WHEN THIS LETTER WAS READ.

Q. LET'S STOP RIGHT THERE. I FAILED TO ASK YOU ABOUT JOINT EXHIBIT 8. EXPLAIN TO THE JURY WHAT THAT LETTER IS, PLEASE.

A. WHENEVER A PERSON WAS SEEN IN THE CLINIC, THEY WOULD GO - AND THIS WAS PART OF DOCUMENTING THEIR EDUCATION, THE NURSES IN THE CLINIC WERE RESPONSIBLE FOR SHOWING THIS VIDEO. AND IF IT WAS THE FIRST TIME -

MR. WHERRY: OBJECTION, YOUR HONOR, HEARSAY. SHE IS TALKING ABOUT WHAT SOMEONE ELSE DID WHEN SHE WASN'T THERE OR SOMEONE ELSE TOLD THE PATIENTS WHEN SHE WASN'T THERE. THAT'S HEARSAY.

THE COURT: I THINK IT'S HEARSAY.

Q. (BY MR. HOOD, CONTINUING) EXPLAIN.

MR. HOOD: THIS IS A JOINT EXHIBIT. I'LL PUBLISH IT, YOUR HONOR.

Q. (BY MR. HOOD, CONTINUING) "I HAVE SEEN A VIDEO ON SUBSTANCE ABUSE AND HAVE BEEN ADVISED OF THE RISKS TO MYSELF AND MY BABY. I UNDERSTAND THAT THE MEDICAL UNIVERSITY,

MEDICAL CENTER STAFF IS WILLING TO ASSIST ME IN OBTAINING ASSISTANCE FOR DRUG ABUSE TREATMENT."

AND THE PATIENT SIGNED IT?

A. THAT'S CORRECT.

Q. ALL RIGHT. SO WE STARTED WITH THE CONSENT FORM AND THERE WERE TWO OF THOSE THAT YOU EXCHANGED. PRENATAL IN THE HOSPITAL. CONSENT FORM, I BLEW UP THE LANGUAGE OF IT. AND IT

[BROWN 197]

SAYS, JUST TO REITERATE, THAT THEY ACKNOWLEDGE SO FORTH AND CONSENT TO THE TESTING OF DRUGS IF DEEMED ADVISABLE BY MY PHYSICIAN.

THEN THE NEXT JOINT EXHIBIT THAT'S AGREED TO IS NUMBER 9. WHAT IS THIS DOCUMENT?

A. THAT'S AN APPOINTMENT LETTER.

Q. NOW, WHEN IN THE PROCESS OF THIS POLICY WAS THE APPOINTMENT DONE?

A. OKAY. WHEN YOU TOOK THE HISTORY AND THE PATIENT SAID WHAT TYPE OF TREATMENT THEY WANTED, THEN THE PERSON WHO WAS TAKING THE HISTORY, WHETHER IT WAS ME OR ONE OF THE PEOPLE, OTHER DESIGNEES WOULD GO AND CALL WHICHEVER FACILITY THIS PATIENT WAS TO GO INTO TREATMENT FOR, MAKE AN APPOINTMENT. IT WOULD BE PUT ON THAT, THE UNIT SECRETARY WOULD CALL AND MAKE

THE APPOINTMENT FOR PRENATAL CARE IF THEY WERE STILL PREGNANT.
Q. SO EXHIBIT 9 IS A WRITTEN APPOINTMENT WITH A PRENATAL CLINIC AT A CERTAIN TIME AND PLACE FOR SUBSTANCE ABUSE COUNSELING OR TREATMENT?
A. THAT'S CORRECT.
Q. NOW YOU HAVE MENTIONED THE SOLICITOR'S LETTER WHICH OCCURS RIGHT BEFORE THAT. AND I THINK THAT THERE ARE THREE OF THEM IN THE JOINT EXHIBIT. 5, 6 AND 7. WE HAVE A CHANGE IN SOLICITOR'S DURING THE POLICY. MR. CONDON TO MR. SCHWACKE. BASICALLY THE LETTER FROM THE SOLICITOR THE SAME?
A. ONE OF THE LETTERS TALKS ABOUT PRENATAL DRUG USE AND THE

[BROWN 198]

OTHER ONE TALKS ABOUT AT DELIVERY. THEY HAD ALREADY DELIVERED.
Q. OKAY. NOW, THEY GET THE SOLICITOR LETTER, GO TO SUBSTANCE ABUSE OR THEY WILL, IT'S UNDERLINED, BE PROSECUTED. GET THE APPOINTMENT. THEN WHAT IS THE NEXT THING?
A. ONE STEP THAT IS LEFT OUT.
Q. PLEASE ADD IT IN. SORRY.
A. IN PART OF REVIEWING THE VIDEO, THEY WERE ALSO, IN ADDITION TO THE LETTER THAT THEY WERE - SIGNED, THEY WERE GIVEN A LETTER FROM THE PHYSICIANS.

Q. OKAY. AND THAT'S JOINT EXHIBIT NUMBER 10. IS THAT SOMETHING THAT YOU PREPARED?
A. NO, I DID NOT.
Q. WHO PREPARED IT?
A. THAT WAS WRITTEN BY THE PHYSICIANS IN OB.
Q. THOSE ARE THE DOCTORS. OKAY. AND THAT'S GIVEN TO THE PATIENT?
A. THAT'S CORRECT.
Q. AND SINCE IT'S IN EVIDENCE, JUST READ THE CRUCIAL PARTS OF THIS, IF YOU CAN.
A. "IF YOU'RE USING DRUGS, PLEASE STOP. IF YOU'RE UNABLE TO STOP, PLEASE LET YOUR DOCTOR KNOW. WE WANT TO HELP MOTHERS GET OFF THE DRUGS FOR THE BENEFIT OF BOTH YOU AND YOUR BABY. WE WILL PROVIDE YOU WITH COUNSELING ABOUT THE HARMFUL EFFECTS OF DRUG ABUSE AND WILL MAKE ARRANGEMENTS FOR YOU TO BE SEEN AT

[BROWN 199]

THE SUBSTANCE ABUSE CLINIC. WE REALIZE DRUG ABUSE IS A VERY DIFFICULT PROBLEM AND WE WILL DO ALL WE CAN TO HELP YOU. IF, HOWEVER, WE CONTINUE TO DETECT EVIDENCE OF DRUG ABUSE OR A FAILURE TO FOLLOW RECOMMENDED TREATMENT, WE WILL TAKE ACTION TO PROTECT YOUR UNBORN CHILD. THE CHARLESTON POLICE, THE SOLICITOR'S OFFICE AND PROTECTIVE SERVICE DIVISION OF DSS ARE

ALSO COMMITTED TO THE PROTECTION OF THE UNBORN AND NEWBORN CHILDREN FROM THE HARMS OF ILLEGAL DRUG ABUSE. WE HOPE THAT YOU UNDERSTAND THE TRAGEDY WHICH IS BEING CAUSED BY THE CONTINUED USE OF ILLEGAL DRUGS DURING PREGNANCY. THIS POLICY OF PROVIDING WARNING, COUNSELING AND TREATMENT FOR PREGNANT WOMEN USING ILLEGAL DRUGS IS THE BEST WAY FOR US TO HELP YOU. FOR THOSE OF YOU WHO FAIL THIS TREATMENT, WE MUST ASK HELP TO PROTECT THE LIFE AND HEALTH OF OUR MOST INNOCENT UNBORN CHILDREN."

Q. SO IN THE PROCESS WE START WITH THE VIDEO. BUT WE START WITH THE INFORMED CONSENT, THE VIDEO. AFTER THE VIDEO THE SOLICITOR'S LETTER - NO, THE DOCTOR'S LETTER. AND THEN WE GO TO THE APPOINTMENT, THE SUBSTANCE ABUSE AND THEN THE SOLICITOR'S LETTER; IS THAT-RIGHT?

A. THE ONLY PEOPLE THAT IT WOULD - IF THEY TESTED POSITIVE, THEN IT WOULD GO FROM HERE OVER. FROM THIS EXHIBIT TO OUR PATIENTS OVER TO THIS WAS SOMETHING THAT WAS DONE TO ALL PATIENTS RECEIVING PRENATAL CARE AT THE MEDICAL UNIVERSITY.

Q. OKAY. IN OTHER WORDS, WHETHER THEY WERE A PRIVATE

PATIENT, A PAYING PATIENT, A FREE PATIENT IN THE CLINIC, EVERYONE THAT CAME IN, EVERY PATIENT GOT EXHIBIT 13? EXHIBIT 12?

MR. WHERRY: EXCUSE ME, MR. HOOD, I HAVE TO OBJECT.

THE COURT: YES.

MR. WHERRY: I REALIZE THAT THIS IS TECHNICALLY CROSS-EXAMINATION.

THE COURT: NO, IT'S NOT.

MR. WHERRY: IT'S REALLY DIRECT EXAMINATION.

THE COURT: IT'S NOT TECHNICALLY.

MR. WHERRY: THE QUESTIONS ARE HORRIBLY LEADING.

THE COURT: I SUSTAIN THE OBJECTION. THEY ARE.

Q. (BY MR. HOOD, CONTINUING) WHO GOT EXHIBITS 13, 14 -

THE COURT: NO. NO. YOU CAN'T LEAD. SHE KNOWS WHAT SHE IS TESTIFYING TO.

A. THIS IS A CONSENT FORM THAT YOU SIGNED.

Q. GIVE US THE NUMBERS OF THE EXHIBITS THAT YOU SAID A MOMENT AGO EVERYONE IN PRENATAL GOT, AND THEN THE OTHER EXHIBIT.

A. JOINT EXHIBIT 13 WAS THE CONSENT TO TREATMENT WAS GIVEN PRENATALLY IF THEY WENT THROUGH ANY OF OUR CLINIC AREAS. AND WE CALLED THE CLINICS ANYWHERE A PERSON GOT CARE IF SHE HAD INSURANCE OR DIDN'T.

Q. OKAY.
A. THIS IS A CONSENT FORM THAT YOU SIGNED WHEN YOU CAME INTO

[BROWN 201]

THE HOSPITAL.
Q. THAT'S TO DELIVER YOUR BABY?
A. OR FOR ANY TYPE OF COMPLICATION THAT YOU MIGHT HAVE.
Q. OKAY. THAT'S NUMBER?
A. THAT IS NUMBER 12.
Q. OKAY.
A. EVERYONE IN THE PRENATAL CLINIC WAS SHOWN THE VIDEO SMOKING, DRINKING AND DRUGS AND SIGNED A STATEMENT WHICH IS EXHIBIT NUMBER 9, STATING THAT THEY HAD SEEN THE VIDEO.
EXHIBIT NUMBER 10 WAS ALSO A LETTER THAT WAS GIVEN TO PRENATAL PATIENTS. OKAY?
IF A PATIENT MET THE CRITERIA SET FORTH BY THE PHYSICIANS AT THE MEDICAL UNIVERSITY TO BE SCREENED FOR DRUG ABUSE, THEN WHEN THAT SCREEN WAS POSITIVE, THEN THE OB CASE MANAGER, AND I WAS ONE OF THOSE, BUT THERE WERE A NUMBER OF OTHER PEOPLE THAT COULD HAVE BEEN CALLED, INCLUDING THE PCC, AND THAT'S PATIENT CARE COORDINATOR, WHO IS A NURSE WHO IS IN THE HOSPITAL WHEN THE REST OF US GO HOME, WAS CALLED AND SHE WOULD BE THE ONE THAT WOULD DO SOME OF THE REST OF THIS.

OKAY? AFTER WHOEVER TALKED TO THEM ABOUT ALL OF THE HARMFUL EFFECTS OF COCAINE USE, TOOK A BRIEF HISTORY. AND THE REASON FOR THIS HISTORY IS SO THAT IN TALKING WITH THE PHYSICIANS, SOCIAL WORKERS, NURSING, EVERYONE ELSE INVOLVED, ABOUT RISK FACTORS, WHAT OTHER -

THE COURT: MS. BROWN, LET ME STOP YOU. THAT'S NOT

[BROWN 202]

RESPONSIVE. WHAT OTHER EXHIBITS DO YOU SAY WERE SHOWN? THE REASON I WANT TO DO THAT, A MOMENT AGO YOU SAID THESE ON THIS SIDE DO SOMETHING AND THE OTHER SIDE DO SOMETHING. THE RECORD NEEDS TO REFLECT WHAT YOU WERE TALKING ABOUT.

THE WITNESS: ALL RIGHT.

A. JOINT EXHIBIT NUMBER 9 IS AN APPOINTMENT LETTER WHEN A PERSON TESTED POSITIVE FOR DRUGS WHERE WE WOULD WRITE ON THERE WERE THEY WOULD GO FOR SUBSTANCE ABUSE COUNSELING. OKAY? THESE WERE ONLY IF YOU TESTED POSITIVE AND THERE WAS ALSO AN APPOINTMENT MADE FOR PRENATAL CARE.

IF YOU TESTED POSITIVE, JOINT EXHIBIT NUMBER 7 AND JOINT EXHIBIT NUMBER 5, ONLY DIFFERENCE IS A CHANGE IN THE SOLICITOR, WOULD BE THE LETTER THAT YOU GOT IF YOU TESTED

POSITIVE WHILE YOU WERE STILL PREGNANT.

IF YOU HAD DELIVERED, JOINT EXHIBIT NUMBER 6 IS THE ONE THAT YOU WOULD GET STATING ALL OF THE INFORMATION IN THAT LETTER.

Q. THANK YOU VERY MUCH. I'M GOING TO COLLECT THESE. THE JURY WILL HAVE THEM AT THE END OF THE CASE. I'M GOING TO ASK YOU TO RETURN TO THE STAND, PLEASE.

MR. HOOD: YOUR HONOR, I BELIEVE, YOUR HONOR, ALL OF THESE ARE JOINT EXHIBITS. JOINT EXHIBITS 1 THROUGH 15 IN THE NOTEBOOK WHICH THE JURY WILL HAVE.

Q. (BY MR. HOOD, CONTINUING) SO, MS. BROWN, FIRST THIS POLICY, DID IT APPLY TO MEN?

* * *

[BROWN 205]

A. NO, IT WASN'T. WE ONLY TREAT FEMALES.

Q. AND YOUR ROLE, AS YOU HAVE DESCRIBED IT, DID YOU DEAL WITH PATIENTS? DID YOU YOURSELF DEAL WITH PATIENTS?

A. YES, I DID.

Q. AND HOW DID THOSE PATIENTS COME TO BE YOURS?

A. AS A CASE MANAGER YOU FOLLOW DIAGNOSES OF PATIENTS. AND ANYTIME A REFERRAL WAS MADE FROM A PHYSICIAN, SOCIAL STAFF, SOCIAL WORKER, ANYBODY IN THE HOSPITAL COULD REQUEST THAT I

SEE A PATIENT.
Q. AND IF A WOMEN WHOSE URINE DRUG SCREEN WAS DONE AND SHE TESTED POSITIVE FOR COCAINE, WAS SHE REFERRED TO YOU BY A DOCTOR?
A. TO ME OR WHOEVER WAS COVERING FOR ME.
Q. OKAY. SO, AS TO WHO THE PATIENTS WERE GOING TO BE THAT SHIRLEY BROWN WOULD TALK WITH, WORK UP THE HISTORY ON AND SO FORTH, YOU HAD NO CONTROL OVER THAT YOURSELF?
A. NO, I DIDN'T.
Q. AND UNTIL THEY WERE TESTED AND TESTED POSITIVE, YOU HAD NO WAY OF KNOWING WHICH OF THE PATIENTS COMING INTO THE MEDICAL UNIVERSITY WOULD END UP AS PATIENTS FOR YOU?
MR. WHERRY: I OBJECT TO THE LEADING OF QUESTION.
MR. HOOD, IT IS LEADING. I'LL REPHRASE IT.
Q. (BY MR. HOOD, CONTINUING) PRIOR TO A PATIENT BEING TESTED POSITIVE THAT CAME TO THE MEDICAL UNIVERSITY, DID YOU KNOW WHICH PATIENTS WOULD OR WOULDN'T BE YOURS TO TRY TO HELP?

[BROWN 206]

A. NO, I DIDN'T.
Q. DID YOU DECIDE WHICH PATIENTS WOULD BE REPORTED TO THE POLICE?
A. NO, I DIDN'T.

Q. WHO DID?
A. IT WAS DEFINED IN THE POLICY. BUT WHATEVER SUBSTANCE ABUSE COUNSELOR WOULD BE THE ONE WHO DETERMINED THAT THEY DID NOT COMPLETE SUBSTANCE ABUSE AND WOULD NOTIFY ME OF THAT.
Q. AND AS THE POLICY WAS ORIGINALLY SET UP WITH CHARLESTON COUNTY SUBSTANCE ABUSE, DID THEY HAVE A ROLE IN THIS PROCESS?
A. YES, THEY DID. THEY WERE THE ONES RESPONSIBLE FOR INITIALLY DOING THE SETUP OF THE TREATMENT AND EVALUATION OF WOMEN WHO WERE IDENTIFIED POSITIVE AT THE MEDICAL UNIVERSITY.
Q. AND IF THE PATIENT DID NOT COMPLY WITH CHARLESTON COUNTY SUBSTANCE ABUSE OR THE AGENCY THAT WAS TO HELP THEM WITH THEIR SUBSTANCE ABUSE, WHAT WAS YOUR ROLE THEN?
A. ACCORDING TO THE POLICY IF THEY SENT A LETTER TO ME SAYING THAT THE PATIENT WAS NONCOMPLIANT WITH TREATMENT, THEN I WAS SUPPOSED TO GIVE THAT INFORMATION TO THE POLICE.
Q. DID YOU MAKE THE DECISION? WERE YOU THE PERSON THAT DECIDED WHETHER OR NOT A PERSON OR PATIENT FAILED TO COMPLY WITH THE POLICY, OR DID CHARLESTON COUNTY SUBSTANCE ABUSE MAKE THAT DECISION?
A. THE PERSON WHO WAS DOING THEIR SUBSTANCE ABUSE EVALUATION

[BROWN 207]

AND TREATMENT IS THE ONE THAT MADE THE DECISION THAT THEY WERE NONCOMPLIANT WITH THEIR SUBSTANCE ABUSE TREATMENT.

Q. WAS THAT SHIRLEY BROWN?

A. THAT WAS NOT ME.

Q. AND AS THE POLICY WAS ORIGINALLY SET UP, WAS THAT CHARLESTON COUNTY SUBSTANCE ABUSE?

A. AS IT WAS ORIGINALLY SET UP IT WAS.

Q. LATER OTHER AGENCIES DEVELOPED?

A. OTHER AGENCIES LATER DEVELOPED PROGRAMS AND WOULD ACCEPT MEDICAID FUNDING FOR TREATMENT OF SUBSTANCE ABUSE DURING PREGNANCY.

Q. YOU TOLD US THE MEDICAL CRITERIA WAS NOT SOMETHING THAT SHIRLEY BROWN WROTE?

A. THAT'S CORRECT.

Q. DID THE POLICE TELL THE MEDICAL UNIVERSITY WHICH PATIENTS TO TEST? WHICH - DID THEY TELL THE DOCTORS WHICH PATIENTS TO TEST AND WHICH ONES NOT TO TEST?

A. NO, THEY DID NOT.

Q. AND WAS THERE ANY ONE DOCTOR THAT WAS INVOLVED IN THIS PROGRAM OR POLICY?

A. IT WAS THE MATERNAL FETAL FACULTY THAT DEVISED THE POLICY.

Q. WHICH IS A LOT OF DOCTORS?

A. THAT'S CORRECT.

Q. NOW, WE DISCUSSED THE INDIVIDUAL PLAINTIFFS WHEN THEY

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[BROWN 210]

GRIFFIN. I'M GOING TO PUT OVER HERE MS. SINGLETON'S. OKAY.
LET'S DEAL WITH YOUR INVOLVEMENT WITH THIS PATIENT.
SO IF YOU WILL, TURN TO THE PROGRESS NOTES. THE
FIRST - WHY IN THE PATIENT'S CHART ARE YOU WRITING IN
PROGRESS NOTES? WHAT IS THE REASON THAT THAT IS THE PLACE
THAT YOU MAKE YOUR ENTRIES?
A. ADVANCE PRACTICE NURSES AT THE MEDICAL UNIVERSITY WRITE
IN THE PROGRESS NOTES.
Q. AND IS THAT ALSO WHERE THE DOCTORS WRITE?
A. THAT'S ALSO WHERE THE DOCTORS WRITE.
Q. AND THAT'S DIFFERENT FROM THE NURSE NOTES WHICH HAVE AT
THE TOP OF THE PAGE NURSES' NOTES?
A. THAT'S CORRECT.
Q. AND ON THIS PATIENT, THEN, LET'S TURN TO 10-10-89. HAVE
AN ENTRY BY YOU?
THE COURT: THIS IS LORI GRIFFIN?
MR. HOOD: YES, SIR.
THE COURT: OKAY.
Q. (BY MR. HOOD, CONTINUING) BEFORE THIS POLICY WITH THIS
PATIENT, I BELIEVE, THIS IS OCTOBER 10, '89?
A. THAT IS CORRECT.

Q. OKAY. AND YOU RECORD SIMULTANEOUSLY WITH YOUR JOB IN THE FIRST SENTENCE WHAT ABOUT MS. GRIFFIN?
A. TALKED WITH PATIENT ABOUT HISTORY OF COCAINE ABUSE.
Q. OKAY. AND THEN PLEASE GO ON AND READ THE NEXT TWO

[BROWN 211]

SENTENCES.
A. "PATIENT STATES SHE BEGAN USING COCAINE AT AGE 19, BUT STATES SHE HAS USED IT - BUT STATES SHE HAS USED IT INFREQUENTLY UNTIL AGE 25. PATIENT STATES SHE WAS USING COCAINE WHEN SHE FOUND OUT THAT SHE WAS PREGNANT BUT STATED THAT SHE CONTINUED USING COCAINE. CONFRONTED PATIENT WITH THE FACT THAT SHE HAD SAID DURING PRENATAL VISITS AND LAST ADMISSION INTO THE HOSPITAL THAT SHE WAS NO LONGER USING DRUGS. PATIENT DID NOT RESPOND. PATIENT STATES SHE LAST USED COCAINE IN AUGUST OR SEPTEMBER. CONFRONTED PATIENT WITH THE FACT THAT SHE TESTED POSITIVE FOR COCAINE AND PATIENT STATES SHE KNEW. ALSO CONFRONTED PATIENT WITH THE FACT THAT SHE HAD TO HAVE USED COCAINE IN THE PAST COUPLE OF DAYS. PATIENT WOULD NOT TALK OPENLY ABOUT COCAINE USE. PATIENT LIVES WITH HER BOYFRIEND AND TWO CHILDREN AGES THREE AND FOUR. PATIENT

STATES HER BOYFRIEND ALSO USES COCAINE. PATIENT STATES SHE KNOWS THE RISKS OF COCAINE, THAT THE DOCTOR HAD TOLD HER THAT IT COULD CAUSE THE BABY TO DIE. PATIENT STATES THAT SHE ALSO WATCHED 48 HOURS ON CHANNEL 5 ABOUT CRACK AND NEWBORNS. DISCUSSED THE RISK, OF COCAINE WITH PATIENT. I.E., ABRUPTIO PLACENTAE, INTRAUTERINE FETAL DEATH, INCREASED RISK OF SIDS AND NEUROLOGICAL DAMAGE. NOTIFIED FRANK CORNELEY, SOLICITOR UPON REQUEST OF DR. JONES.

Q. OKAY. NOW, IS THAT YOUR INITIAL WRITE-UP ON MS. GRIFFIN?

* * *

[BROWN 218]

TO OFFER EVIDENCE THAT THE POLICY WAS NOT SUCCESSFUL?

MR. WHERRY: NO. WE INTEND TO -

THE COURT: YOU SAY NO, THAT YOU DON'T?

MR. WHERRY: WELL LET ME, IT'S A QUALIFIED NO.

THE COURT: DIDN'T YOU JUST SAY NO PERIOD?

MR. WHERRY: I SAID NO, WE INTEND TO, AND THAT WAS GOING TO BE THE QUALIFICATION OF MY NO. WE INTEND TO OFFER EVIDENCE THAT THE POLICY WAS NOT NARROWLY TAILORED TO FIT THE NEED AND THERE WAS A MUCH BETTER WAY AND MORE SUCCESSFUL WAY

OF DOING IT. I'M NOT GOING TO SAY NO ONE WAS HELPED. I'M NOT GOING TO SAY THERE WASN'T A MOTHER WHO DIDN'T GET OFF DRUGS. I'M GOING TO SAY THAT IT WAS TOO BROAD, NOT NARROWLY TAILORED AND THAT THERE WAS A MUCH BETTER AND MORE EFFECTIVE WAY OF DOING IT.

THE COURT: NOW, MS. BROWN, THERE HAS BEEN SOME - MENTION OF THE FACT THAT CERTAIN BABIES - I DON'T KNOW THAT THERE IS ANY - ANY TESTIMONY THAT THEY WERE TESTED FOR COCAINE. BUT THAT THERE IS TESTIMONY THAT CERTAIN LETTERS WERE SENT IF THE BABY WAS TESTED POSITIVE FOR COCAINE OR SOMEHOW IT -

THE WITNESS: THE REVISED POLICY IN MARCH OF 1990, THE ONE WHEN WE CHANGED THE POLICY.

THE COURT: YES.

THE WITNESS: TO WHERE PATIENTS WOULD BE GIVEN THE BENEFIT - THAT DELIVERED, THE SAME BENEFIT AS A WOMEN WHO WAS

[BROWN 219]

STILL PREGNANT OF THE EDUCATION AND REFERRAL OF TREATMENT IN MARCH OF 1990. AND THAT WAS ALREADY ENTERED WAS THE SCREENS - WERE THE CRITERIA FOR INFANTS THAT WERE TO BE SCREENED UNDERNEATH THE POLICY.

THE COURT: SO YOU'RE SAYING AFTER JANUARY AND MARCH OF 1990, THAT THE BABIES WERE SCREENED?

THE WITNESS: THEY WERE - THERE WAS A FORMALIZED PROTOCOL ON THEM BEING SCREENED. IF A MOTHER TESTED POSITIVE AT DELIVERY, THE NURSERY WAS NOTIFIED AND THAT BABY WAS SCREENED AT THAT POINT IN TIME.

THE COURT: THIS BABY HERE WAS NOT SCREENED?

THE WITNESS: I WOULD HAVE TO LOOK AT THE RECORD TO SEE. I DON'T KNOW. IF YOU LET ME LOOK AT THE RECORD, I COULD SEE.

THE COURT: WHILE SHE IS LOOKING AT THAT I DON'T THINK IT WILL DISTURB HER IF WE DISCUSS THE MATTER OF PRIVILEGE. WHAT IS IT THAT GIVES THE PATIENT, THE CHILD A PRIVILEGE IN THIS CASE? WERE IT'S A CHILD'S PRIVATE PERSONAL MEDICAL RECORDS, WHERE DO THEY GET A PRIVILEGE FOR THEM?

MR. WHERRY: THEY GET A PRIVILEGE FOR MEDICAL RECORDS JUST AS EVERYONE DOES. BEAR WITH ME A MOMENT WHILE I LOOK UNDER PRIVILEGES.

THE COURT: YOU'RE NOT GOING TO FIND ANY PRIVILEGE STATED IN THERE.

MR. WHERRY: I STAND CORRECTED. I THINK THAT THERE

* * *

[BROWN 225]

THE COURT: THERE IS NO PRIVILEGE IN THE STATE OF SOUTH CAROLINA EXCEPT BETWEEN THE CASE OF A PSYCHIATRIST AND PHYSICIAN.

MR. HOOD: YOU'RE RIGHT.

THE COURT: DON'T TELL ME I'M RIGHT.

MR. HOOD: I DO A LOT OF THAT KIND OF WORK AND I THINK YOU'RE RIGHT. BUT I'LL GO ON.

I UNDERSTAND YOUR RULING AND YOUR REASONS AND IT DOESN'T REALLY MATTER, TO BE HONEST. TO BE HONEST WITH YOU.

THE COURT: IT IS LORI GRIFFIN AND SHE DID SAY DANIELL IS PERFECT. AND SO I THINK THAT WE PROBABLY - THAT PROBABLY AT LEAST ARGUABLY GETS OVER THE RELEVANCE QUESTION. AND THEN WE GO TO THE PRIVILEGE QUESTION. AND I'LL LOOK AT THAT WHEN YOU GET ME SOMETHING TO LOOK AT. BUT I DO THINK THAT WE NEED TO DECIDE WHERE WE'RE GOING ON THIS QUESTION OF THE CONDITION OF THESE BABIES.

NOW, IF THE PLAINTIFF PROCEEDS TO PROVE THAT THEY'RE PERFECT, THEN I KNOW WHAT YOU'RE GOING TO WANT TO PROVE. YOU'RE GOING TO WANT TO PROVE THEY'RE ALL BASKET CASES OR ALL COCAINE AFFECTED. AND I THINK IT'S GOING TO CUT BOTH WAYS,

AND I'M INCLINED TO SAY NEITHER IS ADMISSIBLE. I'M INCLINED TO BELIEVE THAT THE SUCCESS OF THIS PROGRAM IS NOT ADMISSIBLE. I THINK MS. JESSUP WANTS TO TESTIFY TO THAT, BUT I DON'T THINK THAT HAS TO DO WITH THE NARROWING OF THE PROGRAM.

* * *

[BROWN 237]

Q. OKAY. LET'S TALK ABOUT THE OTHER PLAINTIFF THAT HAS TESTIFIED AND IS AROUND THE CORNER THERE OF THE WITNESS BOX. TURN TO YOUR NOTES ON 11-10-89 FOR MS. SINGLETON, PLEASE.

A. ALL RIGHT.

Q. FIRST OF ALL THIS LADY, AS YOU LOOK THROUGH HER CHART, YOU DID BEFORE YOU GOT ON THE STAND, DOES IT INDICATE IF SHE WAS BROUGHT IN BY EMS OR DELIVERED A BABY ON THE WAY?

A. NO. SHE CAME IN THROUGH OUR EXAM ROOM AND DELIVERED A BABY IN LABOR AND DELIVERY.

Q. ALL RIGHT. AND BY COMING IN THAT WAY WOULD SHE GET THIS HOSPITAL PAMPHLET?

A. NO, SHE WOULD NOT.

Q. WERE YOU THE - WERE YOU THE CASE MANAGER THAT WORKED UP THE HISTORY ON THIS PATIENT?

A. YES, I WAS.

Q. TELL THE JURY WHAT YOU RECORDED AS PART OF HER HISTORY.

IF THERE IS SOMETHING SENSITIVE IN THERE JUST PASS OVER THAT, PLEASE.

A. OKAY. STARTING WITH, "THE PATIENT CONFRONTED WITH POSITIVE URINE DRUG SCREEN FOR MARIJUANA AND COCAINE. PATIENT STATES SHE GAVE PERMISSION FOR THE URINE DRUG SCREEN BECAUSE SHE THOUGHT SHE WAS CLEAN." THAT IS IN QUOTES. AND WHEN I WROTE IT IN QUOTE MEANS THAT IS EXACTLY WHAT SHE TOLD ME." PATIENT ADMITS TO USE OF MARIJUANA BUT STATES SHE HAD NEVER USED COCAINE. PATIENT STATES SHE WOULD NOT USE COCAINE

[BROWN 238]

BECAUSE SHE HAD SEEN ON TV WHAT COCAINE WOULD DO TO HER BABY. PATIENT STATES HER BROTHER USES COCAINE IN THE BATHROOM AND THAT HER USING THE BATHROOM AFTER HER BROTHER IS PROBABLY HOW COCAINE WAS IN HER URINE. PATIENT STATES HER BROTHER LAST USED COCAINE THE SATURDAY BEFORE SHE WAS ADMITTED TO THE HOSPITAL. EXPLAINED TO PATIENT THAT USING THE BATHROOM AFTER HER BROTHER WOULD NOT CAUSE HER TO TEST POSITIVE FOR COCAINE. EXPLAINED TO PATIENT THAT I SUSPECTED THAT SHE EITHER SMOKED OR SNORTED COCAINE IN THE PAST TWO DAYS. EXPLAINED TO PATIENT

PROBLEMS THAT CAN OCCUR IN THE INFANT WHEN MOTHERS USE COCAINE IN PREGNANCY."

Q. LET ME STOP YOU RIGHT THERE. IS THIS SOMETHING THAT YOU EXPLAINED TO MS. SINGLETON?

A. YES, IT IS.

Q. AND THIS IS ON 11-10-89 WHEN SHE WAS ADMITTED?

A. WHEN I WAS NOTIFIED TO SEE HER.

Q. OKAY.

THE COURT: GO AHEAD.

Q. (BY MR. HOOD, CONTINUING) GO AHEAD.

A. "EXPLAINED TO PATIENT THAT IT WAS IMPORTANT TO KEEP INFANT IN QUIET AREA, HANDLE GENTLY, ENCOURAGE FEEDINGS EVERY THREE TO FOUR HOURS AND KEEP UP WITH INFANT'S WELL BABY CARE. INFORMED PATIENT THAT THE POLICE DEPARTMENT AND DSS PROTECTIVE SERVICES WOULD BE NOTIFIED OF THE POSITIVE DRUG SCREEN."

Q. THAT'S WHAT YOU WROTE DOWN WHEN YOU FIRST, AS A CASE

[BROWN 239]

MANAGER, TALKED TO THIS PATIENT?

A. THAT'S CORRECT.

Q. NOW, DOES THIS PATIENT COME IN UNDER THE HOSPITAL POLICY, WHEN SHE COMES IN AND THE DELIVERY WAS 11-9-89. DO WE HAVE THE POLICY IN EFFECT AT THAT TIME?

A. THE WORKING DRAFT OF THE POLICY WAS IN EFFECT. IT HAD

NOT GONE THROUGH ALL OF THE EXECUTIVE COMMITTEES AT THE MEDICAL UNIVERSITY AT THAT TIME, I DO NOT BELIEVE.

Q. OKAY. NOW AFTER THE POLICY WAS IN EFFECT FOR THREE MONTHS, WAS THERE A CHANGE TO THE POLICY?

A. YES, IT WAS.

Q. EXPLAIN THAT TO THE JURY.

A. IN JANUARY OF 1990 A MEETING WAS CALLED BY THE SOLICITOR'S OFFICE AND DSS AND MEDICAL UNIVERSITY MET AND DISCUSSED THE POLICY. AND IT WAS DECIDED THAT WOMEN WHO TESTED POSITIVE AT DELIVERY AND HAD NOT HAD THE BENEFITS OF THE PRENATAL EDUCATION OR CHANCE OF GOING INTO DRUG TREATMENT BEFORE THEY WERE ARRESTED, THAT WE WOULD CHANGE THE POLICY SO THAT IF THEY TESTED POSITIVE AT DELIVERY, THAT THEY WOULD BE OFFERED TREATMENT.

Q. AND IN FACT WHEN THIS PATIENT CAME BACK A SECOND TIME FOR ANOTHER DELIVERY -

MR. WHERRY: OBJECTION. NOT RELEVANT, IT'S NOT THE SUBJECT OF THIS LAWSUIT. YOU PREVIOUSLY RULED ON THAT I BELIEVE WHEN THE WITNESS WAS ON THE STAND.

* * *

[BROWN 244]

TESTIMONY HERE WAS A ROLODEX KEPT IN YOUR OFFICE. WHAT WAS THE PURPOSE OF THAT ROLODEX?

A. THE ROLODEX WAS A REFERENCE FOR ME WHEN A PATIENT CALLED SO I WOULD KNOW WHERE TO GO PULL THEIR RECORD AND ANSWER ANY QUESTIONS THAT THEY MIGHT HAVE.

Q. AND WHO FROM THE SOLICITOR'S OFFICE WAS ALLOWED TO LOOK AT WHAT INFORMATION ON A GIVEN PATIENT IN YOUR OFFICE?

A. GARDEN BLINCOW WAS - CAME ABOUT ONCE A WEEK FOR A BRIEF TIME. SHE DIDN'T COME THE WHOLE TIME DURING THE POLICY. AND WAS GIVEN AND LOOKED AT THE SOLICITOR LETTER AND WOULD ENTER INFORMATION INTO THE ROLODEX.

Q. DID YOU SHARE WITH HER FROM YOUR LOCKED RECORDS THE MEDICAL RECORD ON ANY PARTICULAR PATIENT?

A. NO, I DID NOT.

Q. WHAT WAS THE INTENT OF THE INTERAGENCY POLICY?

A. IT WAS TO PROTECT CHILDREN BEFORE THEY WERE BORN AS WELL AS AFTER THEY WERE BORN. AND TO TRY TO GET MOTHERS INTO TREATMENT.

Q. WAS THE PURPOSE OF THIS POLICY TO HAVE MOTHERS THAT USED COCAINE THROWN IN JAIL?

MR. WHERRY: OBJECTION. LEADING.

THE COURT: I THINK THE QUESTION IS LEADING.

OBVIOUSLY THE RULE PERMITS LEADING QUESTIONS WHERE THEY'RE NECESSARY. BUT I CAN THINK OF MANY LESS LEADING, IF NOT ALTOGETHER UNLEADING WAYS TO ASK THAT QUESTION, SO I SUSTAIN

[BROWN 245]

THE QUESTION.
Q. (BY MR. HOOD, CONTINUING) WHAT ABOUT JAIL?
A. THE INTENT WAS NOT TO HAVE WOMEN ARRESTED.
Q. BEFORE THE POLICY WENT INTO EFFECT, OCTOBER, NOVEMBER OF 1989, WERE WOMEN THAT CAME IN TESTED? GIVEN DRUG TESTS? URINE DRUG SCREEN?
A. YES, THEY WERE. THE FIRST ONE I REMEMBER WAS IN OCTOBER OF 1988.
Q. UNRELATED TO THE POLICY THIS LAWSUIT IS ABOUT?
A. THAT IS CORRECT.
Q. AND BEFORE THE POLICY WENT INTO EFFECT IN THE FALL OF '89, WERE WOMEN VOLUNTARILY GOING TO SUBSTANCE ABUSE?
A. NO, THEY WERE NOT.
MR. WHERRY: OBJECTION, IRRELEVANT.
Q. (BY MR. HOOD, CONTINUING) BASED ON YOUR KNOWLEDGE?
A. WHEN I WAS CONSULTED -
THE COURT: YES, SIR.
MR. WHERRY: OBJECTION, NOT RELEVANT. OTHER WOMEN,

OTHER WOMEN PLAINTIFFS. BEFORE THE POLICY.

THE COURT: I OVERRULE THE OBJECTION.

MR. WHERRY: VERY WELL, SIR.

Q. (BY MR. HOOD, CONTINUING) BEFORE THE POLICY, WERE WOMEN THAT WERE USING COCAINE THAT WERE PREGNANT, WERE THEY GOING TO SUBSTANCE ABUSE?

A. WHEN I WAS NOTIFIED ABOUT A POSITIVE URINE DRUG SCREEN I

[BROWN 246]

WOULD GO AND TALK TO THE PEOPLE ABOUT HARMFUL EFFECTS AND MAKE ARRANGEMENTS FOR THEM TO GO TO SUBSTANCE ABUSE. AND OF THOSE WOMEN, WHEN THEY CAME BACK IN AND DELIVERED BABIES SUBSEQUENTLY, NONE OF THEM REPORTED THAT THEY HAD BEEN TO SUBSTANCE ABUSE.

Q. AFTER THE POLICY, DID WOMEN, SUCH AS THE FIRST ONE WE HEARD UNDER THE POLICY, MRS. SINGLETON, DID THEY GO TO SUBSTANCE ABUSE?

A. YES, THEY DID.

Q. THANK YOU VERY MUCH.

MR. HOOD: THANK YOU, YOUR HONOR.

THE COURT: ANYTHING FURTHER?

<u>REDIRECT EXAMINATION</u>

BY MR. WHERRY:

Q. WITH WHAT YOU JUST SAID RECENTLY ABOUT THE ATTEMPT OF THE

POLICY WAS NOT TO ARREST WOMEN OR SEND THEM TO JAIL?
A. THAT'S CORRECT.
Q. SO I TAKE IT THAT WHEN THE WOMEN WERE ARRESTED, THESE TEN PLAINTIFFS WERE, THEY WERE NOT ARRESTED FOR THE INTENT OF PROSECUTING THEM THROUGH THE CRIMINAL JUSTICE SYSTEM, BUT RATHER WERE ARRESTED TO ACCOMPLISH SOME MEDICAL PURPOSE, FAIR?
A. I WASN'T THE ONE THAT HAD THEM ARRESTED. I COULDN'T SPEAK TO THAT.
Q. WELL, YOU WERE INTIMATELY INVOLVED IN THE FORMULATION OF, THE CREATION OF, AND THE IMPLEMENTATION OF THE INTERAGENCY

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[BROWN 250]

THE COURT: I'M NOT GOING TO PERMIT THAT QUESTION. MR. HOOD OBJECTED TO IT ON THE GROUND THAT IT'S NOT RESPONSIVE TO HIS EXAMINATION. IT IS NOT. YOU WENT INTO THAT IN GREAT DETAIL IN YOUR CROSS-EXAMINATION. YOU QUESTIONED HER OVER AND OVER AND OVER AGAIN AS TO WHAT HER INVOLVEMENT IN THE FORMATION OF THIS POLICY WAS, AND I'M NOT GOING INTO IT AGAIN. IT'S NOT IN RESPONSE TO NEW MATTER. YOU MAY PROCEED.
Q. (BY MR. WHERRY, CONTINUING) MY INQUIRY IN THAT AREA, MS.

BROWN, WAS, I THINK YOU INDICATED THAT INTENT OF THE POLICY
WAS NOT TO ARREST PEOPLE; IS THAT RIGHT?
A. THAT'S CORRECT.
Q. AND WHEN THEY WERE ARRESTED, THE INTENT OF THE ARREST,
THE INTENT OF THAT PART OF THE POLICY WAS NOT TO PROSECUTE
THEM BUT TO HELP THEM AND THEIR BABIES, FAIR?
A. THAT WOULD BE FAIR.
Q. YOU TALKED ABOUT THE ROLODEX, MS. BROWN, AND HOW THAT WAS
THE ONLY THING IN EFFECT THAT THE SOLICITOR'S REPRESENTATIVE
HAD ACCESS TO; IS THAT RIGHT?
A. IN MY OFFICE, THAT IS CORRECT.
Q. NOW WERE THE PATIENTS' RECORDS IN YOUR OFFICE THAT WERE
KEPT IN THIS LOCKED DRAWER, WERE THEY KEPT IN A PARTICULAR
FILE?
A. YES, THEY WERE.
Q. AND THERE WAS A FILE FOR EACH PATIENT, WASN'T THERE?
A. NO, THERE WAS NOT.

[BROWN 251]

Q. THERE WAS A FILE FOR ALL OF PATIENTS ALL KEPT TOGETHER?
A. THERE WERE BY MONTH AND YEAR WITH EVERYONE THAT TESTED
POSITIVE DURING THAT MONTH. INFORMATION PUT IN THERE.
Q. AND THOSE FILES WERE, OF COURSE, NOT MADE AVAILABLE TO
THE SOLICITOR'S OFFICE, WERE THEY?

A. NO, THEY WERE NOT.
Q. SHOWING, YOU, MA'AM, WHAT HAS BEEN MARKED P 233-A, WHICH CAME FROM YOUR OFFICE, LET ME SHOW YOU THE SECOND PAGE OF THAT, MS. BROWN, AND ASK YOU IF THAT ISN'T THE OUTSIDE OF ONE OF THOSE FILE FOLDERS THAT CAME FROM YOUR OFFICE WITH YOUR BATE STAMP NUMBER AND CONTAINS THE HANDWRITING OF BOTH YOU AND GARDEN BLINCOW, THE REPRESENTATIVE OF THE SOLICITOR'S OFFICE?
A. THAT IS A FILE FOLDER FROM THE FILE.
Q. THE HANDWRITING THAT IS ON THE OUTSIDE OF THAT FILE FOLDER IS BOTH YOURS AND GARDEN BLINCOW'S; ISN'T THAT RIGHT?
A. I CAN ATTEST TO MINE AND IT PROBABLY - I CAN'T ATTEST TO GARDEN. BUT SHE DID WRITE ON FILE FOLDERS.
Q. RIGHT. GARDEN BLINCOW FROM THE SOLICITOR'S OFFICE?
A. THAT IS CORRECT.
Q. WROTE ON THE FILE FOLDERS THAT YOU JUST SAID THAT SHE DIDN'T HAVE ACCESS TO, FAIR?
A. RIGHT.
Q. MAY I HAVE THAT DOCUMENT BACK, PLEASE.
WITH RESPECT TO LAVERNE SINGLETON, I THINK IT WAS ALSO LORI GRIFFIN, YOU INDICATED THAT THEY WERE NOT ARRESTED

* * *

[BROWN 279]

MR. WHERRY: NO, SIR.
THE COURT: OKAY.
MS. BROWN, I WOULD LIKE TO ASK YOU JUST A FEW QUESTIONS ABOUT THE DRUG SCREENS. WHEN YOU USE THE WORD DRUG SCREEN, OF COURSE YOU MEAN YOU TAKE A URINE SAMPLE AND THE LABORATORY EXAMINES THAT URINE TO SEE WHAT DRUGS ARE IN IT?
THE WITNESS: THAT'S CORRECT.
THE COURT: ALL RIGHT. MR. HOOD ASKED YOU A QUESTION THAT MAY HAVE ANSWERED MY QUESTION, BUT I WANT TO BE ABSOLUTELY SURE. WHEN DID THE MEDICAL UNIVERSITY OR DID THE MEDICAL UNIVERSITY EVER BEGIN ROUTINELY GIVING DRUG SCREENS TO PRENATAL PATIENTS?
THE WITNESS: I DON'T THINK I - IF PEOPLE MET CERTAIN CRITERIA THAT WERE LISTED THAT WERE PUBLISHED BY THE FACULTY, YOU KNOW, TO GO OUT INTO THE CLINICS THAT THE FOLLOWING ARE INDICATORS AND WOULD NEED TO BE SCREENED, YOU KNOW, FOR MEDICAL EVALUATION, THEN THEY WOULD HAVE.
THE COURT: BUT YOU NEVER GAVE IT TO EVERY PREGNANT WOMEN THAT REPORTED FOR PRENATAL CARE?
THE WITNESS: NO, WE DIDN'T.

THE COURT: ALL RIGHT. NOW WHEN DID YOU FIRST START GIVING THE DRUG SCREENS TO SOME WOMEN WHO REPORTED FOR PRENATAL CARE?

THE WITNESS: THE FIRST URINE DRUG SCREEN THAT I GOT

[BROWN 280]

CALLED IN ON WAS IN OCTOBER OF 1988.

THE COURT: OKAY. WAS THAT AT THAT TIME A POLICY OR DID IT JUST OCCUR TO THAT ONE PATIENT THAT YOU GOT CALLED IN ON?

THE WITNESS: IT OCCURRED BECAUSE THIS PATIENT WAS AN ABRUPTING. THE PLACENTA WAS SEPARATING, IT WAS PUTTING HER LIFE AND BABY'S LIFE IN JEOPARDY, AND THE PHYSICIAN ORDERS A TEST AS PART OF MANY TESTS THAT THEY ORDER.

THE COURT: NOW WAS THAT SOMETHING THAT THAT PHYSICIAN DID BECAUSE THAT PHYSICIAN THOUGHT IT WAS GOOD MEDICINE OR WAS IT SOMETHING THAT WAS DONE BY ALL PHYSICIANS IN THE HOSPITAL?

THE WITNESS: THAT WAS ABOUT THE TIME OF THE LITERATURE THAT PHYSICIANS WERE IN CONFERENCES AND ATTENDING CONFERENCES WHERE THEY WERE BEING TOLD AS PHYSICIANS, AND THEY TOLD ME AND THEN I READ SOME IN THE LITERATURE, THAT THAT WAS

ONE OF THE POSSIBLE CAUSES. AND IT WAS BEING DONE TO LOOK FOR REASONS.

THE COURT: OKAY. LET ME BE MORE DIRECT. WHEN THE POLICY WAS INITIATED IN 1989?

THE WITNESS: CORRECT.

THE COURT: YOU BEGAN DOING DRUG SCREENS ON PREGNANT WOMEN THAT MET CERTAIN CRITERIA?

THE WITNESS: THAT IS CORRECT.

THE COURT: NOW BEFORE THAT TIME, DID YOU DO DRUG

[BROWN 281]

SCREENS ON ANY PREGNANT WOMEN? AND IF SO, WHAT WERE THE CRITERIA FOR THOSE DRUG SCREENS? WHAT I'M TRYING TO FIND OUT IS, WHETHER INDEPENDENT OF THIS POLICY YOU HAD A POLICY OF DOING DRUG SCREENS ON PREGNANT WOMEN, AND IF SO, WHAT WAS THAT?

THE WITNESS: WE HAD A PROTOCOL. IT'S NOT A FORMAL POLICY, IT DIDN'T GO THROUGH COMMITTEES, OKAY? IT WAS PROTOCOL WITHIN THE DEPARTMENT OF OB AND IT SAID AND I WOULD HAVE TO, YOU KNOW - I MEAN BASICALLY NO PRENATAL CARE, LATE PRENATAL CARE, ABRUPTIO PLACENTAE, INTRAUTERINE FETAL DEATH, PRETERM LABOR, AND THERE WAS ONE OTHER ONE THAT WAS SUPPOSED

TO BE SCREENED PRENATALLY OR AT DELIVERY. I MEAN, THAT WAS A PROTOCOL ACCEPTED BY THE PHYSICIANS AND IT WAS SOMETHING THAT ALL PHYSICIANS WERE ADHERING TO.

THE COURT: AND WHEN YOU SAY PROTOCOL, IS THAT IN WRITING?

THE WITNESS: A PROTOCOL AT THE MEDICAL UNIVERSITY DID NOT AT THAT POINT IN TIME HAVE TO GO THROUGH ANY FORMAL COMMITTEES FOR APPROVAL. THE DEPARTMENT OF MATERNAL FETAL MEDICINE, THEY MET AND DISCUSSED PROBLEMS. AND THEY WOULD SEND OUT A MEMO AND SAY DEAR RESIDENTS, DEAR FACULTY, THE FOLLOWING ARE TO BE SCREENED.

THE COURT: OKAY. AND SO IT WOULD BE IN THAT FORM?

THE WITNESS: IT WOULD BE IN THAT FORM.

[BROWN 282]

THE COURT: OKAY. NOW THAT PROTOCOL, IT COMMENCED ABOUT WHAT TIME?

THE WITNESS: THERE WAS SOME RANDOM SCREENING STARTING IN OCTOBER.

THE COURT: UMM-HMM.

THE WITNESS: IT WAS DISCUSSED IN APRIL, BUT IF I REMEMBER CORRECTLY, IT WAS ABOUT JUNE OF 1989 WAS THE DATE OF THE OFFICIAL PROTOCOL.

THE COURT: OKAY.
THE WITNESS: SOMEWHERE BETWEEN APRIL AND JUNE. IT'S BEEN A LONG TIME AGO, I CAN'T REMEMBER, BUT I DO KNOW THAT IT DID COME OUT IN WRITING IN THE DEPARTMENT.
THE COURT: NOW WHAT HAPPENED IN THAT PROTOCOL WHEN THE POLICY UNDER DISCUSSION IN THIS CASE WAS INITIATED?
THE WITNESS: ANYONE WHO TESTED POSITIVE FROM OCTOBER OF 1988 UNTIL THE ADOPTION OF THE FORMAL POLICY, THE PERSON WAS COUNSELED ABOUT THE HARMFUL EFFECTS OF DRUGS TO THEM OR TO THEIR CHILD, OR WERE REFERRED TO SUBSTANCE ABUSE AND A REFERRAL WAS MADE TO THE DEPARTMENT OF SOCIAL SERVICES.
THE COURT: THE PROTOCOL THAT YOU'RE TALKING ABOUT THAT WAS JUNE OF '89, WHATEVER, WAS IT EVER REVOKED OR RECALLED?
THE WITNESS: WHENEVER THE - A HOSPITAL POLICY OVERRIDES A PROTOCOL.
THE COURT: OKAY. AND WAS THAT PROTOCOL

[BROWN 283]

OVERRIDDEN?
THE WITNESS: IT WAS WHEN THE POLICY WENT INTO EFFECT IN NOVEMBER.
THE COURT: OKAY.

THE WITNESS: OR LATE OCTOBER, YOU KNOW. I DON'T REMEMBER THE EXACT DATE THE EXECUTIVE COMMITTEE APPROVED IT.

THE COURT: OKAY.

THE WITNESS: UNTIL THEN PEOPLE WERE SCREENED BASED ON THAT PROTOCOL.

THE COURT: OKAY. I THINK - NOW, THE TESTING OF NEWBORN INFANTS, IS THAT SOMETHING THAT YOU CAN DO? CAN YOU TEST A NEWBORN INFANT FOR DRUGS?

THE WITNESS: THAT IS THE WAY THAT IT WAS INTERPRETED TO US BASED ON THE STATUTE.

THE COURT: YOU'RE SAYING THAT YOU CAN - I DON'T MEAN LEGALLY, I MEAN, CAN YOU PEDIATRICALLY DO IT TO AN INFANT?

THE WITNESS: WELL, WHENEVER A BABY IS BORN YOU PUT A - THE URINE BAG ON AND WHEN THE BABY VOIDS THEY GIVE YOU THE SPECIMEN. YOU TAKE THE BAG OFF AND YOU SEND IT TO THE LAB.

THE COURT: JUST LIKE WOULD YOU WITH AN ADULT.

THE WITNESS: JUST LIKE YOU WOULD EXCEPT THAT AN ADULT WOULD GO TO THE BATHROOM.

THE COURT: UMM-HMM. AND GO

THE WITNESS: AND GO INTO A LITTLE CUP.
THE COURT: I UNDERSTAND THE DIFFERENCE.
THE WITNESS: YOU KNOW, I DIDN'T WANT SOMEONE TO THINK WE WERE PUTTING BAGS ON PEOPLE. BUT ON BABIES WE COULDN'T.
THE COURT: I'M NOT REAL BRIGHT, BUT I GOT THAT. WHAT ABOUT THE DRUG SCREENING ON NEWBORN BABIES, HAVE YOU EVER INITIATED A POLICY WHERE YOU DO THAT? ANSWER ME YES OR NO.
THE WITNESS: YES.
THE COURT: ALL RIGHT. WHEN DID YOU START DOING THAT?
THE WITNESS: WHEN DID IT BECOME A FORMAL POLICY?
THE COURT: OR PROTOCOL OR WHATEVER.
THE WITNESS: OKAY. AROUND - WELL IN JANUARY OF '90. JANUARY OF 1990 THE NEONATOLOGISTS WERE DISCUSSING IT. AND IN MARCH OF 1990 IT BECAME PART OF THE - OF A NEW REVISED POLICY WITH LISTING ALL OF THE INDICATORS FOR BABIES.
THE COURT: YOU TALKED ABOUT THE REVISION OF THE POLICY IN QUESTION. IS THAT THE -
THE WITNESS: THAT'S THE REVISION.
THE COURT: ALL RIGHT. NOW, AND SO IN JANUARY AND

THEN FORMALLY IN MARCH, YOU BEGAN SOME SORT OF SCREENING OF NEWBORN CHILDREN FOR DRUGS?
THE WITNESS: THE SCREENING BEGAN IN OCTOBER OF 1989
ON CHILDREN IF THE PHYSICIAN DEEMED IT NECESSARY. LIKE IF A

[BROWN 285]

BABY WAS JITTERY, IRRITABLE, REAL FUSSY, ONE OF THE TESTS THAT THEY MIGHT ORDER WAS A BLOOD SUGAR, BUT THEY ALSO COULD ORDER A URINE DRUG SCREEN TRYING TO FIND OUT WHY THIS BABY WAS THIS WAY.
THE COURT: BUT THAT WAS PHYSICIAN INITIATED?
THE WITNESS: THAT WAS PHYSICIAN INITIATED.
THE COURT: NO PROTOCOL?
THE WITNESS: NO PROTOCOL.
THE COURT: AND THAT'S THE WAY IT CONTINUED UP UNTIL JANUARY OF 1989?
THE WITNESS: UNTIL JANUARY OF -
THE COURT: '90.
THE WITNESS: '90. BUT THE ACTUAL PUBLISHED THING CAME OUT IN MARCH OF 1990.
THE COURT: WHEN YOU BEGAN THESE DRUG SCREENS ON NEWBORN CHILDREN, HOW DID YOU CHOSE WHICH CHILDREN YOU WERE GOING TO SCREEN?
THE WITNESS: BASICALLY IF THE NEONATOLOGISTS

DETERMINE WHAT WERE RISK FACTORS THAT THEY NEEDED TO DO A URINE DRUG SCREEN ON, BASED ON THEIR LITERATURE REVIEW.

THE COURT: SO THERE WASN'T ANY CRITERIA, SUCH AS ARE IN THE POLICY, FOR DOING NEWBORN INFANTS' DRUG SCREENING?

THE WITNESS: IN MARCH OF -

THE COURT: CERTAINLY, YOU GO RIGHT AHEAD. GO RIGHT AHEAD. RIGHT AHEAD.

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THE WITNESS: THIS IS EXHIBIT NUMBER 4 IN THIS BOOK.

THE COURT: YES.

THE WITNESS: MARCH OF 1990 INFANTS TO BE SCREENED IN BOTH THE WELL BABY NURSERY AND NEWBORN INTENSIVE CARE UNIT BY URINE OR MECONIUM IF POSSIBLE DRUG TESTING INCLUDE THOSE DELIVERED FOLLOWING OR WITH: NO MATERNAL PRENATAL CARE.

LATE PRENATAL CARE OBTAINED AFTER 24 WEEKS GESTATION.

INCOMPLETE MATERNAL PRENATAL CARE FEWER THAN FIVE OBSTETRICAL VISITS.

ABRUPTIO PLACENTA.

PRETERM LABOR OF NO OBVIOUS CAUSE.

IUGR, BABY'S SIZE IS DECREASED IN UTERO. OR AND SGA BABY MEANS THAT WHEN A BABY IS BORN WE HAVE THESE CHARTS AND

WE LOOK AT HOW LONG THE BABY AND WHAT THEIR GESTATIONAL AGE IS AND WHAT THE WEIGHT IS, AND THEN THE PHYSICIAN DECIDES IF THIS IS AN SGA BABY, WHICH MEANS THAT IT IS SMALLER THAN IT NEEDS TO BE, OF NO OBVIOUS CAUSE.

PREVIOUS KNOWN MATERNAL DRUG OR ALCOHOL ABUSE.

UNEXPLAINED CONGENITAL ANOMALIES.

CLINICAL MANIFESTATIONS SUGGESTING EVIDENCE OF DRUG WITHDRAWAL.

THE COURT: OKAY. THANK YOU. ANY FURTHER QUESTIONS OF THIS WITNESS BY THE PLAINTIFF OR THE DEFENDANT?

MR. WHERRY: EXCUSE ME FOR A MOMENT, YOUR HONOR.

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(PAUSE.)

MR. WHERRY: JUST ONE OR TWO.

RECROSS EXAMINATION

BY MR. WHERRY:

Q. BEFORE THE POLICY, THE TESTING THAT THE JUDGE ASKED YOU ABOUT WAS FOR PURELY MEDICAL PURPOSES, WASN'T IT?

A. THAT IS CORRECT.

Q. AFTER THE POLICY, THE TESTING THAT THE JUDGE ASKED YOU ABOUT WAS FOR BOTH MEDICAL AND LEGAL PURPOSES, WASN'T IT?

A. IT STILL WAS FOR MEDICAL PURPOSES.

Q. WAS IT ALSO FOR LEGAL PURPOSES?
MR. HOOD: SHE HAS ANSWERED THE QUESTION, YOUR HONOR.
THE COURT: SHE DID NOT ANSWER THE QUESTION. I WOULD LIKE IT ANSWERED. YOU ANSWERED THE QUESTION HOW?
THE WITNESS: THE REASON THE TESTS WERE DONE WERE FOR MEDICAL REASONS.
THE COURT: OKAY.
Q. (BY MR. WHERRY, CONTINUING) AND NOT FOR LEGAL REASONS?
A. THE CRITERIA WERE DETERMINED BY THE PHYSICIANS ON WHO WAS TO BE SCREENED.
MR. WHERRY: THAT'S IT.
MR. HOOD: NO QUESTIONS.
THE COURT: THANK YOU, MA'AM. YOU'RE EXCUSED.

CERTIFICATE

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF SHIRLEY BROWN 12/10/96

[SHIRLEY BROWN 4]

THEY WOULD CALL THEIR OWN CLIENTS. AND THOUGH I ASKED THEM TO GO AHEAD AND EXAMINE THEM AT THAT TIME TO CUT DOWN ON THE REPETITION, THEN I WOULD LET HIM, IN ORDER TO PROPERLY PRESENT HIS CASE, TO RECALL HER.

I'M NOT GOING TO LET HIM GO BACK IN ALL OF IT, BUT I'M GOING TO LET HIM ADD SOME CONTEXT TO IT AND BE A LITTLE BIT REPETITIVE BECAUSE I THINK I NEED TO DO THAT TO BE FAIR.

AND I THINK THAT'S PRECISELY WHAT I SAID, BECAUSE THAT'S WHAT I ALWAYS DO AND I DON'T KNOW WHY I WOULD DO IT ANY DIFFERENT HERE.

I'LL LET YOU PROCEED. WE'RE NOT GOING INTO THE WHOLE THING, BUT I THINK YOU UNDERSTAND MY RULING.

Q. (BY MR. HOOD, CONTINUING) FIRST OF ALL, DID YOU MAKE THE DECISION, MS. BROWN, AS TO WHETHER OR NOT THE MOTHERS SHOULD HAVE HER URINE TESTED FOR DRUGS?

MR. WHERRY: OBJECTION, LEADING.

MR. HOOD: DID YOU MAKE THE DECISION?
A. THAT'S THE PHYSICIAN'S DECISION, NOT MADE BY ME.
Q. DID YOU MAKE THE DECISION TO PLACE THE WOMEN IN THE CATEGORY THAT MADE HER FALL UNDER THE POLICY?
MR. WHERRY: OBJECTION, LEADING.
THE COURT: I DON'T THINK IT'S LEADING. I'LL PERMIT IT.
A. THE PHYSICIANS MADE THE DETERMINATION AS TO WHO WAS TO BE TESTED.

[SHIRLEY BROWN 5]

Q. OKAY. AND IN YOUR ROLE, ONCE A PATIENT WAS REFERRED TO SUBSTANCE ABUSE, WAS YOUR ROLE TO MAKE SURE THEY WENT TO SUBSTANCE ABUSE?
THE COURT: THAT QUESTION IS LEADING, MR. HOOD.
Q. (BY MR. HOOD, CONTINUING)AS TO SUBSTANCE ABUSE, WHAT WAS YOUR ROLE?
A. MY ROLE WAS WHEN A PERSON WAS IDENTIFIED AS TESTING POSITIVE, TO TALK TO THEM AND MAKE THE REFERRAL TO SUBSTANCE ABUSE. SUBSTANCE ABUSE THEN EVALUATED THEM AND DETERMINED WHAT TYPE TREATMENT THEY WERE TO HAVE. IF THE PERSON FAILED IN TREATMENT, ACCORDING TO THE POLICY, THEY WERE TO NOTIFY

ME. I DID NOT ROUTINELY CALL ON EVERY PATIENT TO SEE WHAT WAS GOING ON IN SUBSTANCE ABUSE.
Q. OKAY. OKAY. I'M GOING TO COME BACK TO YOUR OTHER ROLE WITH REGARD TO THE FIRST STEPS OF INTERVIEWING THE PATIENT AND GET A HISTORY AND SO FORTH IN JUST A MINUTE. I FIRST WANT TO ASK YOU ABOUT SOME SPECIFIC THINGS, MS. BROWN.
FIRST OF ALL, IN THE CONTEXT OF THIS POLICY, HAVE YOU EVER SAID THAT MIXING OF RACES IS AGAINST GOD'S WAY?
A. I - THAT IS MY PERSONAL BELIEF THAT WAS TAUGHT TO ME BY MY PARENTS. I HAVE, NEVER SAID THIS IS RELATED TO THIS POLICY.
Q. OKAY. HAVE YOU EVER SAID THAT RELATED TO THIS POLICY ALL BLACK PEOPLE SHOULD BE STERILIZED?
A. I HAVE NEVER SAID THAT.

[SHIRLEY BROWN 6]

Q. HAVE YOU EVER SAID THERE WAS AN EPIDEMIC OF COCAINE USE IN THE BLACK COMMUNITY?
A. I HAVE NEVER SAID THAT.
Q. HAVE YOU EVER SAID THEY BETTER ARREST A WHITE WOMEN SOON OTHERWISE THEY WILL THINK I'M A RACIST?
A. I NEVER SAID THAT.
Q. MS. BROWN, ARE YOU A RACIST?
A. NO.
Q. NOW, LET'S TALK ABOUT THIS SPECIFIC PLAINTIFF.

MR. HOOD: I WOULD LIKE TO HAND THE WITNESS THE MEDICAL RECORDS OF ALL OF THE PLAINTIFFS THAT ARE IN EVIDENCE. AND I BELIEVE ONE PLAINTIFF'S RECORDS, SINCE THE PLAINTIFF WASN'T CALLED, MS. HALE, IS NOT IN EVIDENCE, AND I MOVE THOSE IN EVIDENCE.

MS. SHOWERS: DEFENDANT'S 22.

THE COURT: I ASSUME WITHOUT OBJECTION AND WITH THE SAME UNDERSTANDING THAT WE MADE WITH THE OTHER RECORDS.

MR. WHERRY: YES, SIR.

Q. (BY MR. HOOD, CONTINUING) WHILE WE'RE GETTING - WHILE BARBARA IS GETTING THE MEDICAL RECORDS ORGANIZED TO PASS UP TO YOU OF EACH OF THE TEN PLAINTIFFS, AS THE CASE MANAGER UNDER THIS POLICY, MS. BROWN, DID YOU HAVE RESPONSIBILITY WITH REGARD TO PROVIDING CHILD CARE FOR THESE COCAINE MOTHERS?

A. THAT WAS NOT MY RESPONSIBILITY.

Q. DID YOU HAVE RESPONSIBILITY WITH REGARD TO PROVIDING THEM

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WITH TRANSPORTATION TO SUBSTANCE ABUSE?

A. THAT WAS NOT MY RESPONSIBILITY. IF A WOMEN SAID THAT SHE HAD PROBLEMS I WOULD MAKE A REFERRAL TO THE SOCIAL WORKER AT THE MEDICAL UNIVERSITY.

Q. WHILE SHE IS GETTING THOSE TOGETHER, AGAIN, TELL THE JURY WHAT IS GIVEN TO A WOMEN WHO'S HAD A BABY WHEN SHE IS DISCHARGED, A DISCHARGE KIT?
A. WE HAVE A BAG, IT SAYS MY PERSONAL BELONGINGS ON IT. IT USED TO BE IN BLUE WRITING. I THINK WE NOW USE PURPLE WRITING. AND WHENEVER A MOTHER IS DISCHARGED FROM THE HOSPITAL, SHE IS GIVEN PERI PADS, SHE IS GIVEN A SQUIRT BOTTLE. IT'S JUST A CLEAR PLASTIC BOTTLE TO USE IN RINSING THEMSELVES. THEY'RE GIVEN O.B. SPONGES, SANITARY BELTS AND MESH PANTIES. ANY MEDS THAT ARE IN THE ROOM. AND IF THEY NEEDED A SITZ BATH, THEY WOULD BE GIVEN THE PORTABLE SITZ BATH TO TAKE WITH THEM. THEY WOULD BE GIVEN THEIR HYGIENE KIT, WHICH IS A PLASTIC BUCKET WITH TOOTHPASTE, AN EMERSON BASIN AND TOOTHBRUSH AND SOME PERSONAL BELONGINGS. PACKAGING UP BELONGINGS.
Q. IS THIS KIT GIVEN TO EVERY WOMEN WHO DELIVERS A BABY AT THE MEDICAL UNIVERSITY, TO YOUR KNOWLEDGE?
A. YES, IT IS.
Q. WHETHER THEY PAID FOR THE MEDICAL UNIVERSITY, OR MEDICAID OR MEDICARE HAS PAID FOR IT OR WHOEVER?
A. WE DON'T GIVE SERVICES BASED ON A PERSON'S ABILITY TO

[SHIRLEY BROWN 8]

PAY. EVERYONE RECEIVES THE SAME TREATMENT.
Q. AND WITH REGARD TO WHEN YOU TALK TO THESE PATIENTS AND GOT A SOCIAL HISTORY FROM THEM, IF YOU RECORDED THAT THE FATHER OF THE BABY WAS ONE RACE - ONE RACE OR ANOTHER, WHY DID YOU DO THAT?
A. AS PART OF THE NURSING HISTORY THAT WE HAD TO TAKE, WE WERE CONCERNED ABOUT SICKLE CELL DISEASE AND IF THE - IF WAS A DIFFERENT RACE THAT WOULD PLAY A PART INTO IT. THE BABY WAS UP FOR ADOPTION, THAT WAS ONE OF THE ADOPTION QUESTIONS THAT WAS ASKED WHAT WAS THE RACE OF THE FATHER.
Q. AND WHEN YOU HAD THE ADOPTION SITUATION, WHAT WERE THE INITIALS YOU WOULD PUT ON THE CHART ABBREVIATION?
A. BABY UP FOR ADOPTION, BUFA.
Q. AND DID YOU, MS. BROWN, IN APPLYING THE POLICY, CARE WHAT RACE THE BOYFRIEND OR SPOUSE WAS?
A. NO, I DIDN'T. I DETERMINED THE RACE OF EVERY PATIENT THAT I TOOK CARE ABOUT THE FATHER OF - IF IT WAS IN RELATION TO THE CHILD.
Q. DID YOU APPLY THIS POLICY ANY DIFFERENTLY TO A WHITE OR TO A BLACK?

A. ALL PATIENTS WERE TREATED THE SAME.
Q. OKAY. AND LET'S GO THROUGH WHAT YOUR ROLE WAS AS THE CASE MANAGER. AND BY THE WAY, THIS WAS AS - AT THIS TIME, '89 AND '90, DID YOU HAVE OTHER ROLES AS A NURSE AT THE MEDICAL UNIVERSITY?

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A. I WAS THE O.B. OUTCOME MANAGER. I TOOK CARE OF PATIENTS WHO WERE IN PRE-TERM LABOR, I TOOK CARE OF PATIENTS WHOSE BABIES HAD DIED. I TOOK CARE OF PATIENTS WITH DIABETES TO MAKE SURE THAT ALL OF THEIR CARE WAS TAKEN CARE OF. I TOOK CARE OF PATIENTS WHO TRIED SUICIDE. I GOT CALLED TO ANY HIGH RISK OBSTETRICAL PROBLEM OR ANY PSYCHOSOCIAL PROBLEM AS A PART OF THE TEAM TO DO MY PART OF THE NURSING EVALUATION. AND THEN TO HELP COORDINATE WITH THE PHYSICIANS AND SOCIAL WORKERS AND THE DIETICIANS AND PHYSICAL THERAPISTS, YOU KNOW, EVERYONE THAT WAS NEEDED TO MAKE SURE THAT THIS PATIENT HAD ALL OF THE CARE. THE PARAPLEGIC, YOU KNOW , THAT WE GOT HER IN REHAB SO THAT SHE COULD LEARN TO TAKE CARE OF HER CHILD FROM A WHEELCHAIR. PATIENTS WERE GIVEN MY CARD WHEN THEIR BABY DIED

AND I WOULD BE THE PERSON THAT THEY COULD CALL AT NIGHT OR ON THE WEEKEND OR WHATEVER WHEN THEY NEEDED TO TALK TO SOMEONE.

Q. WERE THESE ALL DUTIES OVER AND BEYOND IN ADDITION TO YOUR CASE MANAGEMENT JOB UNDER THIS POLICY?

A. THAT - THE - YES, IT WAS. I MEAN, IT WAS JUST PART OF THE CASE MANAGER. AND THE PATIENTS THAT WERE ON DRUGS WERE A SMALL PORTION OF THE PATIENTS THAT I HAD TO PROVIDE CARE FOR.

Q. BY THE WAY, THIS INTERAGENCY POLICY, WAS IT APPROVED BY THE HOSPITAL EXECUTIVE COMMITTEE?

A. YES, IT WAS.

Q. WAS THE ADOPTION OF THIS POLICY ANY DIFFERENT THAN THE OTHER NORMS OF POLICIES ADOPTED AT THE MEDICAL UNIVERSITY, AS

[SHIRLEY BROWN 10]

FAR AS YOU WERE AWARE OF, FOR A NURSE?

A. IT FOLLOWED NORMAL PROCEDURES AS FAR AS I WAS AWARE OF.

Q. WAS THIS YOUR POLICY, MS. BROWN? WAS THIS SOMETHING - WAS THIS YOUR IDEA THAT THE MEDICAL UNIVERSITY CAME UP WITH THIS POLICY?

A. NO, I DIDN'T WRITE THIS POLICY.

Q. NOW, LET'S GO THROUGH YOUR ROLE IN MEETING EACH OF THESE PATIENTS AND DOING AN ASSESSMENT. JUST PICK UP A STACK AND

LET'S GO THROUGH THEM, IT DOESN'T MATTER WHAT ORDER THEY'RE IN.

WHO IS THE FIRST ONE?

A. PATRICIA WILLIAMS.

Q. OKAY. PATRICIA WILLIAMS. PLEASE TURN TO THE PROGRESS NOTE.

MR. HOOD: YOUR HONOR. THESE ARE IN EVIDENCE. THESE ARE HER RECORDS OF TALKING WITH THIS PATIENT. WHAT I ASKED HER TO DO IS READ WHAT SHE WROTE DOWN.

A. DATE. WHICH DATE?

Q. YES, MA'AM. 1/15/92?

A. 1/15/92. "TALKED TO PATIENT ABOUT POSITIVE URINE DRUG SCREEN FOR COCAINE. PATIENT ADMITS TO USING COCAINE DURING PREGNANCY. PATIENT STATES SHE BEGAN USING COCAINE AT AGE 38, DESCRIBES USE AS SOCIAL. PATIENT GIVEN INFORMATION FOR PROTOCOL. PATIENT HAS APPOINTMENT WITH CHARLESTON COUNTY SUBSTANCE ABUSE JANUARY THE 22, 1992, AT 4 P.M. LETTER FROM

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SOLICITOR SIGNED. COPY IS IN MY OFFICE."

Q. ALL RIGHT. AND LET'S LOOK AT YOUR RECORDING ON JANUARY THE 30, '92. CASE MANAGER'S NOTES SIGNED BY YOU.

A. "REVIEWED WITH PATIENT HARMFUL EFFECTS OF COCAINE ON

PATIENTS AND FETUS AS WELL AS LEGAL RISK IF PATIENT CONTINUES TO USE DRUGS AND DOES NOT ENTER INTO TREATMENT. PATIENT STATES SHE HAS COMPLETED MEDICAID APPLICATION. PATIENT HAS AN APPOINTMENT ON 2-25-92 AT 4 P.M. WITH GLENDA BROWN AT CHARLESTON COUNTY SUBSTANCE ABUSE."

Q. OKAY. ON FEBRUARY 24, '92 AS THE CASE MANAGER YOU WROTE?

A. "TALKED TO PATIENT AT LENGTH ABOUT CONTINUED DRUG ABUSE AND THE MEDICAL RISKS TO THE PATIENT AND THE FETUS AS WELL AS THE LEGAL RISKS. PATIENT ENCOURAGED TO ATTEND INPATIENT TREATMENT BUT STATES THAT SHE CAN KICK THE PROBLEM." AND I HAVE IN QUOTES KICK THE PROBLEM. MEANS IT'S A DIRECT QUOTE FROM HER. "ON HER OWN."

"PATIENT STATES HER CONTINUED DRUG ABUSE IS RELATED TO LACK OF CONCERN ON MUSC'S PART. PATIENT ASKED WHAT WE CAN DO. PATIENT SAID IF WE CARED, SHE WOULD STOP USING DRUGS. EXPLAIN TO PATIENT WE, IN PARENTHESIS MUSC, WANTED THE BEST FOR THE PATIENT AND UNBORN CHILD AND THAT WE WERE WILLING TO ASSIST THE PATIENT IN RECEIVING TREATMENT FOR HER DRUG PROBLEM BUT THAT PATIENT MUST BE WILLING TO ACCEPT SHE HAS A PROBLEM AND THAT SHE MUST WANT THE TREATMENT FOR HERSELF AND UNBORN

CHILD. PATIENT UNDERSTANDS THE MEDICAL AND LEGAL RISKS FOR

[SHIRLEY BROWN 12]

CONTINUED DRUG ABUSE. DETECTIVE WARING WITH CHARLESTON CITY POLICE NOTIFIED ABOUT CONTINUED DRUG ABUSE ACCORDING TO HOSPITAL POLICY."

Q. AND THAT'S SIGNED BY YOU?

A. SIGNED BY ME.

Q. AND THE NEXT ENTRY BY YOU IS 3-10-92. AND WHAT DO YOU RECORD THERE?

A. "PATIENT WELL KNOWN TO ME BECAUSE OF CONTINUED DRUG ABUSE DURING PREGNANCY. JAMIE HAMILTON SOCIAL WORKER MADE REFERRAL TO DSS. WILL AWAIT URINE DRUG SCREEN ON INFANT FOR IC PATIENT."

Q. MS. BROWN; AS TO THIS PATIENT, MS. WILLIAMS, DO YOU RECALL REFUSING TO ALLOW HER TO SEE HER COUSIN?

MR. WHERRY: OBJECTION, LEADING.

A. I NEVER REFUSED TO LET THE PATIENT SEE ANY FAMILY MEMBERS.

THE COURT: WHAT?

MR. WHERRY: MAY I REQUEST A RULING BEFORE THE WITNESS ANSWERS THE QUESTION?

THE COURT: I WAS THINKING ABOUT IT. I'LL PERMIT THE QUESTION. I DON'T KNOW HOW - YOU KNOW, YOU CAN ASK

LEADING QUESTIONS. I THINK THE RULE SAYS WHERE THEY'RE NECESSARY, AND I DON'T KNOW HOW HE CAN ADDRESS A SPECIFIC PIECE OF EVIDENCE SUCH AS THAT THAT WAS BROUGHT OUT BY THE PLAINTIFF WITHOUT DOING IT IN A LEADING FASHION.

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Q. (BY MR. HOOD, CONTINUING) YES, MA'AM, AS TO THE COUSIN?
A. I'M SORRY?
Q. DID YOU REFUSE TO ALLOW HER TO SEE HER COUSIN?
A. I NEVER REFUSED TO LET ANYONE SEE ANY OF THEIR FAMILY.
Q. DID YOU HAVE ANY REASON TO REFUSE TO LET A PATIENT SEE THEIR FAMILY?
A. THAT - NO. I WOULDN'T DO THAT.
Q. IF THIS PATIENT CLAIMED THAT SHE WAS GIVEN NOTHING IN THE WAY OF MEDICAL SUPPLIES WHEN SHE WAS DISCHARGED, WOULD THAT HAVE OCCURRED?
A. THAT DID NOT OCCUR ON ANY PATIENT THAT I WAS THERE FOR. YOU KNOW, THEY WERE GIVEN ALL OF THEIR - ALL OF THEIR PERI PADS. IN FACT. WE ACTUALLY PUT EXTRA PERI PADS IN THERE AND EVERYTHING WAS PUT IN THAT BAG AND IT WAS HANDED TO THEM AND TO THE - AND IN FRONT OF THE POLICE OFFICER.
Q. OKAY. THAT'S MS. WILLIAMS. LET'S GO TO THE NEXT ONE YOU

HAVE.
THE COURT: IT'S 11:30. LET'S GO ON AND TAKE A BREAK. LET'S TAKE ABOUT FIFTEEN OR TWENTY MINUTES, LADIES AND GENTLEMEN.11:30 A.M.
(WHEREUPON, A BREAK WAS TAKEN OFF THE RECORD.)
(JURY ENTERS AT 12 NOON.)
Q. (BY MR. HOOD, CONTINUING) OKAY. WE GOT THROUGH WILLIAMS, LET'S GO TO THE NEXT ONE. WHO IS THE NEXT ONE IN YOUR STACK?

[SHIRLEY BROWN 14]

A. THERESA JOSEPH.
MR. WHERRY: MAY I HAVE A SIDEBAR, YOUR HONOR.
THE COURT: CERTAINLY.
(SIDEBAR AS FOLLOWS:)
MR. WHERRY: WITH THE JOSEPH RECORDS, WE HAVE A CONFIDENTIALITY MOTION FILED. THIS IS THE WOMAN WITH THE VERY SERIOUS HEALTH PROBLEM.
THE COURT: NOT QUITE SO LOUD.
MR. WHERRY: BACK AT MY TABLE I HAVE A DOCTOR'S LETTER, WHICH I'LL HAND UP TO THE COURT, WHICH I COULD BRING UP SAYING SHE IS HOSPITALIZED NOW, VERY SICK AND MAY NOT SURVIVE. BUT AT LEAST WITH RESPECT TO THE DIGNITY OF THE PATIENT, HER PARTICULAR MEDICAL PROBLEM, I THINK OUGHT NOT BE

REFERRED TO IN ANY WAY, AS MY MEMORY SERVES ME, AND YOU CAN LOOK AT THE SIZE OF THE RECORD.

THE COURT: WHAT ABOUT THAT, DO YOU PLAN TO GO INTO THAT? MY UNDERSTANDING IS THAT SHE HAS TESTED POSITIVE FOR HIV. DO YOU PLAN TO GO INTO THAT?

MR. HOOD: YOUR HONOR, JUST LOOKING AT HER NOTES, I DON'T KNOW WHETHER IT'S IN HER NOTES OR NOT.

THE COURT: WE WILL HAVE TO GET MS. SHOWERS UP HERE BECAUSE IF YOU' DON'T KNOW SHE WILL.

MR. HOOD: I'M LOOKING AT THEM. SHE WOULD KNOW.

MR. WHERRY: HERE IS A CERTIFICATE OR LETTER FROM HER DOCTOR ABOUT HER MEDICAL CONDITION.

[SHIRLEY BROWN 15]

MR. HOOD: WE HAVE ALSO SUBPOENAED HER CURRENT CHART. IT HASN'T ARRIVED YET.

THE COURT: JUST TELL ME WHETHER YOU'RE PLANNING ON PUTTING THAT IN?

MR. HOOD: YES, SIR. NO, WE WERE NOT PLANNING ON PUTTING IT IN. I WANT TO MAKE SURE THAT IT'S NOT IN HERE. IF IT IS, I CAN ASK HER NOT TO READ IT.

MS. SHOWERS: THERE MIGHT BE ONE WHEN SHE SIGNED OUT, BUT HE CAN STOP.

MR. HOOD: WHERE?

MS. SHOWERS: NOT ON THIS ADMISSION.
THE COURT: OKAY.
MS. SHOWERS: WE HAVE LEFT IT OUT.
THE COURT: I DON'T KNOW OF ANY REASON WHY YOU WOULD WANT TO BRING IT OUT. IF IT IS, WE'LL DISCUSS IT.
MR. HOOD: NO, WE DON'T CARE.
MAY I TELL THE WITNESS IN CASE I MISSED IT?
Q. (BY MR. HOOD, CONTINUING) OKAY, MS. BROWN, THIS IS PLAINTIFF JOSEPH. AND IF YOU WILL REFER TO JUNE 6, '91, YOUR CASE MANAGER NOTE.
A. I'M SORRY?
Q. 6/6/91.
A. YOU WANT ME TO READ THIS?
Q. YES, MA'AM.
A. 6/6/91. "LATE ENTRY. PATIENT SEEN AT 5:30 P.M. AND I

[SHIRLEY BROWN 16]

DISCUSSED PATIENT'S DRUG USAGE AND HARMFUL EFFECT OF DRUG USAGE TO THE PATIENT AND HER UNBORN CHILD. PATIENTS ADMITS IT TO IV HEROIN AND COCAINE USE. PATIENT WOULD NOT GIVE DETAILED HISTORY ON USE, I.E. NUMBER OF TIMES A WEEK OR LENGTH OF TIME USED. PATIENT SAID SHE WANTED TREATMENT BUT THAT SHE COULD STOP. EXPLAINED TO PATIENT THAT WE WOULD TRANSFER HER FOR

SUBSTANCE ABUSE TREATMENT AS WELL AS CONTINUE TREATMENT FOR CELLULITIS. WILL SHOW PATIENT VIDEO AND HAVE PATIENT SIGN LETTERS IN POLICY ON FRIDAY BEFORE TRANSFER TO MUSC PSYCHIATRIC INSTITUTE. PATIENT ASKED NUMEROUS QUESTIONS ABOUT TRANSFER TO THE PSYCHIATRIC INSTITUTE AND THE PROGRAM SHE SAW ON TV WITH THE SOLICITOR. EXPLAINED TO PATIENT IF SHE RECEIVED SUBSTANCE ABUSE TREATMENT THAT SHE WOULD NOT BE IN TROUBLE WITH THE LEGAL SYSTEM."

Q. WHAT WAS THE CELLULITIS ON HER FOOT FROM?

A. SHE USED IV HEROIN AND COCAINE, AND REPEATED USES INFLAMED THE VEIN AND CAUSED HER FOOT TO GET REALLY INFECTED. OR LEG.

Q. ALL RIGHT. AND THE NEXT ENTRY ON 6/7/91 BY YOU MS. BROWN ON THIS PATIENT?

A. INFORMED BY NURSES THAT PATIENT HAD LEFT AMA.

Q. WHAT DOES AMA MEAN?

A. LEFT THE HOSPITAL AGAINST MEDICAL ADVICE. "PHYSICIANS TRIED TO TALK HER INTO STAYING AND SHE REFUSED TO STAY."

Q. OKAY.

[SHIRLEY BROWN 17]

A. "TELEPHONED PATIENT AND TRIED TO CONVINCE PATIENT TO

RETURN TO HOSPITAL FOR TREATMENT OR HER CELLULITIS AS WELL AS TREATMENT FOR DRUG ABUSE PROBLEM. EXPLAINED TO THE PATIENT THAT FAILURE TO TREAT CELLULITIS FOR RESULT IN" - COULD RESULT - SAYS, "FOR RESULT OF LOSS OF HER FOOT AS WELL AS COULD RESULT IN HER DEATH. PATIENT SAID SHE HAD MADE UP HER MIND TO STOP USE OF DRUGS AND SHE COULD. PATIENT SAID SHE WOULD GO TO PHYSICIAN FOR TREATMENT OF HER FOOT. EXPLAINED TO PATIENT AFTER ALL ATTEMPTS - EXPLAINED TO PATIENT AFTER ALL ATTEMPTS TO HAVE PATIENT RETURN TO THE HOSPITAL FOR TREATMENT, THAT FAILURE TO ENTER SUBSTANCE ABUSE TREATMENT AND CONTINUED USE OF DRUGS COULD RESULT IN PATIENT BEING ARRESTED. PATIENT SAID SHE WOULD STAY AT HOME, STAY OFF DRUGS AND TAKE CARE OF HER SIX-YEAR-OLD. WILL HAVE SUZANNE J. WITTSCHEN, SOCIAL WORKER NOTIFY CHARLESTON COUNTY DSS PROTECTIVE SERVICES."

Q. OKAY. SIGNED BY YOU?

A. SIGNED BY ME.

Q. OCTOBER THE 18, 1991, AS THE CASE MANAGER, YOU WROTE WHAT ABOUT MS. JOSEPH?

A. WHICH DATE DID YOU SAY?

Q. 10/18/91.

A. "TALKED TO PATIENT ABOUT RECENT DRUG USAGE. PATIENT STATES SHE HAS BEEN USING TWENTY DOLLARS A DAY OF COCAINE A

DAY AND TWENTY-FIVE DOLLARS OF HEROIN A DAY IV."

I DON'T THINK I AM SUPPOSED TO READ ANYTHING ELSE.

[SHIRLEY BROWN 18]

Q. I THINK THAT'S OKAY. I THINK THAT'S OKAY. YOU'RE JUST TALKING ABOUT - "EXPLAINED TO PATIENT THAT INFANT WOULD."

A. THAT OKAY?

Q. YES, THIS IS WHAT YOU WROTE AND WHAT YOU EXPLAINED TO HER.

A. OKAY. "EXPLAINED TO PATIENT THAT INFANT WOULD GO TO THE NICU," WHICH MEANS NEONATAL INTENSIVE CARE UNIT AND PROBABLY GO THROUGH WITHDRAWAL. PATIENT ASKING QUESTIONS ABOUT BEING ARRESTED. EXPLAINED TO PATIENT THAT I COULD NOT ANSWER THAT QUESTION."

Q. OKAY. THANK YOU. NOW THE THREE THAT WE HAVE DONE, LET ME GET THOSE OUT OF WAY SO MS. JOSEPH, MS. WILLIAMS AND WHOEVER THE OTHER ONE WAS. THIS ONE HERE.

YOU HAVE DONE WILLIAMS. AND IS ALL OF THIS JOSEPH?

A. THIS IS JOSEPH'S.

Q. OKAY. WHAT IS THE NEXT ONE?

A. PAULA S. HALE.

Q. OKAY. MS. HALE. IS THAT HER NAME, H A L E?

A. H A L E.

Q. SHE HAD - I DON'T BELIEVE SHE HAS TESTIFIED HERE, EITHER. GIVE ME A MINUTE. LOOK AT YOUR NOTE, PLEASE, OF 10/2/89 OF MS. HALE.
A. OKAY.
Q. TELL US WHAT IT SAYS WHEN YOU FIND IT.
A. I DON'T HAVE THAT MEDICAL RECORD UP HERE.

[SHIRLEY BROWN 19]

Q. 10/2/89.
ANY OTHER RECORD ON HALE SOMEBODY. LET'S PUT HER ASIDE AND COME BACK TO HER.
WE GOT A COPY, LET'S JUST READ IT AND THEN WE'LL GET THE ORIGINAL. OKAY?
A. "TALKED TO MOTHER OF BABY WHO ADMITS TO SMOKING COCAINE BEFORE PREGNANCY AS WELL AS DURING PREGNANCY. MOTHER, BABY WAS AT PARTY AND SAID THAT SHE SMOKED COCAINE THE NIGHT SHE WENT INTO LABOR. IN FACT," AND I HAVE IT IN CHART MOB WHICH STANDS FOR MOTHER OF BABY, IT'S SHORTHAND, "STATES THE COCAINE PROBABLY CAUSED THE LABOR. MOTHER OF BABY DESCRIBES HERSELF AS A PARTY USER ONLY." THAT'S IN QUOTES. "NOT SOMEONE THAT IS ADDICTED TO COCAINE. MOTHER OF BABY STATES SHE LIVES WITH HER GRANDFATHER AND THAT THEY HAVE ALL THE SUPPLIES NEEDED FOR

THE BABY. MOTHER OF BABY PLANS TO BEGIN PICKING UP HER WIC FOR THE INFANT."

Q. WHAT IS WIC?

A. WOMEN AND INFANT CHILDREN. THAT'S WHENEVER YOU GET FORMULA FOR THE BABY, MILK, CHEESE, CEREAL AND DRIED BEANS EVERY MONTH FOR THE MOTHER.

Q. OKAY.

A. "STRESS TO PATIENT," IN PARENTHESIS, MOB FOR MOTHER OF THE BABY, "THE IMPORTANCE OF FOLLOW-UP CARE FOR THE INFANT. DISCUSSED WITH PATIENT IMPORTANCE OF FEEDING AND HOLDING INFANT. MICHELLE KINSLEY REQUESTED TO MAKE REFERRAL TO DSS

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PUBLIC SERVICE. MOTHER OF BABY STATES SHE DID NOT HAVE PRENATAL CARE BECAUSE SHE DOES NOT LIKE NEEDLES. THIS IS DATED 10/2/89." SIGNED BY SHIRLEY S. BROWN, CASE MANAGER.

Q. AND 12/14/1990. WOULD YOU READ THAT, PLEASE?

A. "PATIENT ADMITS TO USE OF COCAINE. STATES SHE BEGAN USING CAVIAR AROUND 24 YEARS OF AGE. PATIENT DESCRIBES USE AS RECREATIONAL. ON WEEKENDS ONLY - ONLY ON WEEKENDS AT PARTIES. PATIENT GIVEN INFORMATION PER PROTOCOL. LETTER FROM SOLICITOR SIGNED. COPY IS IN MY OFFICE. APPOINTMENT WITH

CHARLESTON COUNTY SUBSTANCE ABUSE JANUARY THE 3, 1991, AT TEN A.M. PATIENT HAS HAD INVOLVEMENT WITH THE LEGAL SYSTEM AND DSS PROTECTIVE SERVICES. PATIENT INFORMED THAT CHARLESTON COUNTY DSS PS, WHICH IS PROTECTIVE SERVICES, WOULD BE NOTIFIED. INFORMED LYNN FREDERICKS SOCIAL WORKER OF POSITIVE URINE DRUG SCREEN AND REQUESTED REFERRAL BE MADE TO DSS PUBLIC - PROTECTION SERVICES. SHIRLEY B. BROWN, RNNM. ADDENDUM, PATIENT HAS APPLIED FOR MEDICAID, AFFIDAVIT C, WHICH IS AID FOR DEPENDENT CHILDREN FOOD STAMPS AND PLANS TO APPLY FOR WIC. SHIRLEY B. BROWN, RNNM."

Q. OKAY. AND THAT'S MS. HALE. WHICH IS THE NEXT ONE YOU HAVE?

A. THE NEXT.

Q. THE NEXT PLAINTIFF.

A. LORI GRIFFIN.

Q. OKAY. LOOK AT YOUR PROGRESS NOTES FOR MS. GRIFFIN,

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PLEASE. IT'S DATED 10/10/89.

A. "TALKED WITH PATIENT ABOUT HISTORY OF COCAINE ABUSE. PATIENT STATES SHE BEGAN USING COCAINE AT AGE 19 BUT STATES SHE HAD USED IT INFREQUENTLY UNTIL AGE 25. PATIENT STATES SHE WAS USING COCAINE WHEN SHE FOUND OUT THAT SHE WAS PREGNANT BUT

STATED THAT SHE CONTINUED USING COCAINE. CONFRONTED PATIENT WITH THE FACT THAT SHE HAD SAID DURING PRENATAL VISITS AND LAST ADMISSION TO THE HOSPITAL THAT SHE WAS NO LONGER USING DRUGS. PATIENT DID NOT RESPOND. PATIENT STATES SHE LAST USED COCAINE IN AUGUST OR SEPTEMBER. CONFRONTED PATIENT WITH THE FACT THAT SHE TESTED POSITIVE FOR COCAINE AND PATIENT STATES SHE KNEW.

ALSO CONFRONTED PATIENT WITH THE FACT THAT SHE HAD HAD TO HAVE USED COCAINE IN THE PAST COUPLE OF DAYS. PATIENT WOULD NOT TALK OPENLY ABOUT COCAINE USE. PATIENT LIVES WITH HER BOYFRIEND AND TWO CHILDREN AGES THREE AND FOUR. PATIENT STATES HER BOYFRIEND ALSO USES COCAINE. PATIENT STATES SHE KNOWS THE RISK OF COCAINE, THAT THE DOCTORS HAD TOLD HER BEFORE THAT IT COULD CAUSE THE BABY TO DIE PATIENT STATES SHE ALSO WATCHED 48 HOURS ON CHANNEL 5 ABOUT CRACK AND THE NEWBORN. DISCUSSED RISK OF COCAINE WITH PATIENT, I.E., ABRUPTIO PLACENTA, IUFD AND INCREASED RISK OF SIDS AND NEUROLOGICAL DAMAGE."

Q. WHAT IS IUFD?

A. INTRAUTERINE FETAL DEATH. MEANS THAT THE BABY COULD DIE

INSIDE OF HER.
Q. AND WHAT IS SIDS?
A. THAT'S COMMONLY REFERRED TO AS CRIB DEATH.
Q. OKAY. AND THE LAST SENTENCE?
A. "NOTIFIED FRANK CORNELEY, SOLICITOR UPON REQUEST OF DR. JONES."
Q. UPON REQUEST OF WHO?
A. DR. JONES.
Q. OKAY. AND THAT'S YOUR NOTE SIGNED BY YOU?
A. SHIRLEY B. BROWN, RNNM.
Q. OKAY. NOW, I THINK I HAVE GOT A QUESTION ABOUT MS. GRIFFIN. WITH REGARD TO HER ARRESTS, DID YOU - DID YOU PARTICIPATE IN THAT?
A. CAN I REFER TO THE CHART. I THINK I WAS PRESENT.
Q. OKAY.
A. I WAS PRESENT.
Q. YOU WERE PRESENT?
A. YES.
Q. DID ANYTHING UNUSUAL HAPPEN DURING THAT OCCASION?
A. I DON'T RECALL ANYTHING UNUSUAL.
Q. HOW WAS SHE TREATED?
A. WITH RESPECT AND DIGNITY, JUST LIKE ALL PATIENTS ARE TREATED.
Q. OKAY.
MR. HOOD: YOUR HONOR, AT THIS POINT I WOULD LIKE TO

* * *

CONSEQUENCES. SHOULD YOU LEAVE THE HOSPITAL AGAINST MEDICAL ADVICE NEITHER THE HOSPITAL NOR THE PRIMARY PHYSICIAN WILL BE RESPONSIBLE FOR ANY HARM THAT ACTION MAY CAUSE YOU OR ANY OTHER PERSON."

Q. THANK YOU, MA'AM. MAY I TAKE THAT BACK, PLEASE. THANK YOU.

NOW, MS. BROWN -

THE COURT: YOU CAN MOVE THE EASEL.

MR. WHERRY: YES, I WILL.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, WHAT YOU HAVE JUST READ, PART OF 105, 105 IS, MS. BROWN, AN APPROVED DOCUMENT BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, APPROVED BY WHATEVER COMMITTEE HAD TO APPROVE IT, FAIR?

A. THAT'S CORRECT.

Q. NOW LET'S GO BACK TO WHAT WE TALKED ABOUT AT LEAST WITH RESPECT TO THE PLAINTIFFS LORI GRIFFIN AND LAVERNE SINGLETON. WOULD YOU AGREE WITH ME THAT A DRUG SCREEN OR RESULTS OF LABORATORY ANALYSIS OF ONES' URINE IS MEDICAL INFORMATION?

A. YES, IT IS.

Q. AND IF IN FACT YOU RELAYED THAT INFORMATION ON TO ANYONE IT WOULD HAVE BEEN BECAUSE YOU GOT THE RESULTS OF THE LAB TESTS FROM THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. THAT IS CORRECT.

Q. OKAY. NOW, LET'S GO FORWARD - I'M SORRY.

MR. WHERRY: YOUR HONOR, I WOULD LIKE TO SHOW THE

[SHIRLEY BROWN 28]

WITNESS WHAT HAS BEEN MARKED AS EXHIBIT 106. PLAINTIFF'S 106 FOR TRIAL FOR IDENTIFICATION ONLY. I'M SHOWING MY ADVERSARY.

(PAUSE IN PROCEEDINGS.)

MR. HOOD: YOUR HONOR, AS TO THIS EXHIBIT WE HAVE AN OBJECTION TO ITS RELEVANCY.

THE COURT: LET ME SEE IT.

MR. WHERRY: I'M NOT OFFERING IT YET.

THE COURT: IF YOU'RE NOT OFFERING IT.

MR. WHERRY: NO, SIR, I'M NOT. I WANT TO SHOW IT TO THE WITNESS TO SEE IF SHE CAN MAKE IT RELEVANT.

Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, YOU REFERRED TO EARLIER IN YOUR TESTIMONY A WRITING OF FIRST DRAFT OF A POLICY.

MS. BROWN, LET ME WITHDRAW THAT QUESTION AND I'LL LEAVE THE DOCUMENT THERE WITH YOU FOR A MOMENT. IT'S NOT WHAT I THOUGHT IT WAS.

DID THERE COME A POINT IN TIME, MS. BROWN, AT WHICH - AT WHICH YOU ATTENDED OR PARTICIPATED IN ANOTHER MEETING, A FURTHER DEVELOPMENT OF WHAT I WILL CALL THE INTERAGENCY

POLICY?
A. YES IT WAS.
Q. WITH RESPECT TO THE ONE THAT WAS ADOPTED IN OCTOBER OF '89, WERE THERE A LIST OF CRITERIA THAT WOULD LEAD TO THE HOSPITAL OBTAINING A UDS, URINE DRUG SCREEN?
A. YES, IT WAS.

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Q. AND WOULD YOU TELL THE JURY, PLEASE, WHAT THOSE CRITERIA WERE THAT WOULD LEAD TO THE HOSPITAL RUNNING A UDS, A URINE DRUG SCREEN?
A. A PERSON HAD NO PRENATAL CARE.
Q. NO PRENATAL CARE?
A. CORRECT. IF THEY HAD LATE PRENATAL CARE, THAT WOULD BE AFTER 24 WEEKS GESTATION.
Q. LATE PRENATAL CARE?
A. IF THEY HAD INCOMPLETE PRENATAL CARE, I.E., THEY CAME IN ONE VISIT AND THEN DIDN'T COME BACK UNTIL JUST BEFORE THEY DELIVERED.
Q. INCOMPLETE PRENATAL CARE.
A. IF THEY CAME IN WITH AN ABRUPTO PLACENTA, THAT IS WHENEVER THE PLACENTA SEPARATES FROM THE INSIDE OF THE UTERUS WHICH CAN CAUSE THE BABY TO DIE AND OR PUT THE MOTHER'S HEALTH IN SERIOUS JEOPARDY.
IF SHE CAME IN AND HER BABY HAD DIED INSIDE OF HER KNOWN AS INTRAUTERINE FETAL DEATH.

Q. MS. BROWN, I PROMISE YOU I'M GOING TO LET YOU CONTINUE WITH THAT. WITH THE INTRAUTERINE FETAL DEATH THAT WOULD TRIGGER A UDS?
A. YES, IT WOULD.
Q. IF THEIR THERE WAS INTRAUTERINE FETAL DEATH, THE HOSPITAL, I TAKE IT THE HEALTH CARE PROFESSIONALS HAD NO FURTHER INTEREST IN PROTECTION OF THE FETUS, DID THEY? THE

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BABY'S DEAD, THEY HAD NOTHING LEFT TO PROTECT, RIGHT?
A. BUT OUR URINE DRUG SCREENS WERE DONE TO LOOK FOR REASONS.
Q. I UNDERSTAND. CONTINUE WITH YOUR LIST AND THEN LET US RETURN TO THAT.
A. IF THEY WERE IN PRETERM LABOR.
Q. PRETERM LABOR.
A. IF - AND OF NO OBVIOUS CAUSE. IF A LADY HAD TWINS, TRIPLETS, A LONG HISTORY OF CERVICAL INCOMPETENCE OR SOMETHING LIKE THAT, SHE MIGHT NOT BE SCREENED.
INTRAUTERINE GROWTH RETARDATION. THAT'S WHEN THE BABY IS NOT THE SIZE THAT IT SHOULD BE AND THERE WAS NO OBVIOUS CAUSE FOR THAT.
AND UNEXPLAINED CONGENITAL ANOMALIES.
Q. WHICH I TAKE IT MEANS A BIRTH DEFECT?
A. A BIRTH DEFECT.

Q. OKAY. NOW, MS. BROWN, LET'S GO BACK TO THAT INTRAUTERINE FETAL DEATH. AND IN CONJUNCTION WITH THAT THE INTENT OF THE POLICY, THE REASON THAT WE DECIDED ON THIS POLICY, AT THE FIRST MEETING, WAS BECAUSE OF OUR CONCERN, AND AS MR. HOOD SAID IN HIS OPENING, FOR THE HEALTH AND SAFETY AND CARE OF THESE FETUSES AND SOON TO BE CHILDREN; FAIR?
A. THAT IS CORRECT.
Q. SO, HOW DID A TAKING A URINE SAMPLE FROM THE MOTHER OF A CHILD WHO WAS ALREADY DEAD, HOW DID THAT PROTECT UNBORN CHILDREN? IT DIDN'T, DID IT?

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A. IT DIDN'T.
Q. WHEN WE GOT A POSITIVE URINE SCREEN ON THE UNFORTUNATE WOMEN WHO EXPERIENCED THE INTRAUTERINE DEATH, THAT LIKEWISE WAS TURNED OVER TO THE POLICE FOR HER TO BE ARRESTED, WASN'T IT?
A. NO, IT WASN'T.
Q. WHAT WAS DONE WITH IT? WHY DID YOU TAKE IT?
A. UNDER THE SOUTH CAROLINA LAW AS EXPLAINED TO ME BY THE LEGAL COUNSEL AT THE MEDICAL UNIVERSITY, THAT WAS A WRONGFUL DEATH AND HAD TO BE REPORTED TO THE MEDICAL EXAMINER. SO THE MEDICAL EXAMINER.

Q. I'M SURE, MS. BROWN, EVERYTHING THAT YOU JUST TOLD ME IS TRUE. WHAT DOES THAT HAVE TO DO WITH YOUR REPORTING OF THE INTRAUTERINE FETAL DEATH TO THE MEDICAL EXAMINER FOR HER EXAMINATION OF THE CAUSE OF DEATH, WHAT DOES THAT HAVE TO DO WITH YOU TAKING A URINE SCREEN OF THE UNFORTUNATE MOTHER?
NOTHING, DOES IT, MA'AM?
A. IT WAS THE POLICY.
Q. MS. BROWN, I UNDERSTAND THAT IT WAS THE POLICY. IT HAS NOTHING TO DO WITH FETAL PROTECTION, DOES IT?
A. NO, IT DOESN'T.
Q. THANK YOU. NOW -
MR. WHERRY: IF THE COURT WILL BEAR WITH ME FOR JUST A MOMENT.
Q. (BY MR. WHERRY, CONTINUING) WHILE MR. HOOD IS LOOKING AT

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MARCH AND THAT THE PHYSICIANS EXPLAINED TO HER THE EFFECT OF COCAINE ON HERSELF AS WELL AS THE FETUS. PATIENT STATES SHE STOPPED USING COCAINE FOR ABOUT TWO MONTHS AND BEGAN USING COCAINE AGAIN BECAUSE OF SO MUCH PRESSURE. PATIENTS STATES SHE LAST USED COCAINE AROUND FIVE P.M. ON THURSDAY 10/12/89. DR. JONES IS AWARE."
Q. OKAY. AND YOU HAVE SAID DOCTOR SEVERAL TIMES IS AWARE.

WHAT IS THAT AN INDICATION OF THAT YOU WERE DOING?
A. I WOULD ALWAYS DISCUSS ANY CASE WITH THE PHYSICIAN TO DETERMINE WHAT NEEDED TO BE DONE.
Q. AND IF THIS PATIENT TESTIFIED THAT SHE LEFT THE HOSPITAL IN A HOSPITAL GOWN, HOW WOULD SHE HAVE BEEN DRESSED?
A. SHE WOULD HAVE LEFT IN TWO HOSPITAL GOWNS OR POSSIBLY THREE IF IT WAS COOL.
Q. OKAY. THE NEXT PLAINTIFF.
A. CRYSTAL FERGUSON.
Q. OKAY. IF I CAN GET YOUR NOTE OF 6/20/91. DID YOU OBTAIN A HISTORY FROM THIS PATIENT?
A. YES, I DID.
Q. OKAY.
A. "PATIENT GIVEN INFORMATION FOR COCAINE POLICY AND LETTER SIGNED FROM SOLICITOR. COPY IS IN MY OFFICE. PATIENT ADMITS TO THE USE OF COCAINE/CRACK. DENIES IV USE. PATIENT STATES SHE BEGAN USING COCAINE AUGUST THE 3, 1990, AND LAST USED SATURDAY JUNE 15, 1991. PATIENT BEGAN SMOKING CIGARETTES AND

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MARIJUANA AT AGE 15 AS WELL AS DRINKING ALCOHOL, BEER AND WINE. PATIENT STATES SHE HAS DECREASED BEER CONSUMPTION TO SIX-PACK EVERY WEEK. PATIENT LIVED WITH HER HUSBAND WHO SHE

CLAIMS IS A DRUG ADDICT AND NOW HER TWO CHILDREN AGES 11 AND 10. PATIENT'S SISTER IS TAKING CARE OF CHILDREN WHILE PATIENT IS IN HOSPITAL. PATIENT IS RECEIVING UNEMPLOYMENT, WIC AND FOOD STAMPS. PATIENT HAS AGREED TO INPATIENT SUBSTANCE ABUSE TREATMENT AT MUSC PSYCHIATRIC INSTITUTE. DOCTOR TATE AWARE AND AGREES. PATIENT WILL BE ADMITTED TO MUSC PSYCH. INSTITUTE THIS P.M. IF MEDICALLY STABLE. SHIRLEY B. BROWN, RNNM."

Q. ULTIMATELY IF THIS PATIENT WAS ARRESTED, WERE YOU PRESENT AT THE TIME SHE WAS ARRESTED?

A. NO, I WAS NOT.

Q. IF SHE SAID THAT YOU WERE PRESENT, WOULD THAT BE CORRECT OR NOT?

A. I WAS NOT PRESENT WHEN SHE WAS ARRESTED.

Q. DOES THE CHART SHOW WHO THE CASE MANAGER WAS WHEN SHE WAS ARRESTED?

A. MELISIA HENRY.

Q. THE NEXT PLAINTIFF, PLEASE?

A. DARLENE NICHOLSON.

Q. OKAY. ACCORDING TO YOUR NOTE AS CASE MANAGER OF 12/17/93.

A. I'M SORRY?

Q. 12/17/93?

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A. SHE HAS GOT SO MANY RECORDS I CAN'T FIND IT.

Q. OKAY.
A. 12/17/93?
Q. YES, MA'AM. DO YOU WANT TO TAKE MY COPY?
A. OKAY. I CAN'T FINE IT.
Q. THERE IS AN ENTRY FOR 2/17/94. IS THAT YOUR ENTRY?
A. I'M SORRY, DO WHAT?
Q. IS THAT YOUR ENTRY?
A. YES.
Q. AND THE DATE OF IT IS?
A. 12/17/93.
Q. OKAY.
A. OB CASE MANAGER NOTE. "SPOKE WITH MAXINE GAILLARD, COUNSELOR AT CHARLESTON COUNTY SUBSTANCE ABUSE REGARDING PATIENT'S CONTINUED POSITIVE DRUG SCREEN FOR COCAINE. MS. GAILLARD RECOMMENDED THAT PATIENT RECEIVE INPATIENT TREATMENT. WILL SEE PATIENT AT NEXT VISIT TO TALK TO PATIENT ABOUT INPATIENT TREATMENT AND MAKE ARRANGEMENT FOR INPATIENT SUBSTANCE ABOUT TREATMENT. SHIRLEY B. BROWN, RNNM.4"
SAME DAY THAT I DIDN'T KNOW THAT. I WAS GOING TO SEE HER THAT DAY. "O.B. CASE MANAGER NOTE 12/17/93. TALKED TO PATIENT ABOUT RISK RELATED TO COCAINE ABUSE AND FETAL WITHDRAWAL RELATED TO METHADONE USE. PATIENT STATES SHE WANTS TO STOP METHADONE AS SOON AS SHE DELIVERS: TALKED TO PATIENT ABOUT INPATIENT TREATMENT AND PATIENT AGREED TO INPATIENT

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TREATMENT. ARRANGEMENTS MADE FOR PATIENT TO BE ADMITTED TO MUSC INSTITUTE OF PSYCHIATRY THIS P.M. INFORMED PATIENT ABOUT A BED AVAILABLE NOW. PATIENT STARTED WITH EXCUSES ABOUT NOT GOING INTO TREATMENT TILL MONDAY, THEN SATURDAY AFTER ONE P.M. THEN GIVE HER SEVERAL HOURS AND SHE WILL GO INTO TREATMENT. TALKED WITH DR. MALCOMB IN PSYCHIATRY WHO RECOMMENDED INVOLUNTARY COMMITMENT. EXPLAINED TO PATIENT THAT IF SHE REFUSED VOLUNTARY ADMISSION THAT. INVOLUNTARY COMMITMENT WOULD BE DONE. AFTER A LONG DISCUSSION WITH PATIENT AND HER BOYFRIEND, PATIENT AGREED TO VOLUNTARY ADMISSION TO MUSC IOP. PATIENTS STAYED SHE HAS NOT USED COCAINE IN SEVERAL WEEKS SINCE LAST POSITIVE COCAINE ON 12/3/93. PATIENT'S DRUG WAS POSITIVE FOR COCAINE TODAY. GAVE PATIENT INFORMATION REGARDING TRANSPORTATION TO MUSC IOP."

Q. IS THIS PATIENT TESTIFIED YOU FORCED HER OR PUSHED HER INTO SUBSTANCE ABUSE TREATMENT, WOULD THAT BE CORRECT?

A. I EXPLAINED TO HER WHAT DR. MALCOMB TOLD ME TO EXPLAIN TO

HER, SHE WOULD BE INVOLUNTARILY COMMITTED.
Q. OKAY. ALL RIGHT. DOES THAT CONCLUDE YOUR ENTRIES ON HER?
A. 2/17/94.
Q. OKAY. PLEASE READ THAT ENTRY BY YOU?
A. "PATIENT KNOWN TO ME BECAUSE SHE WAS SEEN IN DECEMBER OF '93. I DID NOT HAVE PATIENT SIGN LETTER FROM SOLICITOR'S OFFICE BECAUSE SHE WAS GOING TO BE INVOLUNTARILY COMMITTED TO

[SHIRLEY BROWN 36]

MUSC IOP. I TALKED WITH PATIENT AT LENGTH ABOUT HARMFUL EFFECTS OF COCAINE AND HEROIN TO PATIENT AND HER UNBORN CHILD. PATIENT STATES SHE HAS SEEN THE VIDEO ON SMOKING DRINKING AND DRUGS. PATIENT STATES PREGNANT WOMEN SHOULD NOT USE DRUGS." THAT'S IN QUOTES. "PATIENTS ADMITS TO USING COCAINE, CRACK, SINCE AGE 13, BUT STATES IN THE PAST YEAR SHE HAS LOST CONTROL AND LOST EVERYTHING EXCEPT HER KID BECAUSE OF DRUG USE. PATIENT STATES SHE BEGAN USING HEROIN AT AGE 27."
AND I WENT TO WRITE SOMETHING AND WROTE ON TOP OF IT MISTAKE, AND MY INITIALS WHICH MEANS -
Q. FINE.
A. BEGAN USING - LET ME START OVER AGAIN. "PATIENT STATES

SHE BEGAN USING HEROIN AT AGE 27 AND BEGAN USING METHADONE ABOUT FOUR AND A HALF YEARS AGO. PATIENT HAS BEEN INVOLUNTARILY COMMITTED TIMES TWO THIS PREGNANCY, AND STATES SHE VOLUNTARILY ENTERED MUSC IOP ON MONDAY. EXPLAINED TO PATIENT THAT DSS WOULD BE NOTIFIED AFTER THE INFANT WAS BORN. PATIENT STATES HER CHILDREN AGES 16, 12 AND 3 ARE BEING CARED FOR BY THEIR GRANDPARENTS. PATIENT STATES THE FATHER OF THE BABY IS ALSO USING HEROIN AND SHE DOES NOT PLAN ON LIVING WITH HIM BECAUSE SHE STATES SHE NEEDS TO FIND A DRUG FREE ENVIRONMENT. PATIENT READ LETTER FROM SOLICITOR'S OFFICE BUT REFUSED TO SIGN. COPY OF LETTER WITH STATEMENT OF PATIENT REFUSING TO SIGN LETTER IS ON FILE IN MY OFFICE MELISIA HENRY, RNNM. AND PRESENT FOR TALK WITH PATIENT."

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Q. THANK YOU VERY MUCH. AND THE LAST PLAINTIFF IS MS. PEAR I BELIEVE.

THE COURT: WHAT WAS THE NAME OF THE LAST ONE?

MR. HOOD: NICHOLSON, YOUR HONOR.

THE COURT: WAS SHE EVER ARRESTED?

THE WITNESS: NO, SHE WASN'T.

MR. HOOD: SHE WENT INTO SUBSTANCE ABUSE AND WAS NOT ARRESTED?

THE WITNESS: THAT'S CORRECT.

MR. HOOD: GOOD.

Q. (BY MR. HOOD, CONTINUING) AND THE LAST ONE IS MS. PEAR. LET ME JUST GIVE YOU MY NOTES?

A. NO. WOULD YOU TAKE THESE BECAUSE I'M AFRAID THEY WILL FALL AND THEN IT WILL BE A MESS. THERE WERE A BUNCH OF RUBBER BANDS TRYING TO HOLD THEM TOGETHER.

Q. THANK YOU.

MR. HOOD: THIS IS WHAT SHE READ FROM. I'LL LET YOU HAVE IT.

DEPUTY CLERK: THANK YOU.

A. THESE ARE THERESA JOSEPH.

Q. I'M GOING TO ASK YOU ABOUT THAT IN JUST A MOMENT. DO YOU HAVE PEAR RIGHT THERE?

A. OKAY.

Q. GO BACK TO MS. NICHOLSON. WAS HER INVOLUNTARY COMMITMENT AFTER THIS LAWSUIT WAS BROUGHT IN '94?

[SHIRLEY BROWN 38]

A. SHE WAS - YEAH. SHE - THIS -

Q. THAT'S FINE. THAT'S ALL I WANT TO KNOW.

NOW, LET'S DO MS. PEAR.

A. ALL RIGHT.

Q. OKAY. IT'S 9/14/90 PLEASE. THE LAST ONE. TWO ENTRIES.

A. "THIS PATIENT IS WELL KNOWN TO ME BECAUSE OF POSITIVE

URINE DRUG SCREEN AND CONTINUED USE OF COCAINE DESPITE COUNSELING. PATIENT WAS ARRESTED FOR COCAINE ABUSE DURING PREGNANCY AND IS OUT ON BOND. TALKED TO PATIENT ABOUT TECHNIQUES USED TO HANDLE PROBLEMS ASSOCIATED WITH COCAINE AND GAVE PATIENT LETTER FROM THE NEONATOLOGY. STRESSED TO PATIENT THE IMPORTANCE OF CONTINUING WITH SUBSTANCE ABUSE TREATMENT. PATIENT INFORMED THAT DSS PROTECTIVE SERVICES WOULD BE NOTIFIED. PATIENT'S OTHER CHILDREN ARE NOT WITH PATIENT. PATIENT'S OLDEST CHILDREN ARE IN HER PARENTS' CUSTODY AND HER YOUNGEST CHILD IS IN FOSTER CARE WITH POSSIBLE CARE GOING TO THE FATHER OF THAT CHILD MOTHER. FATHER OF BABY IS CURRENTLY IN JAIL. SHIRLEY B BROWN, RNNM."

Q. YOU HAVE ANOTHER CASE MANAGER NOTE ON 8/31/90 FOR THIS PATIENT. AND IT SAYS -

A. "TALKED TO PATIENT ABOUT COCAINE." SORRY. "TALKED TO PATIENT ABOUT URINE TESTING POSITIVE FOR COCAINE. PATIENT DENIES USE AND IS NOT COOPERATIVE IN GIVING A DRUG HISTORY. REVIEWED WITH PATIENT PROBLEMS THAT CAN OCCUR TO PATIENT AND THE FETUS BECAUSE OF CONTINUED COCAINE USE. PATIENT STATES

SHE UNDERSTAND THE PROBLEM. REVIEWED WITH PATIENT SIGNS AND SYMPTOMS OF PRE-TERM LABOR AND NEED FOR BEDREST AND STOP USE OF COCAINE. PATIENTS STATES SHE IS CURRENTLY LIVING WITH HER UNCLE AND THAT HER CHILDREN LIVE WITH HER MOTHER. PATIENT STATES FATHER OF THE BABY IS IN JAIL."

NOW, WERE YOU INVOLVED IN THIS PATIENT BEING TURNED OVER TO OR DISCHARGED TO THE CITY POLICE?

A. I DON'T REMEMBER.

Q. OKAY.

A. I DON'T REMEMBER THIS PATIENT. IF THERE IS A NOTE IN THE CHART SAYING I WAS PRESENT, I WAS PRESENT. I DON'T REMEMBER HER SPECIFICALLY.

Q. OKAY. WELL I'M NOT GOING TO ASK YOU TO GO THROUGH IT. I DON'T THINK YOU WERE, BUT IF YOU REMEMBERED I WANT TO KNOW ONE WAY OR OTHER. DO YOU HAVE ANY RECOLLECTION ON HER ARREST?

A. I DON'T HAVE ANY RECOLLECTION ABOUT HER ARREST.

Q. I DON'T THINK IT'S NECESSARY. I PUT IN FRONT OF YOU THERESA JOSEPH'S RECORD. SHE HAS BEEN IN THE HOSPITAL MANY TIMES. AND WHAT I WOULD LIKE TO KNOW IS, ON THE PATIENT INFORMATION SHEET THAT SHE CHECKED IN AT REGISTRATION, WHAT DID SHE PUT DOWN AS HER RACE ON EACH OCCASION?

A. DO YOU WANT ME TO GIVE THE DATES AND SO ON?

Q. HER RACE?
A. ON HOSPITAL ADMISSION 6/5/91, WHITE.
Q. OKAY.

* * *

[SHIRLEY BROWN 48]

GOVERNMENT, THEIR APPLICATION FORM.
THE COURT: OKAY.
Q. (BY MR. WHERRY, CONTINUING) IN ANY EVENT, IT WAS AFTER THE INTERAGENCY POLICY BEGAN; ISN'T THAT RIGHT?
A. THAT'S CORRECT.
Q. AND THIS GRANT WAS TO FUND A CHANGE OR IMPROVEMENT IN THE TREATMENT MODALITIES AVAILABLE TO THE WOMEN WHO WERE THE SUBJECT OF THE POLICY, FAIR?
A. THAT IS CORRECT.
Q. NOW, MS. BROWN, GOING TO NEXT SIGNATURE ON WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 119, BECAUSE WE MAY OR MAY NOT HAVE HAD YOU TESTIFY BEFORE AS TO WHETHER OR NOT YOU RECOGNIZE THE HANDWRITING ON THE BOTTOM HALF OF THAT DOCUMENT AS BEING YOUR HANDWRITING?
A. THAT IS MY HANDWRITING.
Q. AND THAT DOCUMENT IS PART OF THE PATIENT RECORD, ISN'T IT?
A. YES, IT IS.
Q. AND THAT'S PART OF THE PATIENT RECORD, PARTICULARLY THE PROGRESS NOTES?
A. THAT IS CORRECT.

MR. WHERRY: YOUR HONOR, AT THIS POINT I MOVE DOCUMENT NUMBER 119 INTO EVIDENCE.

THE COURT: MARK IT IN EVIDENCE. I'M ASSUMING THAT IT'S THE 119 THAT WE HAVE TALKED ABOUT.

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MR. HOOD: CAN I SEE WHAT IT IS.

YOUR HONOR, THIS IS ON A NON-PLAINTIFF SO WE WOULD OBJECT.

THE COURT: I OVERRULE THE OBJECTION.

MR. WHERRY: JUST BECAUSE THERE IS STILL A STICKER ON IT SAYING FOR IDENTIFICATION ONLY, I MOVE INTO EVIDENCE PLAINTIFF'S 120, 121, 122 AND 123. I THINK YOU RULED ON IT BECAUSE THE ID STICKER IS STILL ON IT.

MR. HOOD: OUR POSITION ON ALL OF THEM, THEY'RE JUST NON-PLAINTIFFS. I WANT THE RECORD CLEAR THAT THEY'RE NON-PLAINTIFF. AND UNDER 403.

THE COURT: I HAVE ALREADY RULED ON IT AND I HAVE OVERRULED THAT OBJECTION.

MR. HOOD: YES, SIR.

Q. (BY MR. WHERRY, CONTINUING) GET BACK TO THESE DOCUMENTS IN A MOMENT, MS. BROWN. THE - WITH RESPECT TO THE PLAINTIFF PATRICIA WILLIAMS, I THINK YOU TESTIFIED ABOUT SOME THINGS IN

HER MEDICAL RECORD. IN HER MEDICAL RECORDS - LET ME WITHDRAW THAT QUESTION.

IN FACT WITH PATRICIA WILLIAMS, YOU INFORMED HER IT IS REQUIRED THAT SHE HAVE A TUBAL LIGATION BEFORE LEAVING THE HOSPITAL; ISN'T THAT SO?

A. THAT IS NOT SO.

Q. DID SHE HAVE A TUBAL LIGATION?

A. I WOULD HAVE TO LOOK AT HER CHART TO SEE IF SHE HAD ONE.

* * *

[SHIRLEY BROWN 51]

ONE THAT DID IT.

Q. WHEN YOU REPORTED A PATIENT TO THE CHARLESTON POLICE DEPARTMENT, DID YOU REPORT THE PATIENT'S RACE?

A. THEY NORMALLY ASKED THE RACE.

Q. SO I TAKE IT THEREFORE THE ANSWER TO THAT QUESTION IS YES?

A. IF THEY ASKED ME THE RACE I WOULD HAVE GIVEN THEM THE RACE.

Q. AND SO ASSUMING NO SLIP BETWEEN THE CUP AND THE LIP, THE RACE REPORTED ON THE CHARLESTON POLICE DEPARTMENT' RECORDS WOULD BE THE RACE REPORTED BY YOU IF IN FACT YOU WERE ASKED?

A. IF I WAS ASKED I WOULD HAVE REPORTED WHAT WAS IN HER RECORD.

Q. YES. YOU HAVE SEEN, HAVEN'T YOU, POLICE REPORTS ON WOMEN

THAT WERE ARRESTED PURSUANT TO THE POLICY, HAVEN'T YOU?
A. I HAVE SEEN THE ONES THAT WERE SHOWN TO ME IN DEPOSITION. I NEVER SAW A POLICE REPORT AFTER A PERSON WAS ARRESTED.
MR. WHERRY: MAY I HAVE THIS MARKED FOR IDENTIFICATION, PLEASE.
MR. HOOD: YOUR HONOR, IF THIS IS THE COMPLETE CITY OF CHARLESTON AND POLICE RECORDS ON THIS PERSON, WE HAVE NO OBJECTION. AS WE SAID BEFORE ABOUT OTHERS, WE HAVE THE COMPLETE RECORD, AND IN OUR CASE WE INTEND TO PUT THEM IN. I DON'T THINK COUNSEL CAN REPRESENT THIS IS FULL RECORD AND I

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[SHIRLEY BROWN 56]

PATIENT. HE WAS NEVER ONE OF MY PATIENTS. AND THAT IS SOMETHING THAT THE PATIENT TOLD ME. I COULDN'T RELY ON JUST THAT.
Q. YOU SAID THAT A COUPLE OF TIMES. LET ME CLEAR THAT UP. YOU WERE TOLD THAT IT WAS YOUR OBLIGATION AS A NURSE TO REPORT CRIMES THAT YOU PERCEIVED TO BE COMMITTED BY YOUR PATIENT TO THE POLICE?
A. IF IT RELATED TO CHILD ABUSE I WAS TO REPORT THAT OR

THERE WAS A FIVE HUNDRED DOLLAR FINE AND SIX MONTHS IMPRISONMENT FOR FAILURE TO NOTIFY THE POLICE AND/OR DSS.

Q. LAVERNE SINGLETON REPORTED TO YOU THAT SHE WAS PROBABLY POSITIVE FOR COCAINE BECAUSE HER BROTHER USED COCAINE IN THE BATHROOM AND SHE USED THE BATHROOM AFTER HE USED IT, RIGHT?

A. I READ THAT IN THE CHART. I BELIEVE IT WAS FROM LAVERNE'S NOTE.

Q. YOU DIDN'T REPORT HER BROTHER, WHOSE IDENTITY YOU KNEW AND WHOSE ADDRESS YOU KNEW BECAUSE SHE LIVED WITH HIM, TO THE POLICE OR TO THE SOLICITOR DID YOU?

A. NO, I DID NOT.

Q. AND HER BROTHER, SHE TOLD YOU BY HISTORY, LIVED IN THE SAME HOME AS SHE LIVED IN WHERE SHE WAS RAISING OTHER CHILDREN, FAIR?

A. THAT IS CORRECT.

Q. AND YOU DIDN'T REPORT HIM TO THE DIVISION OF SOCIAL SERVICES DID YOU?

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[SHIRLEY BROWN 64]

Q. AND THAT I THINK YOU TOLD US WAS ON AUGUST 31ST?

A. I DON'T REMEMBER THE DATE, BUT IF YOU SAY I SAID IT THEN I'M SURE THAT YOU WOULDN'T REPEAT SOMETHING THAT I DIDN'T SAY.

Q. NOW, LET'S TALK ABOUT PLAINTIFF'S EXHIBIT NUMBER 120 IN EVIDENCE. YOU RECOGNIZE THAT, AS YOU DID WHEN YOU WERE ON THE STAND BEFORE, AS BEING IN YOUR HANDWRITING, FAIR?

A. THAT'S CORRECT.

Q. AND THAT WAS, AS I TAKE IT, LOOKING AT IT, JUST WRITTEN ON A PLAIN WHITE PIECE OF PAPER FOR YOUR PERSONAL NOTES; RIGHT?

A. THAT'S CORRECT.

Q. THAT WAS NOT PART OF THE MEDICAL RECORD?

A. THIS WAS JUST KIND OF MY NOTE WHEN I WAS IN TALKING WITH A PATIENT SO THAT WHEN I WENT TO WRITE IN THE MEDICAL RECORD I WOULD MAKE SURE THAT ALL OF THE INFORMATION THEY GAVE ME WAS WRITTEN.

Q. AND TOWARD THE TOP OF THAT NUMBER 120, YOU MAKE A NOTE, BOYFRIEND IS BLACK, DON'T YOU?

A. YES, I DO.

Q. NOW, YOU DIDN'T WRITE FATHER OF BABY IS BLACK, DID YOU?

A. NO, I DID NOT.

Q. YOU DIDN'T WRITE HUSBAND IS BLACK, DID YOU?

A. NO, I DID NOT.

Q. YOU WROTE BOYFRIEND IS BLACK. WHAT MEDICAL PURPOSE DID IT SERVE FOR YOU TO NOTE - AND BY THE WAY - LET ME WITHDRAW

THAT QUESTION.
THAT PATIENT THAT YOU WROTE THAT ON IS WHITE, ISN'T SHE?
A. I HAVE NO EARTHLY IDEA. IS IT ON HERE THAT SHE IS WHITE. IT DOESN'T - I DON'T KNOW WHO THIS PATIENT IS. I WOULD HAVE TO SEE HER RECORD TO KNOW.
Q. WELL, YOU HAVE BEEN FAMILIAR WITH THAT DOCUMENT FOR A LONG TIME NOW, HAVEN'T YOU?
A. THIS DOCUMENT?
Q. YES.
A. I THINK I MIGHT HAVE SAW IT DURING ONE OF MY DEPOSITIONS, BUT, I MEAN, I HAVEN'T HAD THESE RECORDS IN MY POSSESSION IN A LONG TIME.
Q. YOU KNEW WHEN YOU CAME BACK TO THE STAND TODAY I WAS GOING TO QUESTION YOU ABOUT THAT, DIDN'T YOU?
A. MR. HOOD NEVER SHOWED ME THIS AND HE NEVER TOLD ME YOU WERE GOING TO QUESTION ME ABOUT THIS.
Q. WHY DID YOU RECORD THE RACE AS OPPOSED TO THE FATHERHOOD OR THE PARENT OF THE CHILD, WHY DID YOU RE - WHY DID YOU RECORD THE RACE OF THE PATIENT'S BOYFRIEND?
A. I WOULD HAVE RECORDED IT BECAUSE SHE MIGHT HAVE SAID HE COULD BE THE FATHER OF THE BABY. SOMETIMES PATIENTS WOULD SAY I'M NOT SURE HE IS THE FATHER. OKAY?
Q. WHY DID YOU RECORD BLACK?

MR. HOOD: BEG THE COURT, PLEASE, SHE IS TRYING TO

[SHIRLEY BROWN 66]

ANSWER THE QUESTION.
THE COURT: LET HER FINISH HER ANSWER.
A. IF HE IS THE FATHER OF THE BABY THAT IS PERTINENT INFORMATION. AND IF THE PERSON COULD NOT TELL US WHO THE FATHER OF THE BABY IS, THEN WE WOULD WANT TO MAKE SURE THAT WE LOOKED AT ALL ASPECTS TO LOOK FOR A SICKLE CELL TRAIT OR ANY MEDICAL PROBLEMS THAT CAN OCCUR.
Q. OKAY. TO LOOK FOR SICKLE CELL TRAITS OR ANY MEDICAL PROBLEMS, THAT IS ASSOCIATED WITH RACE, RIGHT?
A. THAT IS CORRECT.
Q. NOW, MS. BROWN, YOU KNOW, DON'T YOU, THAT THERE IS A SOUTH CAROLINA STATUTE THAT WAS IN EXISTENCE AT THAT TIME THAT REQUIRES EVERY SINGLE CHILD BORN IN SOUTH CAROLINA TO BE TESTED FOR ANY TRAIT THAT COULD RELATE TO RACE, WHETHER WHITE OR BLACK OR ASIAN, HISPANIC, YOU KNOW EVERY CHILD IS TESTED, DON'T YOU?
A. I WAS NOT AWARE OF THAT LAW AT THAT TIME THAT EVERY CHILD WAS TESTED. I'M AWARE OF THE LAW IN RELATION TO BEING TESTED FOR SYPHILIS AND SEXUALLY TRANSMITTED DISEASES.

Q. YOU'RE AWARE OF THAT LAW NOW?
A. I AM.
Q. AND YOU WOULD AGREE WITH ME THAT THAT LAW WAS IN EFFECT, THAT LAW WAS A LAW BACK WHEN YOU WROTE THAT NOTE?
A. I WILL AGREE THAT I HAVE BEEN TOLD THAT LAW WAS IN EXISTENCE, BUT I CANNOT SAY THAT I KNEW THAT LAW WAS IN

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[SHIRLEY BROWN 71]

INSTRUCT YOU ABOUT IT. THE ONLY PURPOSE OF THE QUESTION IS TO SEE WHETHER OR NOT SHE HAD KNOWLEDGE OF THAT, BECAUSE IF SHE HAD KNOWLEDGE OF IT, IT MAY AFFECT HER CREDIBILITY IN SAYING THAT SHE REPORTED THIS INFORMATION FOR ANOTHER REASON.
YOU MAY PROCEED.
Q. (BY MR. WHERRY, CONTINUING) YOU CREATED A CHEAT SHEET FOR USE IN YOUR JOB, DIDN'T YOU?
A. THAT'S CORRECT.
Q. LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 123 IN EVIDENCE. THAT IS THE CHEAT SHEET, ISN'T IT?
A. THAT IS CORRECT.
Q. ON THAT CHEAT SHEET TO MAKE YOUR JOB EASIER, MS. BROWN, YOU DO NOT HAVE ANY - BY THE WAY THAT FORM WAS CREATED BY YOU, WASN'T IT?
A. IT WAS CREATED BY ME AND ONE OF THE PHYSICIANS.

Q. THERE IS NO PLACE ON THAT FORM TO RECORD THE RACE OF THE BABY'S FATHER, IS THERE?
A. NO. IT WAS A WORKING DRAFT IN PROGRESS.
Q. WHETHER A WORKING DRAFT IN PROGRESS OR NOT, THE ANSWER TO MY QUESTION IS: THERE IS NO PLACE ON THERE-TO RECORD THE RACE OF THE FATHER, IS THERE?
A. NO, THERE IS NOT.
Q. BUT ON THAT PARTICULAR FORM, NUMBER 123 IN EVIDENCE, YOU DO RECORD THE RACE OF THE FATHER OF THE BABY, DON'T YOU?
A. YES, I DO.

[SHIRLEY BROWN 72]

Q. AND YOU RECORD IT AS WHAT?
A. FATHER OF BABY IS BLACK.
Q. SO YOU HAD TO MAKE A SEPARATE NOTE TO PUT THAT DOWN OUTSIDE OF THE FILL-IN-THE-BLANKS PART OF THAT FORM, DIDN'T YOU?
A. THAT IS CORRECT.
Q. AND ON THAT PATIENT, MS. BROWN, THAT PATIENT WAS WHITE, WASN'T SHE?
A. AND HER BABY WAS UP FOR ADOPTION.
Q. MS. BROWN, DID I ASK YOU WHETHER HER BABY WAS UP FOR ADOPTION OR DID I ASK YOU WHETHER THE PATIENT WAS WHITE?
A. YOU ASKED ME IF SHE WAS WHITE.
Q. AND THE ANSWER TO THAT QUESTION IS, YES, SHE WAS WHITE?

A. THAT IS CORRECT.
Q. MS. BROWN, LET ME SHOW YOU WHAT HAS BEEN MARKED FOR IDENTIFICATION PLAINTIFF'S EXHIBIT 122?
THE COURT: SHOW HER 122 AND 123.
MR. WHERRY: SHE JUST HAD 123.
THE COURT: SAY WHAT?
MR. WHERRY: SHE JUST HAD 123.
THE COURT: IS THAT THE LAST ONE?
MR. WHERRY: THERE IS ONE MORE.
THE COURT: LET'S SHOW THEM ALL TO HER. YOU'RE GOING TO ASK HER THE SAME QUESTIONS ABOUT ALL OF THEM.
MR. WHERRY: I'M SORRY, SIR, THIS IS THE LAST ONE.

[SHIRLEY BROWN 73]

Q. (BY MR. WHERRY, CONTINUING) LET ME HAND YOU PLAINTIFF'S EXHIBIT 119 AND 122. LOOK FIRST IF YOU WOULD AT EXHIBIT 122.
THAT AGAIN, MS. BROWN, IS THE CHEAT SHEET, ISN'T IT?
A. THAT IS CORRECT.
Q. AND ON THAT CHEAT SHEET YOU AGAIN RECORD THE RACE OF THE FATHER OF THE BABY, DON'T YOU?
A. YES, I DO.
Q. LOOKING AT 119, MS. BROWN, I HAVE A BLOWUP OF 119 AND I WOULD LIKE YOU TO LOOK AT THE ORIGINAL AND TELL ME WHETHER

THIS BLOWUP IS A COPY OF THE ORIGINAL THAT YOU HAVE IN YOUR HAND?
A. THAT IS CORRECT.
Q. AND, MS. BROWN, THIS IS PART OF THE PROGRESS NOTES OF THE HOSPITAL, ISN'T IT?
A. THAT IS CORRECT.
Q. THIS IS NOT A CHEAT SHEET AND IT'S NOT YOUR PERSONAL NOTES, RIGHT?
A. THAT IS CORRECT.
Q. AND ON THIS DOCUMENT WHAT DO YOU SAY ABOUT THE RACE OF THE FATHER OF THE BABY?
A. PATIENT LIVES WITH HER BOYFRIEND WHO IS A NEGRO AND HER EIGHT-YEAR-OLD SON.
Q. WHY DO YOU SAY ABOUT THE RACE OF THE FATHER OF THE BABY?
A. ONCE AGAIN, SHE COULD HAVE SAID THAT THE BOYFRIEND WAS POSSIBLY THE FATHER, BUT SHE COULD NOT SAY WHO THE FATHER WAS.

[SHIRLEY BROWN 74]

Q. SHE MIGHT HAVE SAID THAT. YOU, IN READING THROUGH THE MEDICAL RECORDS TODAY, IT SEEMS TO ME WHEREVER THE PATIENT SAYS SOMETHING SPECIFIC TO YOU, YOU PUT IT IN QUOTES, DIDN'T YOU?
A. SOMETIMES I DID.
Q. ON THAT 119, DID YOU PUT IN QUOTES THAT SHE TOLD YOU THAT SHE WASN'T SURE WHO THE FATHER OF THE BABY WAS BUT HER

BOYFRIEND WAS NEGRO?
A. NO, I DID NOT.
Q. DID YOU PUT IN YOUR PROGRESS NOTES ANY REASON FOR RECORDING THE INFORMATION THE RACE OF HER BOYFRIEND?
A. THE REASON WOULD HAVE BEEN PART OF THE PSYCHOSOCIAL ASSESSMENT THAT WE DID ON ALL PATIENTS.
Q. MS. BROWN, THERE WAS A FORM USED BY THE HOSPITAL TO RECORD GENETIC INFORMATION, WASN'T THERE?
A. THE GENETIC COUNSELORS HAVE A FORM, YES.
Q. AND THAT WAS FILLED OUT ON ALL - ON ALL MATERNITY PATIENTS, WASN'T IT?
A. I CAN'T SPEAK TO THE FACT THAT THEY FILLED OUT A GENETIC FORM ON EVERYONE.
Q. WELL, IT WAS SUPPOSED TO BE FILLED OUT, WASN'T IT?
A. IF YOU WOULD LET ME LOOK AT THE FORM
Q. I SURE WILL. I'M JUST GETTING READY TO DO THAT.
MR. WHERRY: YOUR HONOR, I'M NOT GOING TO HAVE MARKED THIS AS PART OF ELLEN KNIGHT'S RECORD, WHICH HAVE

[SHIRLEY BROWN 75]

ALREADY BEEN IN EVIDENCE, AND IT WOULD BE REDUNDANT TO MARK IT AGAIN.

Q. (BY MR. WHERRY, CONTINUING) LET ME SHOW YOU WHAT PURPORTS TO BE A GENETIC SCREENING FORM. DO YOU RECOGNIZE THAT DOCUMENT AS BEING A MEDICAL DOCUMENT OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. I THINK THIS IS SOMETHING THEY USE IN THE CLINIC. THIS IS NOT A FORM THAT WE USE IN THE HOSPITAL AND IT DOESN'T HAVE A STAMP ON HERE THAT SAYS THAT IT'S A PERMANENT FORM THAT IS USED ON EVERY PATIENT.
Q. AS A GENETIC SCREENING FORM IT DOES INQUIRE OF THE RACE OF THE BABY'S A FATHER, DOESN'T IT?
A. YES, IT DOES.
Q. ONE OR TWO AREAS MORE OF QUESTIONING. YOU INDICATED IN RESPONSE TO MR. HOOD'S QUESTIONS THAT YOU NEVER INDICATED OR YOU NEVER SAID UNDER ANY CIRCUMSTANCES THAT THERE WAS A CRISES OF BLACK WOMEN USING COCAINE; IS THAT RIGHT?
A. THAT IS CORRECT.
Q. WHEN MARTHA WILLIAMS WAS AT THE HOSPITAL WORKING THERE, YOU KNEW HER, DIDN'T YOU?
A. YES, I DID.
Q. DID YOU HAVE ANY PROBLEMS WITH HER THAT WOULD LEAD YOU TO BELIEVE THAT SHE HAD A MOTIVE TO COME IN AND LIE ABOUT IT?
A. SHE DID NOT PERSONALLY CARE FOR THE POLICY OR FOR ME.
Q. DID SHE TELL YOU THAT?

[SHIRLEY BROWN 76]

A. ON NUMEROUS OCCASIONS.
Q. MS. BROWN, YOU INDICATED THAT YOU NEVER UNDER ANY CIRCUMSTANCES SAID MOST BLACK WOMEN SHOULD BE STERILIZED; IS THAT RIGHT?
A. THAT IS CORRECT.
Q. YOU INDICATED THAT YOU NEVER SAID, I THINK THAT WAS WHAT - THAT WAS THE ANSWER IN RESPONSE TO MR. HOOD'S QUESTION, YOU INDICATED THAT YOU NEVER SAID THAT THE MIXING OF RACES WAS AGAINST GOD'S WAY, YOU NEVER SAID THAT IN THE HOSPITAL?
A. I DID NOT SAY THAT. I STATED THAT THAT WAS MY PERSONAL BELIEF AND THAT MY PERSONAL BELIEF WOULD NEVER INTERFERE WITH THE WAY I CARED FOR A PATIENT.
Q. WELL, HAVE YOU SAID THAT AROUND THE HOSPITAL?
A. AS PART OF MY JOB AS A CASE MANAGER I OFTEN HAVE DISCUSSION WITH THE STAFF. THEY DISCUSS WITH ME THEIR FEELINGS. I DISCUSS WITH THEM WE MIGHT HAVE OUR VALUES. I COULD HAVE VERY WELL SAID THAT. BUT, THE COMMON THEME AND WHAT I ALWAYS SAY IS THAT IT DOESN'T MATTER THE RACE, THE SOCIOECONOMIC STATUS, DOESN'T MATTER WHO A PERSON KNOWS OR DOESN'T KNOW, IT DOESN'T MATTER WHAT OUR VALUES ARE, WE HAVE

TO LEAVE THAT AT THE DOOR AND WE HAVE TO TREAT ALL PATIENTS WITH COMPASSION.

SO, I CANNOT SAY THAT I HAVE -YOU KNOW, I CAN SAY THAT IF SOMEONE HAS ASKED ME THAT AT THE HOSPITAL, I CAN SAY THAT WE HAVE DISCUSSED VARIOUS ISSUES, YOU KNOW, THAT IS PART

[SHIRLEY BROWN 77]

OF MY JOB. AND I WILL ALWAYS SAY THIS MIGHT BE MY PERSONAL BELIEF, BUT I WILL - WHAT I ROLE MODEL AT THE MEDICAL UNIVERSITY IS THAT ALL PATIENTS ARE TO BE TREATED ALIKE AND I DO NOT SHOW FAVORITISM BASED ON WHAT THEIR RACE IS OR HOW MUCH MONEY THEY HAVE OR DON'T HAVE.

Q. SO AT LEAST INSOFAR AS MARTHA WILLIAMS REPORTING THAT YOU HAVE SAID THAT, THAT PART OF WHAT SHE SAID WAS TRUTHFUL, THAT YOU WOULD HAVE SAID IN THE HOSPITAL SETTING IN YOUR OPINION THE MIXING OF RACES IS AGAINST GOD'S WAY?

A. IF I SAID THAT AND SHE WAS PRESENT, IT WOULD HAVE BEEN WITH A GROUP OF NURSES DISCUSSING OUR VARIOUS FEELINGS AND HOW WE COPE WITH VARIOUS THINGS. IT WOULD NOT HAVE BEEN TO TRY AND SAY THIS PATIENT IS GOOD OR THIS PATIENT IS BAD. I DON'T DO THAT.

Q. YOU DO, MS. BROWN, PERCEIVE YOURSELF TO BE A MISSIONARY, DON'T YOU?
A. AS A MISSIONARY?
Q. YES.
A. I BELIEVE IN GOD AND I GO TO CHURCH AND I DO A LOT OF MISSION WORK, YES, I DO.
Q. AND SO INSOFAR AS MARTHA WILLIAMS REPORTING YOU SAYING THAT IN THE HOSPITAL, THAT WOULD AT LEAST BE TRUTHFUL, FAIR?
A. I'M SORRY I DIDN'T KNOW SHE SAID I WAS A MISSIONARY.

Q. MS. BROWN, WITH THERESA JOSEPH, IN HER. RECORD YOU DID NOT RECORD ANYWHERE THE RACE OF HER BABY, DID YOU?

[SHIRLEY BROWN 78]

A. I WOULD HAVE TO LOOK AT HEAR RECORD TO SEE.
Q. IF IT WAS IMPORTANT THE RACE OF THE BABY'S FATHER, THE RACE OF THE BABY WOULD BE IMPORTANT FOR ADOPTION PURPOSES, WOULD IT NOT?
A. THAT IS CORRECT.
Q. SO THEREFORE WE WOULD EXPECT TO FIND IT IN HER MEDICAL RECORD?
A. WOULD EXPECT TO FIND?
Q. THE RACE OF HER BABY IN HER MEDICAL RECORD AS RECORDED BY YOU?
A. THE MOTHER OF THE BABY IS THE ONE WHO TELLS US WHAT THE

RACE OF THE BABY IS ON THE BIRTH CERTIFICATE.
Q. I WAS TALKING ABOUT THE HOSPITAL RECORDS WHERE YOU'RE REPORTING THE RACE OF THE FATHER, WHICH YOU SAY IS IMPORTANT FOR ADOPTION PURPOSES. THE RACE OF THE BABY SHOULD BE RECORDED THERE ALSO FOR THE ADOPTION PURPOSES, SHOULDN'T IT?
A. THE QUESTION THAT THEY ASK US IS WHAT IS THE RACE OF THE MOTHER AND WHAT IS THE RACE OF THE FATHER.
Q. WHO ASKED?
A. THE PEOPLE WHO ARE COMING FOR THE ADOPTION. AND THEY ALSO ASK US IF WE KNOW THE NAME OF THE FATHER.
Q. WELL, HAVE YOU RECORDED IN ANY HOSPITAL RECORD THE NAME OF THE FATHER?
A. WHEN A PATIENT WOULD GIVE THE NAME OF THE FATHER AND IT WAS A BABY UP FOR ADOPTION, YES., IT WOULD HAVE BEEN RECORDED.

[SHIRLEY BROWN 79]

Q. WELL THE DECISION OF PUTTING THE BABY UP FOR ADOPTION ISN'T NECESSARILY MADE AT THE TIME OF BIRTH, IS IT?
A. SOMETIMES IT'S MADE AT BIRTH AND SOMETIMES IT'S MADE BEFORE BIRTH AND SOMETIMES IT'S MADE AFTER BIRTH. AND A LOT OF THOSE ENTRIES WOULD HAVE BEEN MADE IN THE BABY'S CHART.

Q. LIKE THE RACE OF THE FATHER?
A. COULD HAVE BEEN PUT IN THE BABY'S CHART, YES.
Q. IF YOU CALL THE SOLICITOR'S OFFICE TO ASK THAT A PATIENT NOT BE ARRESTED FOR NOT BEING COMPLIANT, AND YOU WOULD HAVE NOTED THAT IN THE PATIENT'S RECORD, WOULDN'T YOU, IN THE PROGRESS NOTES?
A. IF I HAD THE PATIENT RECORD THERE, YES, I WOULD HAVE. EVERY NOW AND THEN I WOULD GET A CALL AND I WOULD NOT HAVE ACCESS TO THE RECORD AT THAT POINT IN TIME.
Q. SO, IF IN FACT THAT'S WHAT YOU DID IN LAVERNE SINGLETON'S CASE, WE SHOULD SEE THAT IN HER PATIENT RECORD, SHOULDN'T WE?
A. IN LAVERNE SINGLETON'S?
Q. YEAH.
A. IF I CALLED TO ABOUT - TO THE SOLICITOR'S OFFICE?
Q. YES, MA'AM.
A. OKAY.
Q. WE SHOULD SEE THAT IN HER PATIENT RECORD, SHOULDN'T WE?
A. THAT IS CORRECT. IF I -
Q. ONE LAST QUESTION, MS. BROWN. THE WAY THAT WE LEARN OF THE NUMBER OF WOMEN WHO TESTED POSITIVE FOR COCAINE BEFORE THE

[SHIRLEY BROWN 80]

POLICY WAS ACTUALLY STARTED WAS THROUGH AN INFORMAL COUNTING

METHOD DEVISED BY YOU IN WHICH YOU PUT TICK MARKS ON AN INDEX CARD, FAIR?
A. THAT'S CORRECT.
Q. AND THAT WAS THE ONLY RECORD KEPT OF THAT, AS FAR AS YOU KNOW?
A. AT THAT POINT IN TIME, YES.
MR. WHERRY: MAY I HAVE JUST A MOMENT, PLEASE, YOUR HONOR?
THE COURT: YES.
(PAUSE IN PROCEEDINGS.)
Q. (BY MR. WHERRY, CONTINUING) THE GENETIC SCREENING FORM THAT I SHOWED YOU EARLIER?
A. YES, SIR.
Q. THAT INQUIRES OF THE RACE OF BOTH THE MOTHER AND THE FATHER, DOESN'T IT?
A. YES, SIR.
Q. I DIDN'T WANT TO LEAVE THE IMPRESSION THAT ONLY ASKS THE FATHER'S RACE?
A. THAT'S CORRECT.
Q. AND THAT DOCUMENT, THAT GENETIC SCREENING FORM IS SIGNED BY A MEDICAL DOCTOR, ISN'T IT?
A. THAT IS CORRECT.
MR. WHERRY: I'M SORRY, YOUR HONOR. THERE IS ONE MORE.

[SHIRLEY BROWN 81]

Q. (BY MR. WHERRY, CONTINUING) LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 125 FOR IDENTIFICATION. THE

PROGRESS NOTES THERE WRITTEN BY YOU, MS. BROWN. FIRST OF ALL THAT PATIENT IS A CAUCASIAN, ISN'T THAT RIGHT? WHITE?

A. ACCORDING TO HER PATIENT REGISTRATION SHE IS.

Q. AND IN THAT PROGRESS NOTE THAT I HANDED YOU, YOU DO RECORD THERE THAT ON BEHALF OF THIS PATIENT YOU CALLED THE SOLICITOR AND IN SPITE OF THE FACT THAT SHE HAD BEEN NONCOMPLIANT, YOU ASKED FOR ANOTHER CHANCE, YOU ASKED TO ALLOW HER TO GO TO

MR. HOOD: IF THE COURT PLEASE, THIS IS NOT IN EVIDENCE. IT'S NOT A PLAINTIFF.

MR. WHERRY: I THINK HE IS RIGHT.

THE COURT: OKAY. GOOD.

MR. WHERRY: LOOKING AT THAT FOR A CHANGE, YOUR HONOR.

Q. (BY MR. WHERRY, CONTINUING) LOOKING AT THAT, LET ME ASK YOU NOT WHAT IT SAYS, BUT IN FACT WITH A PARTICULAR WHITE PATIENT, DOES THAT REFRESH YOUR RECOLLECTION AS TO WHETHER YOU CALLED THE SOLICITOR'S OFFICE REQUESTING NONPROSECUTION TO ALLOW A SECOND OR THIRD CHANCE?

A. I'M SORRY, YOU LOST ME IN YOUR QUESTION.

Q. DOES THAT REFRESH YOUR RECOLLECTION, DOES THAT REMIND YOU OF CALLING THE SOLICITOR'S OFFICE TO REQUEST A SECOND OR THIRD

CHANCE FOR A WHITE PATIENT WHO WAS NONCOMPLIANT WITH

[SHIRLEY BROWN 82]

TREATMENT?
A. THIS IS A WHITE PATIENT AND IT HAS IN HERE THAT I SPOKE
WITH THE SOLICITOR'S OFFICE.
Q. SO I TAKE IT THE ANSWER TO MY QUESTION IS YES?
A. UMM-HMM.
MR. WHERRY: NOW I HAVE NO FURTHER QUESTIONS, YOUR
HONOR.
THE COURT: ANY REDIRECT?
MR. HOOD: YES.
FIRST YOU WERE ASKED IF THESE WOMEN WERE CHARGED FOR
THIS SANITARY KIT. I HAVE GOT THE BILLS FOR EACH OF THE TEN
PLAINTIFFS. I WOULD LIKE TO PUT THEM INTO EVIDENCE AT THIS
TIME. I HAVE GOT MY SUMMARY OF WHAT THEY WERE CHARGED FOR ON
THE FRONT OF EACH ONE, WHICH I'LL TAKE OFF IF THE COURT WANTS
ME TO.
THE COURT: SHOW IT TO COUNSEL.
MR. WHERRY: YOUR HONOR, I HAVE NEVER SEEN THEM
BEFORE AND I REQUESTED ALL RELEVANT RECORDS. I MEAN, IT'S
ABOUT A QUARTER OF AN INCH THICK, I WOULD HAVE TO GO THROUGH
THEM. THEY HAVE NEVER BEEN PROVIDED TO US. I HAVE NEVER SEEN
THEM. I AGREE THAT THEY'RE RELEVANT.

THE COURT: GO AHEAD.
I TAKE IT FROM THAT THAT THEY CAN'T CONSENT TO THEM COMING IN.
MR. HOOD: DO YOU WANT ME TO BRING THE CUSTODIAN TO

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[SHIRLEY BROWN 85]

TO PLACE HIM ON NOTICE THAT THESE RECORDS MAY BE OFFERED. NOW THE QUESTION IS THE FOUNDATION OF THEM, AND I DON'T KNOW HOW YOU'RE GOING TO GET THEM IN, BUT HE DOESN'T QUESTION THE FOUNDATION.

MR. HOOD: NO.

MR. WHERRY: NO, SIR. I DON'T DO THAT.

MR. HOOD: I CAN ASK THE WITNESS THE ONE QUESTION.

Q. (BY MR. HOOD, CONTINUING) WHAT DO THE BILLS REFLECT WITH REGARD TO THE CHARGE FOR THE KIT THAT YOU DESCRIBED ON DISCHARGE FOR EACH OF THE TEN PLAINTIFFS?

A. PLAINTIFF CRYSTAL FERGUSON WAS GIVEN 36 PERI PADS AND THREE THINGS OF O.B. SPONGES AS THE THINGS TO BE USED IN PLACE OF TOILET TISSUE. HYGIENE PANTIES, THREE PAIR. SANITARY BELT. A HYGIENE KIT.

Q. AND IS THAT BASICALLY TRUE OF THE OTHER NINE PLAINTIFFS?

A. THERESA JOSEPH GOT THE SANITARY PADS, AND OTHER ITEMS.

LORI GRIFFIN GOT THE SANITARY PADS AND OTHER ITEMS.
PAULA HALE GOT THE SANITARY PADS.
ELLEN KNIGHT GOT 60 INSTEAD OF 36 SANITARY PADS.
Q. OKAY.
A. LAVERNE SINGLETON GOT 48 INSTEAD OF 36.
PAMELA PEAR GOT 48 PERI PADS.
Q. IN ADDITION TO THE REST OF THE KIT?
A. IN ADDITION TO THE OTHER
Q. OKAY.

[SHIRLEY BROWN 86]

A. OTHER THINGS.
SANDRA POWELL GOT 48 SANITARY PADS INSTEAD OF 36, AND WITH THE OTHER THINGS.
PATRICIA WILLIAMS GOT 36 OF THE PADS.
IT LOOKS LIKE SINGLETON GOT 24.
Q. OKAY.
A. AND PAULA HALE GOT 48.
Q. THANK YOU VERY MUCH. NOW YOU WERE ASKED ABOUT THREE OR FOUR PATIENTS THAT
THE COURT: I'M GOING TO LET THE RECORDS IN AND GIVE YOU AN OPPORTUNITY TO LOOK AT THEM AND SEE IF THERE IS ANYTHING IN THERE THAT OTHER THAN WHAT SHE TESTIFIED ABOUT THAT YOU WOULD. LIKE TO RAISE TO THE COURT THAT SHOULDN'T BE

BEFORE THE JURY, BECAUSE I DON'T KNOW WHAT ALL IS IN THERE.

MR. WHERRY: ME EITHER.

THE COURT: BUT YOU CAN LOOK AT THEM AND IF THERE IS ANYTHING OTHER THAN THAT THAT YOU WANT TO MAKE A MOTION TO STRIKE IT, LET ME KNOW.

Q. (BY MR. HOOD, CONTINUING) YOU WERE ASKED ABOUT AN EMPLOYEE NAMED MARTHA WILLIAMS. I BELIEVE THAT SHE LEFT THE MEDICAL UNIVERSITY IN AUGUST OF '91?

MR. WHERRY: I OBJECT, TO THE LEADING NATURE.

MR. HOOD: SHE TESTIFIED TO THAT.

THE COURT: THAT DOESN'T MAKE IT LESS LEADING.

Q. (BY MR. HOOD, CONTINUING) YOU WERE ASKED ABOUT PATIENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF IRA CHASNOFF

[CHASNOFF 3]

(TESTIMONY OF IRA CHASNOFF, 12/4/96.)

MS. DUNN: CALL DOCTOR IRA CHASNOFF.

- - -

IRA CHASNOFF, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. DUNN;

Q. WOULD YOU STATE YOUR FULL NAME, PLEASE.

A. IRA J. CHASNOFF.

Q. WHERE DO YOU PRESENTLY RESIDE?

A. CHICAGO.

Q. WHAT DO YOU DO THERE?

A. I'M A PHYSICIAN. I RUN TREATMENT PROGRAMS AND A POLICY CENTER.

Q. WHEN YOU SAY TREATMENT PROGRAMS, WHAT KIND OF TREATMENT PROGRAM ARE YOU REFERRING TO?

A. TREATMENT PROGRAMS FOR SUBSTANCE-ABUSING PREGNANT WOMEN, PARENTING WOMEN AND FOR THEIR CHILDREN.

Q. AND HOW LONG HAVE YOU HELD THAT POSITION?

A. THAT POSITION IN PARTICULAR FOR SEVEN YEARS.

Q. SO SINCE WHAT DATE?

A. 1990. JANUARY 8TH.
Q. COULD YOU TELL US SOMETHING ABOUT YOUR EDUCATIONAL BACKGROUND, WHERE YOU GOT YOUR UNDERGRADUATE DEGREES AND GRADUATE DEGREES?

[CHASNOFF 4]

A. YES. I GOT MY UNDERGRADUATE DEGREE FROM TRINITY UNIVERSITY AT SAN ANTONIO, TEXAS.
Q. WHEN WAS THAT?
A. 1969.
Q. ALL RIGHT.
A. AND MY MEDICAL DEGREE IN 1973 FROM THE UNIVERSITY OF TEXAS.
Q. DO YOU HAVE ANY FORMAL TRAINING BEYOND YOUR MEDICAL DEGREE?
A. YES. I DID A THREE-YEAR PEDIATRIC RESIDENCY AT CHILDREN'S MEMORIAL HOSPITAL AT NORTHWESTERN UNIVERSITY MEDICAL SCHOOL.
Q. DO YOU HAVE ANY KIND OF BOARD CERTIFICATION?
A. I'M A BOARD CERTIFIED PEDIATRICIAN.
Q. ARE YOU LICENSED TO PRACTICE MEDICINE?
A. YES.
Q. WHERE ARE YOU LICENSED?
A. ILLINOIS.
Q. DO YOU HAVE ANY OTHER TRAINING BEYOND THE PEDIATRIC SPECIALIZATION?
A. NO.

Q. HAVE YOU DONE ANY WORK IN THE FIELD OF ADDICTION?
A. YES. I'VE WORKED EXTENSIVELY IN THE FIELD OF ADDICTION SINCE 1976.
Q. CAN YOU TELL US SPECIFICALLY WHAT YOU HAVE DONE IN THAT

[CHASNOFF 5]

FIELD?
A. IN 1976 I OPENED ONE OF THE FIRST DRUG TREATMENT PROGRAMS FOR PREGNANT WOMEN IN THE UNITED STATES. IT WAS A COMPREHENSIVE PROGRAM TO GIVE SERVICES TO PREGNANT, DRUG-USING WOMEN AND TO PROVIDE CARE FOR THEIR CHILDREN AFTER THE BABIES WERE BORN.
Q. AND WHAT DID YOU DO IN CONNECTION WITH DEVELOPING THAT PROGRAM?
A. IT WAS WHEN I WAS IN PRIVATE PEDIATRIC PRACTICE AND I WAS
A. VOLUNTEER AT THE UNIVERSITY HOSPITAL, WE GOT TOGETHER A GROUP OF INDIVIDUALS FROM THE DEPARTMENTS OF PSYCHIATRY AND OBSTETRICS AND PEDIATRICS TO DEVELOP A COMPREHENSIVE PROGRAM THAT COULD GIVE PREGNANT WOMEN THE KIND OF PRENATAL CARE AND DRUG TREATMENT THEY NEEDED. THE GOAL WAS TO IMPROVE THE OUTCOME OF THE BABY AT THE TIME OF THE DELIVERY.

Q. AND AT THE TIME THAT YOU BEGAN THE WORK YOU DESCRIBED AT THAT TREATMENT CENTER, WAS THERE ANY KIND OF CERTIFICATION OR ACCREDITATION PROCESS FOR SOMEONE WORKING IN ADDICTION?

A. NO, AT THAT TIME THERE WAS NO CERTIFICATION. NO SPECIAL TRAINING AVAILABLE IN THE AREA OF ADDICTION.

Q. DID YOU HAVE ANY WORK IN THE AREA DEVELOPING SOME CERTIFICATION IN THAT AREA?

A. WELL THE CERTIFICATION PROCESS NOW THROUGH THE AMERICAN SOCIETY OF ADDICTION MEDICINE, I'M NOT SURE WHAT YEAR THAT CERTIFICATION PROCESS BEGAN, BUT THEY ASKED ME TO HELP. I DID

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THE INITIAL TRAINING IN THE FIELD OF DRUG USE DURING PREGNANCY AND HELPED THEM DEVELOP SOME OF THE QUESTIONS AND CRITERIA FOR THE CERTIFICATION PROCESS AND ADDICTION.

Q. WHEN YOU SAY HELP THEM, WHO IS THEM?

A. THE SOCIETY.

Q. HAVE YOU PUBLISHED ANY ARTICLES?

A. YES, I HAVE.

Q. IN SCIENTIFIC JOURNALS?

A. YES, WE HAVE PUBLISHED ARTICLES IN A WIDE RANGE OF

SCIENTIFIC JOURNALS AND POLICY JOURNALS RELATED TO SUBSTANCE ABUSE DURING PREGNANCY. RELATED TO THE CARE OF THE CHILDREN, LONG-TERM OUTCOME OF THE CHILDREN WHO HAVE BEEN EXPOSED TO DRUGS DURING PREGNANCY.

Q. CAN YOU GIVE US JUST A COUPLE OF SPECIFIC EXAMPLES OF THE KIND OF ARTICLES THAT YOU HAVE WRITTEN AND SPECIFIC JOURNALS THEY APPEARED IN.

A. SURE. A GOOD NUMBER OF ARTICLES IN THE - IN THE JOURNAL CALLED PEDIATRICS, WHICH IS THE OFFICIAL JOURNAL OF THE AMERICAN ACADEMY OF PEDIATRICS. THOSE ARTICLES FOCUSED ON DRUG USE DURING PREGNANCY AND THE OUTCOME OF THE CHILD, WHAT HAPPENS TO THE, CHILDREN, BOTH SHORT-TERM AND LONG-TERM.

I HAVE PUBLISHED TWO ARTICLES IN THE NEW ENGLAND JOURNAL OF MEDICINE, ONE OF WHICH WAS AN ARTICLE THAT FIRST LOOKED AT THE IMPACT OF COCAINE AND OTHER DRUGS ON PREGNANCY OUTCOME IN A NEWBORN. AND ANOTHER ONE IN THE NEW ENGLAND

[CHASNOFF 7]

JOURNAL WHICH LOOKED AT SOME POLICIES THAT HAVE BEEN ESTABLISHED IN THE STATE OF FLORIDA THAT MANDATED REPORTING OF WOMEN WHO USED DRUGS DURING PREGNANCY INTO THE CHILD ABUSE

REPORTING SYSTEM.
Q. HAVE YOU HAD ANY ACTIVITY SINCE YOU WERE A STUDENT WITHIN THE ACADEMIC AREA?
A. WHEN I FINISHED MY RESIDENCY I JOINED THE FACULTY OF NORTHWESTERN AND TAUGHT COURSES IN PEDIATRICS, PSYCHIATRY, AND SOME OF THE STATISTICAL COURSES FOR MEDICAL STUDENTS AT NORTHWESTERN FOR 15 YEARS. AND FOR THE LAST FOUR YEARS I HAVE BEEN A PROFESSOR AT THE UNIVERSITY OF ILLINOIS COLLEGE OF MEDICINE TEACHING IN THE AREA OF PEDIATRICS.
Q. AND YOU STILL HOLD THAT POSITION?
A. YES, I CURRENTLY AM A PROFESSOR OF PEDIATRICS.
Q. ARE YOU CURRENTLY ON ANY ACADEMIC OR PROFESSIONAL COMMITTEES?
A. I HAVE SERVED ON SEVERAL STATE AND FEDERAL TASK FORCES AND COMMITTEES LOOKING AT HEALTH CARE DELIVERY, LOOKING AT SUBSTANCE ABUSE TREATMENT SERVICES, ADDRESSING SOME OF THE POLICY ISSUES OF HOW TO DELIVER CARE TO HIGH-RISK POPULATIONS. I HAVE SERVED ON VARIOUS COMMITTEES THROUGH VARIOUS ASSOCIATIONS, SUCH AS THE AMERICAN ACADEMY OF PEDIATRICS. AND I'M ALSO ON THE EDITORIAL BOARD OF SEVERAL OF THE JOURNALS, MEDICAL JOURNALS, NEW ENGLAND JOURNAL OF

MEDICINE PEDIATRICS, JOURNAL OF PEDIATRICS.

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Q. DO YOU SERVE ON ANY NATIONAL GRANT REVIEW COMMITTEES?
A. OH, YES. I HAVE REVIEWED GRANTS FOR THE NATIONAL INSTITUTES OF HEALTH, NATIONAL INSTITUTES OF DRUG ABUSE, CENTER FOR SUBSTANCE ABUSE, PREVENTION, THE U.S. DEPARTMENT OF EDUCATION. SO - I CAN'T REMEMBER THEM ALL, BUT -
Q. HAVE YOU SERVED AS A CONSULTANT EITHER FOR GOVERNMENT OR PRIVATE INSTITUTIONS?
A. I HAVE HAD AN OPPORTUNITY TO WORK AT THE COMMUNITY LEVEL HELPING COMMUNITIES SET UP COMPREHENSIVE INTERVENTION PROGRAMS. I HAVE WORKED AT THE STATE LEVEL WITH SEVERAL STATES IN HELPING THE STATE DEVELOP POLICY AND PROGRAMS SPECIFICALLY FOR PREGNANT SUBSTANCE-ABUSING WOMEN AND THEIR CHILDREN.
Q. COULD YOU GIVE US EXAMPLES OF THE STATES THAT YOU WORKED WITH?
A. FLORIDA, ALABAMA, OHIO, ILLINOIS, CALIFORNIA, NEW YORK, THAT'S ALL I CAN THINK OF RIGHT OFF.
Q. DR. CHASNOFF, HAVE YOU TESTIFIED IN U.S. DISTRICT COURTS AS AN EXPERT?

A. I AM NOT SURE IF THEY WERE U.S. DISTRICT COURTS, BUT I HAVE TESTIFIED IN COURT BEFORE, YES.
Q. WHERE WERE THOSE COURTS?
A. IT'S BEEN TWICE. ONE WAS DOWN IN ARIZONA. AND ANOTHER WAS IN CHICAGO.
Q. AND WHAT AREA WERE YOU TESTIFYING IN WHEN YOU TESTIFIED

[CHASNOFF 9]

IN THOSE COURTS?
A. THOSE WERE BOTH ACTUALLY MALPRACTICE CASES IN WHICH A MALPRACTICE SUIT HAD BEEN BROUGHT AGAINST PHYSICIANS. AND I PARTICIPATED.
Q. WHAT WAS THE SUBJECT MATTER?
A. I DON'T REALLY - IT WAS QUITE A FEW YEARS AGO, I DON'T REMEMBER. IT WAS RELATED TO PHYSICIANS WHO - IN ONE CASE A PHYSICIAN HAD BEEN SUED FOR MALPRACTICE AND THEY HAD CLAIMED THAT THE CAUSE OF THE POOR OUTCOME HAD BEEN THE MOTHER'S DRUG USE DURING PREGNANCY. AND I TESTIFIED FOR THE PLAINTIFF IN THAT CASE.
ANOTHER CASE WAS SIMILAR ABOUT OUTCOME, AND THE PHYSICIAN WAS SUED AND I TESTIEIED FOR THE DEFENSE IN THAT CLEARLY IN THAT CASE THE OUTCOME WAS RELATED TO THE DRUG USE.
Q. DR. CHASNOFF, YOU USED THE TERM OUTCOME WHICH IS SORT OF

A TERM OF ART TO SOME OF US. WHAT ARE YOU REFERRING TO?
A. IN BOTH OF THOSE CASES IT WAS A BABY THAT WAS BORN AND SUFFERED CEREBRAL-PALSY.
Q. THE OUTCOME OF THE BIRTH OF THE BABY?
A. YES. THE POOR OUTCOME OF THE BABY.
Q. DR. CHASNOFF, HAVE YOU PUBLISHED ANY BOOKS?
A. I HAVE PUBLISHED THREE BOOKS SPECIFICALLY ON - IN THE AREA OF SUBSTANCE ABUSE AND PREGNANCY.
Q. CAN YOU GIVE US AN EXAMPLE.
A. YEAH. THE FIRST ONE WAS CALLED DRUG USE IN PREGNANCY,

[CHASNOFF 10]

MOTHER AND CHILD. I BELIEVE It WAS PUBLISHED AROUND 1976 OR SO. THE SECOND ONE WAS DRUGS, ALCOHOL, PREGNANCY AND PARENTING IN 1989 OR '90. AND THEN THE THIRD ONE WAS CALLED CHEMICAL DEPENDENCY AND PREGNANCY ABOUT 1992.
Q. DR. CHASNOFF, HAVE YOU WORKED AS AN EXPERT IN THE FIELD OF ADDICTION WITH THE UNITED STATES GOVERNMENT?
A. YES.
Q. TELL US WHAT YOU HAVE DONE?
A. I HAVE WORKED WITH SEVERAL FEDERAL AGENCIES TO HELP DEVELOP POLICY OR TO HELP LOOK AT OUTREACH. AN EXAMPLE IS

CURRENTLY I'M HELPING HEAD UP THE EFFORT FOR SOMETHING CALLED THE NATIONAL WOMEN'S RESOURCE CENTER, WHICH IS A NATIONAL CENTER THAT IS FUNDED THROUGH SIX DIFFERENT FEDERAL AGENCIES THAT CAME TOGETHER TO LEAD POLICY DEVELOPMENT, TRAINING, EDUCATION, RESEARCH IN WOMEN'S HEALTH, MENTAL HEALTH AND SUBSTANCE ABUSE.

I HAVE ALSO WORKED WITH THE NATIONAL CENTER ON DRUG ABUSE IN POLICY DEVELOPMENT. THE INSTITUTE OF MEDICINE. THE CENTER FOR SUBSTANCE ABUSE PREVENTION. ACYF, WHICH IS ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES. ALL OF THESE BEING USUALLY IN THE CONTENT OF DEVELOPING COMPREHENSIVE POLICIES THAT HELP PROMOTE THE ULTIMATE HEALTH OF CHILDREN IN THE FAMILIES.

Q. DR. CHASNOFF, ARE YOU FAMILIAR WITH THE POLICY THAT HAS BEEN IDENTIFIED AS THE INTERAGENCY POLICY THAT INVOLVED THE

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MEDICAL UNIVERSITY HERE IN CHARLESTON, THE POLICE DEPARTMENT AND THE SOLICITOR'S OFFICE?

A. YES.

Q. WHEN DID YOU FIRST LEARN OF THAT POLICY?

A. I DON'T REMEMBER THE EXACT DATE. I KNOW I GOT A CALL FROM SOMEONE I DIDN'T KNOW, HE INTRODUCED HIMSELF AS CHARLIE CONDON. AND HE SAID THAT HE - HE SAID THAT HE WAS A SOLICITOR IN SOUTH CAROLINA. AND I DIDN'T KNOW WHAT A SOLICITOR WAS. SO I NEARLY HUNG UP. BUT HE EXPLAINED HIS POSITION AND BEGAN TALKING - TOLD ME ABOUT THIS POLICY THAT WAS BEING DEVELOPED. ASKED MY OPINION OVER THE TELEPHONE AND ASKED IF I WOULD READ IT. I SAID THAT I WOULD READ IT, BUT I ALSO TOLD HIM MY OPINION JUST OFF THE MARK RIGHT THERE, THAT IT DID NOT SOUND LIKE SOMETHING THAT I WOULD SUPPORT.

Q. HOW DID MR. CONDON DESCRIBE THE POLICY TO YOU?

A. AS I RECALL, HE DESCRIBED IT, THE PURPOSE OF THE POLICY WAS TO PROMOTE THE HEALTH OF - THE - THE HEALTH OF THE BABIES BEING BORN TO COCAINE-USING WOMEN. AND THE WAY THAT WAS GOING TO BE IMPLEMENTED WAS THAT ANY WOMEN WHO WAS FOUND TO BE USING COCAINE WOULD BE MANDATED INTO TREATMENT AND PRENATAL CARE. IF SHE DID NOT RECEIVE.TREATMENT OR PRENATAL. CARE, HIS OFFICE WOULD BE CONTACTED AND THE WOMEN WOULD BE ARRESTED.

Q. DID MR. CONDON REFER SPECIFICALLY TO COCAINE?

A. YES, HE DID

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Q. DID MR. CONDON DESCRIBE FOR YOU HIS ROLE IN THIS POLICY?
A. IN THE DEVELOPMENT OF THE POLICY?
Q. YES.
A. AS I RECALL, HE WAS INVOLVED IN WORKING WITH THE MEDICAL UNIVERSITY TO WRITE THE POLICY AND DEVELOP THE PROCEDURES TO IMPLEMENT IT.
Q. IS THAT WHAT HE TOLD YOU?
A. IT'S THE BEST I CAN REMEMBER, YES.
Q. IS THERE ANY MEDICAL BASIS, BASED UPON YOUR EXPERIENCE, TO FOCUS ONLY ON COCAINE IN RELATIONSHIP WITH MATERNAL HEALTH AND FETAL OUTCOME?
A. WELL, MY CONCERN RIGHT FROM THE BEGINNING AND I BELIEVE THIS WAS AROUND - IT WAS ALMOST TEN YEARS AGO, 1988 OR '89, REALLY DON'T REMEMBER, BUT MY CONCERN RIGHT OFF WAS THAT ALTHOUGH WE WERE BEGINNING TO UNDERSTAND THE EFFECT OF COCAINE ON PREGNANCY OUTCOME, WE WERE ALSO REALIZING THAT YOU CAN'T ISOLATE ANY ONE DRUG.
AND CERTAINLY AT THAT TIME IT WAS CLEAR THAT COCAINE WAS ONLY A SMALL PART OF THE PICTURE. THAT THE USE OF TOBACCO, ALCOHOL AND OTHER DRUGS ALSO PLAYED A ROLE IN ALL OF

THIS AND THAT COCAINE COULD NOT BE ISOLATED AS - IT JUST ATTACKING ONE ASPECT OF A WOMAN'S HEALTH AND LIFE-STYLE WAS NOT GOING TO RESULT IN THE OUTCOMES THAT THEY WERE LOOKING FOR.

Q. AND THOSE OUTCOMES BEING?

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A. THOSE OUTCOMES, YOU KNOW, SUPPOSEDLY WAS TO IMPROVE THE HEALTH AND WELL-BEING OF THE CHILD.

Q. ARE THERE ANY MEDICAL LISTS INVOLVED IN JUST FOCUSING ON COCAINE TO THE EXCLUSION OF PERHAPS OTHER SUBSTANCES THAT MIGHT CAUSE HARM BY PRENATAL EXPOSURE?

A. JUST PURELY FROM A BIOLOGICAL ASPECT, LOOKING AT THE HEALTH ASPECT, WE HAVE DONE STUDIES, EXTENSIVE NUMBERS OF WOMEN WHO ARE USING COCAINE NOW. AND WHAT OUR STUDY SHOW, FOR INSTANCE IF YOU LOOK AT ALL OF THE DIFFERENT DRUGS THAT WOMEN MIGHT TAKE, TOBACCO AND CIGARETTE SMOKING HAS THREE TIMES A GREATER IMPACT ON PRODUCING LOW BIRTH WEIGHT THAN DOES COCAINE.

WE KNOW LOW BIRTH WEIGHT, A BABY BEING BORN WEIGHING LESS THAN FIVE POUNDS EIGHT OUNCES, PUTS THAT BABY AT GREAT RISK FOR DEATH AND FOR ILLNESS. SO THAT IF YOU REALLY WANT TO

IMPROVE THE OUTCOME OF THE CHILD, YOU WOULD DEVELOP PROGRAMS TO HELP WOMEN STOP SMOKING DURING PREGNANCY IF YOU WERE GOING TO FOCUS ON ONLY ONE DRUG. FROM PURELY A MEDICAL PROSPECTIVE YOU WOULD FOCUS ON TOBACCO AND NOT COCAINE.

Q. IS THERE ANYTHING UNIQUELY HARMFUL ABOUT COCAINE IN TERMS OF PRENATAL EXPOSURE?

A. COCAINE IS UNIQUE IN THAT IT HAS A VERY DIRECT EFFECT AND SUDDEN EFFECT. BUT IT IS NOT UNIQUE IN THE FACT THAT THERE ARE OTHER DRUGS THAT ACT IN ALMOST EXACTLY THE SAME WAY. AN EXAMPLE IS AMPHETAMINES, IF A WOMEN USES AMPHETAMINES DURING

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PREGNANCY SHE GETS SOME OF THE EXACT SAME OUTCOMES IN THE SAME TIME SEQUENCE, SO THAT AGAIN JUST FOCUSING ON COCAINE IS NOT A POLICY THAT MOVES YOU TOWARD WHAT WAS THE STATED OUTCOME, IMPROVING THE HEALTH OF THE CHILD.

Q. WHAT IS AN AMPHETAMINE?

A. OH, AMPHETAMINES, ON THE STREET THEY'RE CALLED SPEED. BACK IN THE FIFTIES WHEN WOMEN WERE GIVEN DIET PILLS, THOSE WERE AMPHETAMINES. AMPHETAMINES, ANOTHER FORM OF AMPHETAMINE IS RITALIN, SO THEY CAN BE USED MEDICALLY AS PRESCRIPTIONS.

BUT ABUSE OF AMPHETAMINES AND THE CURRENT RAGE ACROSS THE COUNTRY IS CALLED ICE. PEOPLE ARE COOKING AMPHETAMINES, MAKING HOMEMADE AMPHETAMINES. THEY HAVE A DEVASTATING EFFECT ON PREGNANCY OUTCOME.

Q. AND WHAT WOULD THAT BE?

A. WELL, AMPHETAMINES CAN CAUSE MANY OF THE SAME THINGS THAT COCAINE DOES, ABRUPTIONS, SUDDEN SEPARATION OF THE PLACENTA FROM THE WALL OF THE UTERUS SO THE BABY CAN BLEED OR MOTHER CAN BLEED TO DEATH. AMPHETAMINES CAUSE PREMATURITY, THEY CAN BE RELATED TO - MANY OF THE SAME KIND OF THINGS THAT ARE ASSOCIATED WITH COCAINE.

THE DIFFICULTY AGAIN WITH AMPHETAMINES JUST LIKE WITH COCAINE, YOU CAN'T SPECIFICALLY DIFFERENTIATE, YOU CAN'T SAY THIS IS DUE TO AMPHETAMINES AND COCAINE CAUSES THIS. IT'S PEOPLE WHO USE DRUGS, USE MULTIPLE DRUGS. YOU DON'T FIND ANYBODY USING ONE DRUG.

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Q. IS THE PRENATAL EXPOSURE TO A FETUS OF AN ILLEGAL DRUG THE SAME THING AS THE HARM FROM THAT? IS THERE A DISTINCTION BETWEEN THOSE THINGS?

A. WELL, AGAIN THERE IS NO ONE-TO-ONE BASIS. IN FACT IN OUR

STUDIES, AGAIN LOOKING AT LOTS AND LOTS OF BABIES, IF YOU LOOK AT PURELY JUST THE MEDICAL OUTCOME NOW OF ALL OF THE BABIES WE HAVE STUDIED WHOSE MOTHERS USED COCAINE DURING THE PREGNANCY, ABOUT 25 PERCENT OF THE BABIES HAVE SOME KIND OF EFFECT. 70 PERCENT OF THE BABIES THERE DOES NOT APPEAR TO BE ANY IMMEDIATE EFFECT.

SO AGAIN IF YOU'RE LOOKING AT THE IMMEDIATE OUTCOME AT THE TIME OF BIRTH IT'S 25, 75 SPLIT. SO THE MAJORITY OF BABIES DON'T SHOW IMMEDIATE OUTCOMES.

Q. FROM THE EXPOSURE TO COCAINE?

A. FROM EXPOSURE TO COCAINE.

Q. WERE YOU FAMILIAR WITH THE MEDICAL CRITERIA THAT WERE USED IN THE POLICY TO INSTIGATE THE INITIAL UDS?

A. I'M FAMILIAR WITH THE CRITERIA THAT WERE ESTABLISHED. AS I RECALL THOSE CRITERIA CHANGED A LITTLE BIT OVER THE YEARS, BUT I AM FAMILIAR WITH THEM.

Q. AND HOW DID THOSE CRITERIA RELATE TO THE STATED GOAL OF MATERNAL AND FETAL HEALTH?

A. WELL, IF YOU LOOK PURELY AT THE MEDICAL, THERE WERE A LIST OF, I THINK IT WAS ABOUT 7 CRITERIA IF I RECALL. IF YOU LOOK AT THE PURELY MEDICAL PERSPECTIVES, FOR INSTANCE ONE OF

THE CRITERIA WAS PREMATURE DELIVERY. ANOTHER WAS ABRUPTION. SO, IF A WOMEN HAS ONE OF THOSE OUTCOMES, THAT COULD BE AN INDICATION THAT SHE USED COCAINE.

BUT, TOBACCO ALSO CAUSES ABRUPTION. TOBACCO ALSO CAUSES PREMATURITY. SO THAT SETTING UP CRITERIA THAT CAN BE RELATED TO A WIDE RANGE OF PROBLEMS, INCLUDING TOBACCO USE. BUT THEN NARROWING IT DOWN AND SAYING THIS IS WHAT - THIS IS DUE TO COCAINE, YOU JUST CAN'T DO THAT. I MEAN, IT DOESN'T MAKE MEDICAL SENSE.

THEN THERE WERE SOME CRITERIA IN – THAT WERE SET UP THAT REALLY SET UP A VERY BIASED PICTURE. WHEN YOU USE SOMETHING LIKE NO PRENATAL CARE OR INADEQUATE PRENATAL CARE AND SAY THAT'S WHAT WE'RE GOING TO BASE THIS POLICY ON, WHAT YOU HAVE DONE IS SET UP A CERTAIN POPULATION OF WOMEN TO BEAR THE BRUNT OF THAT POLICY, BECAUSE WHEN A WOMEN RECEIVES NO PRENATAL CARE -

WELL, LET'S GO AT IT FROM THE OTHER DIRECTION. POVERTY PLACES A WOMEN ON THE EDGE OF THE HEALTH CARE SYSTEM. WE KNOW THAT. WOMEN WHO ARE POOR HAVE VERY LITTLE ACCESS TO PRENATAL CARE. SO THAT IF YOU SAY, WELL, YOU DIDN'T GET

PRENATAL CARE AND SO WE'RE GOING TO TEST YOUR URINE FOR DRUGS, WHAT YOU'RE ALSO SAYING IS, YOU'RE POOR, WE'RE GOING TO TEST YOUR URINE FOR DRUGS. BECAUSE THE POORER YOU ARE THE MORE LIKELY IT IS YOU'RE NOT GOING TO HAVE ACCESS TO PRENATAL CARE. SO YOU GET INTO THIS CYCLE WHERE YOU'RE SELECTING OUT

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SPECIFIC GROUP OF WOMEN TO BE TESTED.
NOW, THAT - THAT IS - THAT'S KIND OF THE STARTING POINT. BUT THEN WE HAVE DONE STUDIES AND FOLLOWING UP TO THAT THAT HAVE SHOWN THAT WHEN YOU SET UP THESE KIND OF PUNITIVE POLICIES, YOU DO SELECT OUT WOMEN WHO ARE POOR AND MINORITY WOMEN AND THE IMPLEMENTATION OF THOSE POLICIES.
Q. COULD YOU BEEN MORE SPECIFIC ABOUT WHAT YOU'RE TALKING ABOUT IN TERMS OF RESEARCH?
A. YEAH. WE PUBLISHED AN ARTICLE IN 1990 IN THE NEW ENGLAND JOURNAL OF MEDICINE, WE WERE ASKED TO COME DO A STUDY IN THE STATE OF FLORIDA IN THE PLACE CALLED PINELLAS COUNTY ON THE WEST COAST OF FLORIDA. BECAUSE THEY, ALTHOUGH THEY SAW THEMSELVES AS A VERY STABLE, MIDDLE-CLASS POPULATION, THEY WERE SEEING A NUMBER OF INFANTS WHO THEY THOUGHT MET THE

CRITERIA OF HAVING BEEN EXPOSED TO DRUGS DURING PREGNANCY. SO THEY ASKED US TO DO A STUDY OF THE SITUATION.

SO, THE STUDY WAS SET UP TWO PARTS. THE FIRST PART OF IT WAS EVERY WOMEN IN PINELLAS COUNTY WHO WENT FOR HER FIRST PRENATAL VISIT GOT A URINE TOXICOLOGY. THOSE URINES WERE SENT TO US IN CENTRAL LABS AND TESTED WITHOUT ANY NAMES, IT IS WHAT WE CALL BLINDED, YOU COULDN'T TELL WHOSE URINE WAS WHOSE. BUT WE FOUND THAT THE RATE - WE FOUND AN OVERALL RATE OF POSITIVE URINES FOR ILLEGAL DRUGS OF ABOUT 14 TO 15 PERCENT.

WHEN WE LOOKED AT THE WOMEN IN THE PRIVATE HEALTH

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CARE SECTOR VERSUS THE PUBLIC WE FOUND THAT THE RATES OVERALL WERE SIMILAR WHETHER A WOMEN WAS GOING TO THE BOARD OF HEALTH CLINIC OR WAS GOING TO A PRIVATE OBSTETRICIAN, THE RATE OF HAVING THE DRUG - A URINE THAT WAS POSITIVE FOR DRUGS WAS SIMILAR IN THE TWO GROUPS.

THE NEXT STEP WAS - WE ALSO DIVIDED ALONG RACIAL LINES BECAUSE ONE OF SUPPOSITIONS IN PINELLAS COUNTY AT THIS TIME WAS THAT YOU COULD SELECT OUT WHO WAS A DRUG USER BASED

ON WHERE THEY GOT THEIR CARE AND ALSO THAT RACE WAS A FACTOR THAT PREDICTED DRUG USE. WHAT WE SHOWED WAS THAT THE RATES OF DRUG USE WERE ACTUALLY, ACCORDING TO THE URINE TOXICOLOGIES, EXACTLY THE SAME. IN FACT IN THE WHITE POPULATION WAS A LITTLE BIT HIGHER THAN IN THE BLACK.

SO THAT WAS THE FIRST PART OF THE STUDY. ANSWERING THE QUESTION WHO IS USING DRUGS DURING PREGNANCY IN PINELLAS COUNTY. SO WHAT WE FOUND IS THAT POOR WOMEN AND MIDDLE-CLASS WOMEN WERE USING AT THE SAME RATES. BLACK WOMEN AND WHITE WOMEN WERE USING AT THE SAME RATES.

THE NEXT STEP WAS THEN THEY HAD THE POLICY THAT IF A BABY - IF A PHYSICIAN SUSPECTED A WOMEN OF USING DRUGS, THAT A PHYSICIAN COULD DO A URINE TOXICOLOGY. THERE WERE NO CRITERIA SET UP. BUT THEN IF THE MOTHER'S URINE AT THE TIME OF DELIVERY OR THE BABY'S URINE WAS POSITIVE, IT WAS A MANDATED REPORT INTO THE CHILD ABUSE REPORTING SYSTEM AND THAT WOMAN WAS INVESTIGATED, AND IN MANY CASES HAD THE BABY TAKEN

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AWAY FROM HER.

WHAT WE FOUND IS THAT EVEN THOUGH ON BLINDED TESTING

THE RATES OF URINE - POSITIVE URINES WERE SIMILAR FOR BLACK AND WHITE WOMEN, WHEN THE POLICY WAS IMPLEMENTED, TEN TIMES AS MANY BLACK WOMEN HAD THEIR BABIES REPORTED AND TAKEN AWAY AS WHITE WOMEN.

SO THE WAY IT CAME DOWN WAS THAT IF A BLACK WOMEN AND WHITE WOMEN BOTH WALKED INTO A HOSPITAL IN PINELLAS COUNTY, BOTH HAVING JUST USED A DRUG, AND IT DIDN'T MATTER WHAT THAT DRUG WAS, COCAINE OR MARIJUANA OR AMPHETAMINES, THE BLACK WOMEN WAS TEN TIMES MORE LIKELY TO BE REPORTED TO THE SYSTEM AND HER BABY TAKEN AWAY THAN THE WHITE WOMEN.

AND IT CAME OUT PURELY, AND DOING ALL OF THE STATISTICS AND THE THINGS THAT YOU HAVE TO DO TO STUDY THIS, THAT THE SINGLE FACTOR THAT PREDICTED WHICH WOMEN WOULD BE REPORTED TO THE SYSTEM WAS BASED ON RACE.

Q. WHAT DOES THAT HAVE TO DO WITH THE POLICY HERE?

A. WELL, THAT STUDY HAS BEEN REPEATED IN OTHER PLACES, INCLUDING IN ILLINOIS AND OTHER STATES. AND CONSISTENTLY WHAT HAS BEEN FOUND IS WHEN YOU TAKE ANY KIND OF, WHAT IS SEEN AS PUNITIVE POLICY, WHETHER IT'S TAKING A BABY AWAY FROM ITS MOTHER, REPORTING A WOMEN TO CHILD ABUSE, REPORTING OR

THREATENING A WOMEN WITH JAIL, WHENEVER YOU IMPLEMENT THOSE KINDS OF POLICIES, THEY GET IMPLEMENTED IN A RACIALLY BIASED MANNER. AND IT'S BEEN SHOWN IN EVERY STUDY THAT HAS BEEN DONE

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ALONG THIS LINE.
Q. DO YOU HAVE ANY FIRSTHAND KNOWLEDGE ABOUT TREATMENT THAT IS AVAILABLE IN THE STATE OF SOUTH CAROLINA FOR PREGNANT WOMEN WITH SUBSTANCE ABUSE PROBLEMS?
A. DO YOU MEAN ABOUT THE NUMBER OF TREATMENT PROGRAMS? I DON'T -
Q. HAVE YOU HAD ANY INVOLVEMENT WITH SUBSTANCE ABUSE TREATMENT DIRECTLY IN SOUTH CAROLINA?
A. YEAH. JUST A COUPLE OF YEARS AGO THE FEDERAL GOVERNMENT AWARDED FIVE STATES MONEY THROUGH THE MEDICAID FUNDING SYSTEM TO EXPAND MEDICAID FUNDS TO ENHANCE OUTREACH AND CARE IN PREGNANT SUBSTANCE-ABUSING WOMEN. THERE WERE FIVE STATES. THE FIVE STATES WERE GIVEN THE MONEY AND SAID YOU CAN IMPLEMENT PROGRAMS IN ANY WAY YOU WANT AND LET'S SEE HOW YOU DO. AND THEN WE'RE GOING TO HIRE AN EVALUATOR TO COME IN AND EVALUATE THE FIVE STATES.
OUR GROUP, OUR ASSOCIATION WON THE CONTRACT. WE BID

ON IT WITH ANOTHER GROUP CALLED MATHEMATICAL POLICY RESEARCH.
WE WON THE AWARD TO GO AND EVALUATE EACH OF THE FIVE STATES.
MY PERSONAL INVOLVEMENT WAS TO SET UP A PROTOCOL FOR THE FIVE
STATES WHEREIN WE WENT INTO EACH OF THE FIVE STATES AND.
INTERVIEWED THREE GROUPS OF PEOPLE.
THE FIRST GROUP WERE STATE PEOPLE WORKING AT THE
STATE LEVEL. THE SECOND GROUP WERE PEOPLE WHO WERE ACTUALLY
WORKING DIRECTLY IN THE PROGRAMS GIVING SERVICES TO THE

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REALITY WAS AND WHAT THE STATE AND THE PROGRAM WERE SAYING
WOULD HAPPEN.
SO WE SIMPLY WENT BACK AND PULLED THE RECORD. THERE
WERE NINETEEN WOMEN WHO HAD BEEN ADMITTED TO THIS PROGRAM
SINCE ITS INCEPTION. SO WE PULLED THEIR RECORDS. AND THEN WE
PULLED THE RECORDS OF OTHER WOMEN WHO HAD DELIVERED IN THE
HOSPITAL AT THE SAME TIME. SO THE FIRST GROUP, THE NINETEEN
WOMEN THAT WERE ENROLLED IN THE PROGRAM HAD RECEIVED PRENATAL
CARE, THEY WERE IN THE DRUG TREATMENT PROGRAM, AND WE COMPARED
THEM TO WOMEN WHO CAME INTO THE HOSPITAL WITH NO PRENATAL
CARE, WHO HAD NOT RECEIVED DRUG TREATMENT BUT WERE USING DRUGS

AND WERE FOUND BECAUSE THEY HAD A URINE TOXICOLOGY DONE. WHEN WE ANALYZED WHAT HAPPENED TO THEM, EVENTUALLY WHAT WE FOUND WAS THAT THE WOMEN WHO HAD RECEIVED - WHO WERE USING DRUGS, BUT NOPRENATAL CARE AND NO TREATMENT, 50 PERCENT OF THEIR BABIES WERE IN FACT TAKEN AWAY FROM THEM BY THE DEPARTMENT SOCIAL SERVICES OF THE STATE.

ON THE OTHER HAND, WOMEN WHO WERE USING DRUGS, WHO GOT PRENATAL CARE AND WHO ENTERED THIS PROGRAM, 100 PERCENT OF THEIR BABIES WERE TAKEN AWAY FROM THEM. SO IN FACT WHAT THE WOMEN WERE SAYING WAS TRUE.

SO THE SINGLE BIGGEST IMPEDIMENT TO WOMEN ENTERING THE PROGRAM INTO TREATMENT PROGRAMS WAS THE FACT THIS THREAT OF HAVING THE BABIES TAKEN AWAY FROM THEM, WHICH AGAIN CONFIRMS EVERY OTHER STUDY THAT I KNOW OF THAT HAS LOOKED AT

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THIS ISSUE WHEN YOU SET UP PUNITIVE POLICIES, WHETHER IT'S TAKING BABIES AWAY FROM MOTHERS OR THREATENING WOMEN WITH ARREST AND JAIL, THE ONLY THING YOU ACCOMPLISH IS YOU DRIVE WOMEN OUT OF PRENATAL CARE AND DRIVE THEM OUT OF DRUG TREATMENT, WHICH THEN IMPEDES YOUR PROGRESS IN REACHING YOUR ULTIMATE GOAL, WHICH WAS THE GOAL OF THE CHARLESTON POLICY TO

IMPROVE THE OUTCOME OF MOTHERS AND CHILDREN.

SO, THIS WAS THE VERY BASIS OF ONE OF MY FIRST OBJECTIONS TO THIS POLICY WHEN IT WAS FIRST PRESENTED TO ME, MY FEAR THAT IT WOULD IN FACT DRIVE WOMEN OUT OF THE TREATMENT PROGRAMS AND OUT OF PRENATAL CARE.

Q. DR. CHASNOFF, YOU HAVE DESCRIBED YOUR CURRENT PRIMARY EMPLOYMENT AS RUNNING A CENTER THAT PROVIDES TREATMENT FOR PREGNANT, SUBSTANCE-ABUSING WOMEN; IS THAT CORRECT?

A. WELL LET ME - THE GROUP THAT I WORK FOR, IS CALLED THE NATIONAL ASSOCIATION FOR FAMILIES AND ADDICTION RESEARCH AND EDUCATION. SINCE 1976 I HAVE BEEN RUNNING TREATMENT PROGRAMS AND SETTING UP PROGRAMS. HOWEVER, OUR GOAL IN SETTING UP THESE PROGRAMS IS TO SET UP MODELS THAT THEN THE STATE OR OTHER GROUPS CAN TAKE OVER.

SO, OUR ACTIVE PROGRAM THAT WE ESTABLISHED STARTING IN 1990, WE RAN IT FROM 1990 TO 1994, WAS SETTING UP A MODEL TREATMENT PROGRAM FOR PREGNANT, SUBSTANCE-ABUSING WOMEN. THEN IN 1994, HANDED IT OVER TO THE STATE AND THE STATE IS NOW RUNNING IT.

* * *

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WOULDN'T DO THIS, YOU WOULDN'T USE DRUGS. THE OTHER MODEL -

AND YOU CAN'T SUCCEED IN THE MORAL MODEL. YOU CAN'T SAY, WELL, WE WANT YOU TO STOP USING AND IF YOU DON'T STOP USING, HERE IS WHAT WE ARE GOING TO DO TO YOU, AND OF COURSE YOU WILL STOP.

THE OTHER MODEL, WHICH MOST PROFESSIONALS IN THE FIELD ADHERE TO, IS CALLED THE DISEASE MODEL. ADDICTION IS SEEN AS A CHRONIC, RELAPSING DISEASE SO THAT THE PROCESS OF ADDICTION IS NOT ONE OF CHOICE AND IT'S NOT ONE OF RATIONAL THOUGHT. IT'S NOT ONE OF SAYING: IF YOU KEEP USING COCAINE OR IF YOU KEEP USING AMPHETAMINES, OR YOU KEEP USING ALCOHOL, HERE IS WHAT IS GOING TO HAPPEN TO YOU. THAT DOESN'T WORK ANY BETTER THAN SAYING IF YOU KEEP SMOKING CIGARETTES YOU'RE GOING TO DIE OF LUNG CANCER, BECAUSE A GOOD NUMBER OF PEOPLE KEEP SMOKING. THAT IS THE PROCESS OF ADDICTION. IT'S A DISEASE PROCESS THAT TAKES SIGNIFICANT TREATMENT AND INTERVENTION IN ORDER TO OVERCOME.

Q. AND WHAT DO YOU NEED TO DO TO TREAT IT? WHAT ARE SOMEOF THE COMPONENTS OF TREATING IT?

A. WELL, AS RELATED SPECIFICALLY TO THIS CASE, THAT IS UNDER DISCUSSION TODAY, WE KNOW THAT JUST LIKE IF YOU HAVE THREE DIFFERENT MEN WHO HAVE A HEART ATTACK, THE TREATMENT THAT YOU

GIVE THEM IS GOING TO BE DIFFERENT FOR EACH OF THOSE MEN. AND THEN IF YOU HAVE A WOMEN WHO HAS A HEART ATTACK, THE TREATMENT FOR THAT WOMAN IS GOING TO BE DIFFERENT THAN ANY OF THOSE

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OTHER THREE MEN.

IN A PROCESS OF ADDICTION TREATMENT, IT'S THE SAME THING. IT MUST BE INDIVIDUALIZED TREATMENT. YOU MUST CONSIDER ALL CIRCUMSTANCES FOR THE INDIVIDUAL. AND CERTAINLY AND PROBABLY MOST IMPORTANTLY, THAT RESEARCH HAS SHOWN FOR MANY YEARS NOW IS THAT WOMEN HAVE SPECIFIC TREATMENT NEEDS THAT HAVE TO BE ADDRESSED.

JUST TO GIVE YOU SOME VERY SIMPLE ONES. IF YOU HAVE A MAN WHO IS ADDICTED AND YOU SAY IT'S TIME FOR TREATMENT. AND HE SAYS, OKAY, I HAVE GOT TO GET INTO TREATMENT, WHERE DO I GO. IF YOU HAVE A WOMEN WHO IS ADDICTED AND NEEDS TREATMENT, YOU SAY YOU HAVE GOT TO GET INTO TREATMENT, SHE SAYS, OKAY, I'M READY FOR TREATMENT, HER FIRST QUESTION IS NOT WHERE DO I GO, IT'S WHAT DO I DO WITH MY KID.

SO THAT ANY KIND OF TREATMENT PROGRAMS FOR WOMEN HAVE TO TAKE IN SOME DIFFERENT KINDS OF ASPECT JUST

LOGISTICALLY. CHILD CARE. TRANSPORTATION.
THE OTHER ISSUE THAT COMES UP IN SPECIFIC TREATMENT PROGRAMS FOR WOMEN IS THAT IT'S BEEN SHOWN THAT THE GREAT MAJORITY OF WOMEN WHO ARE ADDICTED AS ADULTS COME FROM BACKGROUNDS WITH HIGH RATES OF INCEST, SEXUAL ABUSE RAPE, VIOLENCE. SO THAT THOSE ARE THE KIND OF ISSUES THAT OFTEN DON'T HAVE TO BE ADDRESSED FOR MEN THAT MUST BE ADDRESSED FOR WOMEN.
SO, I MEAN, WE COULD GO ON AND ON, BUT YOU HAVE TO

* * *

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SUBSTANCE ABUSE. THEY SHOULD FROM JUST A PURELY BIOLOGICAL MEDICAL PERSPECTIVE BE ABLE TO RECOGNIZE. IT. BUT THE MAIN BARRIER IS NOT TRAINING IN THE - LACK OF TRAINING IN THE MEDICAL ASPECTS, IT'S LACK OF TRAINING IN HOW TO COMMUNICATE WITH PATIENTS AND HOW TO UNDERSTAND THE PROCESS.
Q. OKAY. ARE THERE ANY DIFFICULTIES IN INCLUDING IN A MODEL FOR REFERRAL, INFORMATION THAT IS BASED UPON SELF-REPORTING FROM THE PATIENT?
A. YOU MEAN IF A PHYSICIAN, FOR EXAMPLE, ASKS A QUESTION

WHETHER THE WOMEN ANSWERS YES OR NO?
Q. RIGHT.
A. WELL, AGAIN YOU GET INTO ISSUES OF HEALTH CARE AND THE WAY OUR HEALTH CARE SYSTEM WORKS. NOT EVEN SPECIFICALLY TALKING ABOUT WOMEN RIGHT NOW, BUT POOR PEOPLE, PEOPLE WHO DON'T HAVE ACCESS TO HEALTH CARE, WHO ARE NOT COMFORTABLE IN THE HEALTH CARE SYSTEM, WHO DO NOT FEEL EMPOWERED IN THE HEALTH CARE SYSTEM, GENERALLY TEND TO BE MORE HONEST. AND THAT A - AND SPECIFICALLY IN THIS KIND OF CASE, IF A WHITE MIDDLE-CLASS WOMEN WERE ASKED IF SHE USED DRUGS DURING PREGNANCY, SHE WOULD FEEL MUCH MORE EMPOWERED TO DENY IT AND TO SAY NO, AND IT'S NONE OF YOUR BUSINESS, GO AWAY, THAN WOULD A WOMEN WHO IS NOT COMFORTABLE IN THE HEALTH CARE SYSTEM, WHO IS ASKED BY AN AUTHORITY FIGURE, DO YOU USE DRUGS. AND ESPECIALLY IF SHE - YOU KNOW, IF SHE DOESN'T FEEL LIKE SHE HAS ANY CHOICE.

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SO, ONE OF THE DIFFICULTIES WE GET INTO IS WHEN YOU RELY ON UNTRAINED INDIVIDUALS ASKING THESE KINDS OF QUESTIONS, YOU AGAIN BEGIN TO SELECT OUT WOMEN WHO ARE ON - WHO ARE NOT

EMPOWERED IN THE SYSTEM, WHICH CONSEQUENTLY MEANS USUALLY POOR MINORITY WOMEN.

Q. DR. CHASNOFF, HAVE YOU PUBLISHED INFORMATION RELATING TO COCAINE USE DURING PREGNANCY PRIOR TO 199?

A. YES.

Q. AND HAVE YOU DONE RESEARCH IN THAT AREA PRIOR TO 1989?

A. YES. OUR FIRST ARTICLE ON COCAINE USE IN PREGNANCY WAS PUBLISHED IN 1985.

Q. YOU HAVE GIVEN TESTIMONY TODAY BASED UPON YOUR PRESENT INFORMATION, IS THAT CORRECT?

A. YES.

Q. YOU HAVE TALKED ABOUT RESEARCH THAT HAS BEEN COMPLETED SINCE 1989; IS THAT CORRECT?

A. WELL, IT WAS ALL KIND OF MIXED IN THERE. I DIDN'T DIFFERENTIATE. MOST OF IT HAS BEEN SINCE '89.

Q. BUT YOU INDICATED THAT YOU TALKED TO MR. CONDON SOMETIME IN '89?

A. I BELIEVE THAT IT WAS. '88, '89. IT WAS - I MEAN, THE REASON HE CALLED ME WAS BECAUSE WE HAD BEEN PUBLISHING ARTICLES COCAINE USE AND PREGNANCY SO IT WAS, '89 -- '88, '89.

Q. AND WERE THE OPINIONS THAT YOU GAVE MR. CONDON WHEN HE

CONTACTED YOU CONSISTENT WITH THE ONES THAT YOU HAVE GIVEN IN COURT TODAY?

A. OH, ABSOLUTELY.

MS. DUNN: IF YOU WILL BEAR WITH ME JUST A SECOND.

(PAUSE IN PROCEEDINGS.)

Q. (BY MS. DUNN, CONTINUING) DR. CHASNOFF, DID YOUR WORK THAT WAS AVAILABLE IN 1989 PROVIDE A JUSTIFICATION FOR THE ADOPTION OF THE INTERAGENCY POLICY?

A. NO.

MS. SHOWERS: OBJECTION, YOUR HONOR.

THE COURT: I THINK THE QUESTION IS THE - I THINK THE QUESTION IS LEADING.

LADIES AND GENTLEMEN, STRIKE THE QUESTION AND THE ANSWER. GIVE IT NO CONSIDERATION.

Q. (BY MS. DUNN, CONTINUING) IN YOUR CONVERSATIONS WITH MR. CONDON, DID HE ASK YOU ANY INFORMATION CONCERNING YOUR RESEARCH?

A. YES. NOW THERE WERE A SERIES OF CONVERSATIONS THAT OCCURRED. I KNOW WE TALKED, HE SENT ME A COPY OF THE POLICY. AND THEN ASKED ME MY OPINION ON THE POLICY AND IN THOSE: CONVERSATIONS I MADE IT CLEAR TO HIM.THAT OUR WORK AND THE WORK WE WERE DOING ON THE EFFECTS OF COCAINE AND OTHER DRUGS ON PREGNANCY OUTCOME AND ON NEWBORNS DID NOT SUPPORT THE

POLICY THAT THEY WERE DEVELOPING AND IN NO WAY SHOULD HAVE LED TO THAT KIND OF POLICY.

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SO THAT IT WAS - THOSE SERIES OF CONVERSATIONS, I MADE IT QUITE CLEAR THAT - THAT I THOUGHT HE WAS TAKING SOME GREAT LEAPS OF FAITH IN TRYING TO MOVE FROM WHAT WAS - HAD BEEN ESTABLISHED IN SOME SCIENTIFIC RESEARCH THAT HAD BEEN PUBLISHED FOR THE PURPOSE OF BEGINNING TO EXPLORE A NEW AREA, AND TAKING A SUDDEN LEAP AND DEVELOPING POLICIES THAT COULD NOT BE SUPPORTED BY THAT RESEARCH.

MS. DUNN: I HAVE NO FURTHER QUESTIONS. THANK YOU.

MS. SHOWERS: GOOD MORNING, DR. CHASNOFF.

<u>CROSS-EXAMINATION</u>

BY MS. SHOWERS:

Q. YOU HAVE SPENT THE LAST 20 YEARS OF YOUR CAREER DOCUMENTING THE ADVERSE EFFECTS OF COCAINE USE ON PREGNANCY AND THE EFFECTS IN UTERO? TRUE?

A. TRUE.

Q. YOU BEGAN DOCUMENTING THE ADVERSE EFFECTS OF COCAINE ON FETUSES IN UTERO IN THE LATE 1970'S, TRUE?

A. NO, ACTUALLY IT STARTED IN THE EARLY '80'S AND PUBLISHED IN '85.

Q. AND YOU AGREE WITH ME THAT COCAINE USE DURING PREGNANCY SHOULD BE DISCOURAGED?
A. I AGREE WITH THAT, YES.
Q. AND THAT DRUGS TAKEN DURING PREGNANCY WILL CROSS THE PLACENTA BARRIER AND REACH THE BABY?
A. YES. THESE SUBSTANCES INCLUDING TOBACCO AND ALCOHOL.

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Q. MY QUESTION WAS JUST COCAINE.
A. NO, YOU SAID DRUGS.
Q. COCAINE WILL CROSS THE BARRIER ALSO.
WOULD YOU EXPLAIN TO THE JURY WHAT YOU MEAN BY THAT THE PLACENTAL BARRIER?
A. YES. THE PLACENTA IS THE TISSUE THAT BASICALLY TRANSFERS BLOOD AND NUTRIENTS FROM THE MOTHER TO THE BABY THROUGH ITS VASCULAR SYSTEM AND THE UMBILICAL CORD TO THE BABY. AND IT, RATHER THAN ACTING AS ANY KIND OF BARRIER OR PROTECTING THE BABY, RATHER IT'S MORE LIKE A SIEVE. THAT ANY - ANYTHING THAT THE MOTHER INGESTS WILL CROSS FROM THE MOTHER TO THE BABIES.
Q. IN YOUR EARLY ARTICLES ON COCAINE USE DURING PREGNANCY, YOU NOTED THAT THERE WAS AN INCREASED RATE OF PLACENTAL ABRUPTIONS ASSOCIATED WITH COCAINE USE DURING PREGNANCY?

A. YES, THAT CAN BE ASSOCIATED WITH ABRUPTIONS.
Q. CAN YOU EXPLAIN TO THE JURY WHAT ABRUPTION IS?
A. WHEN A WOMEN GOES INTO LABOR THE UTERUS STARTS CONTRACTING AND THE BABY WILL DELIVER. AND AFTER THAT THE PLACENTA WILL THEN SEPARATE FROM THE WALL OF THE UTERUS AND BE DELIVERED. AND THAT'S AFTERBIRTH. IN ABRUPTION THERE ARE CERTAIN CONDITIONS LIKE THE WOMAN HAS HYPERTENSION, HIGH BLOOD PRESSURE, IT CAN LEAD TO ABRUPTION. IF A WOMAN SMOKES TOBACCO OR USES COCAINE OR AMPHETAMINES, THOSE ARE ALL RISK FACTORS FOR INCREASING THE RISK OF ABRUPTION.

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Q. AND THE PLACENTA SEPARATES AND THE WOMAN BLEEDS?
A. THE PLACENTA SEPARATES THE WOMAN CAN BLEED AND THE BABY CAN LOSE OXYGEN.
Q. AND DIE?
A. THAT'S A POSSIBILITY.
Q. AND IN 1989, YOU DOCUMENT THE HARMS OF COCAINE USE ON THE FETUS TO INCLUDE CONGENITAL ANOMALIES?
A. YES, THERE IS AN INCREASED RATE OF CONGENITAL ANOMALIES.
Q. CAN YOU EXPLAIN TO THE JURY WHAT A CONGENITAL ANOMALY IS?
A. WELL CONGENITAL ANOMALY IS WHEN THE BABY IS BORN WITH

SOME TYPE OF MALFORMATION IS THE WAY TO THINK OF IT. AND CAN RESULT AGAIN FROM A VARIETY OF FACTORS INCLUDING ALCOHOL, THAT'S PROBABLY THE MOST COMMON DRUG THAT CAUSES THESE KIND OF ANOMALIES. COCAINE, ALSO.

Q. COCAINE USE ON A FETUS HAS ALSO BEEN DOCUMENTED TO CAUSE WITHDRAWAL?

A. NO. COCAINE HAS NEVER BEEN SHOWN TO HAVE AN EFFECT OF WITHDRAWAL. THE ONLY DRUG HAS BEEN HEROIN.

Q. I SHOULD HAVE CHARACTERIZED THAT, DOCTOR. IN 1989 YOU DOCUMENTED THAT COCAINE USE DURING PREGNANCY COULD CAUSE WITHDRAWAL?

A. NO, WE NEVER SAID THAT IT CAUSED WITHDRAWAL. IT WAS - WE SHOWED THAT IT CAUSED NEURO - NEUROLOGICAL CHANGES IN THE BABY, BUT A CLEAR SYNDROME OF WITHDRAWAL FROM COCAINE HAS NEVER BEEN CLEARLY DOCUMENTED.

[CHASNOFF 35]

Q. PAGE 19, LINE 6.

MS. DUNN: WHICH DEPOSITION?

Q. (BY MS. SHOWERS, CONTINUING) DO YOU REMEMBER WHEN I TOOK YOUR DEPOSITION, DR. CHASNOFF?

A. YES. OH, YES, I DO.

Q. WE WERE IN THE AIRPORT IN CHICAGO, AS I RECALL, CORRECT?

A. YES.

Q. OKAY. AND AT LINE 6 ON PAGE 19, I SAID:

AND THE DOCUMENTED EFFECTS OF COCAINE USE ON A FETUS IN 1989 INCLUDED CONGENITAL ANOMALIES?

AND YOUR ANSWER WAS: YES.

AND THEN AT LINE 9: FETAL DEPENDENCE ON DRUG RESULTING IN WITHDRAWAL, IRRITABILITY, RESTLESSNESS, POOR FEEDING, CRYING, IMPAIRED NEUROBEHAVIORAL ABILITIES, TREMULOUSNESS, INCREASE IN COMPLICATIONS OF LABOR AND DELIVERY, ABRUPTIO PLACENTAE, AND FETAL MONITOR ABNORMALITIES, FETAL MECONIUM STAINING.

AND YOUR ANSWER WAS: YOU SAID DRUG. YOU JUMPED FROM COCAINE TO DRUG.

MY QUESTION WAS: I'M TALKING ABOUT COCAINE SPECIFICALLY.

AND YOUR ANSWER WAS, DOCTOR, AT LINE 18, COULD YOU READ THAT, PLEASE?

A. COCAINE SPECIFICALLY WAS RELATED TO ALL THOSE EXCEPT FOR THE USE OF THE WORD DEPENDENCE.

[CHASNOFF 36]

Q. ALL RIGHT, SIR.

SO WITHDRAWAL WAS IN THAT LIST OF COMPLICATIONS, WAS IT NOT?

A. WELL IN READING IT, YES.

Q. OKAY. THANK YOU. IRRITABILITY AS WELL, WAS DOCUMENTED IN 1989, CORRECT?
A. YEAH.
Q. OKAY. RESTLESSNESS, POOR FEEDING AND CRYING AS WELL?
A. YES.
Q. AND IMPAIRED NEUROBEHAVIORAL ABILITIES. CAN YOU EXPLAIN TO THE JURY WHAT IMPAIRED NEUROBEHAVIORAL ABILITIES IS?
A. SURE. WHEN A BABY IS FIRST BORN THE BABY COMES WITH CERTAIN CAPABILITIES TO INTERACT WITH THE ENVIRONMENT, TO RESPOND. SO EVEN A BABY WHO IS ONE OR TWO DAYS OLD, WHEN YOU PICK THAT BABY UP AND LOOK THE BABY IN THE EYE, THAT BABY WILL RETURN YOUR GAZE. IT WILL INTERACT WITH YOU.
IF THE BABY STARTS GETTING IRRITABLE AND IS CRYING, THE BABY THAT IS ONE, TWO DAYS OF AGE, HAVE THE ABILITY TO COMFORT THEMSELVES. THEY, IF YOU WATCH THEM, THEY TRY TO SUCK ON THEIR HAND. THEY WILL TRY TO BRING THEIR ARMS AND LEGS IN. THOSE ARE NEUROBEHAVIORAL ABILITIES, THE ABILITY TO CALM ONE'S SELF. THE ABILITY TO INTERACT WITH THE ENVIRONMENT AND RESPOND TO THE CARETAKER, THOSE ARE NEUROBEHAVIORS.
Q. AND COCAINE USE DURING PREGNANCY IMPAIRS THE NEUROBEHAVIORAL ABILITIES?

[CHASNOFF 37]

A. YES. COCAINE USE IS ONE OF THE DRUGS THAT CAN DO THAT.
Q. AND IT ALSO CAUSES TREMULOUSNESS IN A NEONATE?
A. IT CAN BE ASSOCIATED WITH TREMULOUSNESS, YES.
Q. AND COCAINE ALSO IS ASSOCIATED WITH INCREASED LABOR AND DELIVERY COMPLICATIONS?
A. YES.
Q. AND CAN YOU TELL THE JURY WHAT THOSE COMPLICATIONS ARE?
A. WELL, WE HAVE TALKED ABOUT SOME OF THE ABRUPTIONS, THE - COCAINE IS ONE OF THE DRUGS ALSO THAT CAN LEAD TO PREMATURITY, PUT A WOMEN INTO LABOR EARLY. TOBACCO CAN DO THAT. AMPHETAMINES. PRECIPITOUS DELIVERY, MEANING THE BABY IS DELIVERED TOO QUICKLY AND CAN SUFFER LOSS OF OXYGEN. SUDDEN RAPID DELIVERY, AMPHETAMINES CAN ALSO DO THAT. THE BABY CAN BE BORN LOW BIRTH WEIGHT, MEANING NOT HAVING GROWN WELL WITHIN - WITHIN THE WOMB. AND COCAINE IS ONE OF THE SUBSTANCES THAT CAN BE ASSOCIATED WITH THAT.
Q. AND FETAL MONITOR ABNORMALITIES, YOU DOCUMENTED THAT THERE WAS AN ADVERSE EFFECT ON FETAL MONITOR ABNORMALITIES CAUSED BY COCAINE USE IN UTERO. CAN YOU EXPLAIN THAT TO THE JURY, PLEASE?

A. THE FETAL MONITOR TRACKS A BABY'S HEART RATE IN UTERO. AND JUST LIKE AN ADULT, WHEN AN ADULT SMOKES A CIGARETTE, HEART RATE CHANGES CAN OCCUR. WHEN AN ADULT USES COCAINE OR AMPHETAMINES, HEART RATE CHANGES CAN OCCUR. SO IF A BABY IS EXPOSED IN UTERO TO THE MOTHER'S - WELL THERE ARE VARIETY OF

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OTHER REASONS, TOO, BUT IN THE CONTEXT OF SUBSTANCES, IF THE BABY IS EXPOSED IN UTERO TO ANY OF THOSE KIND OF SUBSTANCES THERE CAN BE HEART RATE CHANGES AND FETAL MONITOR ABNORMALITIES.

Q. YOU ALSO DOCUMENTED IN 1989 THAT USE OF COCAINE DURING PREGNANCY AND THE EFFECTS OPEN THE FETUS CAUSE FETAL MECONIUM STAINING. CAN YOU EXPLAIN THAT?

A. MECONIUM IS THE WASTE MATERIAL THAT A BABY COLLECTS IN HIS BOWEL. HE DOES NOT HAVE A BOWEL MOVEMENT IN UTERO EXCEPT UNDER DIRE CIRCUMSTANCES WE WILL GET TO IN A MINUTE, BUT RATHER THE MECONIUM WHICH IS MADE UP OF SWALLOWED AMNIOTIC FLUIDS AND BLOOD AND LINING OF THE BABY'S GUT THAT'S PASSED AFTER, IT'S A BLACK, TARRY, STICKY SUBSTANCE THAT IS PASSED WITHIN THE FIRST 24 HOURS AFTER BIRTH. IF A BABY IS NOT

GETTING ENOUGH OXYGEN IN THE WOMB, THEN HE LITERALLY WILL START GASPING FOR OXYGEN IN UTERO. AND IF HE BECOMES STRESSED ENOUGH HE WILL THEN PASS THE STOOL, THE MECONIUM IN THE WOMB. AND THERE ARE A NUMBER OF FACTORS AGAIN THAT CAN LEAD TO THAT, COCAINE BEING ONE OF MANY.

Q. LOWER GESTATIONAL AGE AND LOWER NEONATAL BIRTH WEIGHT. YOU TALKED ABOUT THAT A LITTLE BIT EARLIER, BUT THAT IS ALSO ASSOCIATED WITH COCAINE USE DURING PREGNANCY AND ITS SUBSEQUENT EFFECTS ON THE NEONATE, TRUE?

A. LOWER GESTATION AGE IS THE SAME THING AS WE TALKED ABOUT EARLIER, THE PREMATURITY AND THE LOWER NEONATE WEIGHT IS WHAT

[CHASNOFF 39]

WE REFER TO AS LOW BIRTH WEIGHT. SO A NUMBER OF FACTORS.

Q. SMALLER BABIES?

A. IN GENERAL, A FULL TERM BABY LESS THAN FIVE POUNDS EIGHT OUNCES.

Q. SPECIFICALLY THE HEAD CIRCUMFERENCE HAVE ALSO BEEN NOTED TO BE SMALLER IN BABIES EXPOSED TO COCAINE IN UTERO?

A. YES. SMALL HEAD CIRCUMFERENCE HAS BEEN SHOWN TO OCCUR MORE COMMONLY IN BABIES WHOSE MOTHERS USED ALCOHOL OR COCAINE

OR AMPHETAMINES OR HEROIN DURING PREGNANCY.
Q. COCAINE USE DURING PREGNANCY AND ITS EFFECTS ON THE BABY HAS ALSO BEEN ASSOCIATED WITH SOMETHING CALLED PRUNE BELLY SYNDROME IN 1989, IS THAT TRUE?
A. YES.
Q. COULD YOU EXPLAIN TO THE JURY WHAT PRUNE BELLY SYNDROME IS?
A. THIS IS NOT A VERY PLEASANT - PRUNE BELLY IS, BABIES WHO ARE BORN WITH KIDNEY - A KIND OF KIDNEY PROBLEM THAT THE KIDNEY IS SWOLLEN, IT CAUSES THE BELLY TO SWELL ALSO. THE MUSCLES IN THE ABDOMEN DON'T DEVELOP NORMALLY SO THAT WHEN THE BABY IS BORN THERE IS LACK OF MUSCLES IN THE ABDOMEN SO THAT THE ABDOMEN IS WRINKLED AND LOOKS LIKE A PRUNE, AND IT'S CALLED PRUNE BELLY SYNDROME.
Q. THAT'S A PRETTY SERIOUS COMPLICATION?
A. THE MOST SERIOUS ASPECT OF IT IS THAT IT CAN BE ASSOCIATED WITH KIDNEY PROBLEMS THAT CAN RESULT IN KIDNEY

[CHASNOFF 40]

FAILURE, NEED FOR A TRANSPLANT. PRUNE BELLY SYNDROME MOST COMMONLY OCCURS FOR UNKNOWN REASONS, BUT BABIES WHOSE MOTHERS HAVE USED AMPHETAMINES OR COCAINE, CAN - DO HAVE A SLIGHTLY

INCREASED RISK OVER THE GENERAL POPULATION.

Q. YOU ALSO, IN 1989, DOCUMENTED THAT COCAINE EXPOSURE IN UTERO WAS ASSOCIATED WITH LIMB REDUCTION DEFORMITIES; IS THAT TRUE?

A. YEAH. A LIMB REDUCTION DEFORMITY IS WHEN A BABY IS BORN MISSING A LIMB. AN ARM OR A LEG OR A TOE OR FINGERS. AND THAT SPECIFICALLY OCCURS IN THE KIND OF DRUGS THAT CUT OFF BLOOD SUPPLY FOR THE BABY. AGAIN, AMPHETAMINES, COCAINE, MAYBE A SLIGHTLY INCREASED RATE WITH TOBACCO USE.

Q. IN 1989 YOU ALSO DOCUMENTED THAT COCAINE USE DURING PREGNANCY, WHEN THE BABY WAS BORN, THE EFFECTS OF COCAINE OR THE BREAKDOWN OF COCAINE IN THE BLOOD STREAM REMAINED IN THE CHILD'S BLOOD STREAM FOR HOW MANY DAYS, DOCTOR?

A. WELL, THOSE STUDIES WE WERE ACTUALLY LOOKING AT URINE. WE DID NOT MEASURE IN THE BLOOD. YOU HAVE TO BE VERY SPECIFIC HERE. BUT BABIES THAT APPEAR - WE KNOW THEY HAVE MORE IMMATURE LIVERS, SO THEY DON'T BREAK DOWN COCAINE AS RAPIDLY AS AN ADULT WOULD, SO THAT IT APPEARS THAT YOU CAN ACTUALLY FIND LEVELS OF THE BREAKDOWN MATERIALS FROM COCAINE IN THE BABY FOR ABOUT FIVE DAYS AFTER THE BABY WAS BORN.

Q. DR. CHASNOFF, ONE LAST QUESTION ON THE EFFECTS OF THE COCAINE USE IN UTERO.

[CHASNOFF 41]

YOU ALSO REPORTED THAT A ONE-TIME USE OF COCAINE COULD RESULT IN A STROKE TO THE BABY OR THE FETUS, TRUE?

A. YEAH. THERE ARE - AT THAT TIME THERE WERE BEGINNING REPORTS, THE FACT THAT A SINGLE USE OF COCAINE ON A SINGLE OCCASION COULD RESULT IN FAIRLY DIRE CONSEQUENCES, AS WAS SHOWN ALSO FOR AGAIN OTHER DRUGS LIKE AMPHETAMINES.

Q. IN GENERAL, DOCTOR, SUBSTANCE-ABUSING PREGNANT WOMEN AVOID GETTING PRENATAL CARE; ISN'T THAT TRUE?

A. NO, I CAN'T SAY THAT HAS BEEN SHOWN THROUGH RESEARCH.

Q. THERE IS NO DIFFERENCE BETWEEN AN AVERAGE PREGNANT WOMAN GETTING PRENATAL CARE AND A SUBSTANCE-ABUSING PREGNANT WOMAN?

A. WELL, THE DIFFICULTY IS, YOU ARE GETTING INTO SCIENTIFIC METHODOLOGY. THERE ARE STUDIES THAT SHOW IF YOU TAKE A LARGE GROUP OF WOMEN WHO GET NO PRENATAL CARE, A SIGNIFICANT NUMBER OF THOSE WOMEN HAVE USED DRUGS DURING PREGNANCY. BUT THERE IS NO STUDY - THAT'S CALLED A RETROSPECTIVE STUDY.

SCIENTIFICALLY IT IS NOT AS VALID, SEEN AS VALID, THOUGH, AS A PROSPECTIVE STUDY WHERE YOU TAKE A POPULATION OF WOMEN, DRUG USERS AND NON DRUG USERS, AND STUDY THEM PROSPECTIVELY. YOU FIND NO ONE HAS EVER DONE THAT TO KNOW IF TRULY THAT THE DECREASED RATES OF PRENATAL CARE ARE ASSOCIATED WITH THE DRUG USE OR THERE ARE OTHER FACTORS THAT - THAT ARE LEADING TO IT. BUT IT'S - IN GENERAL, ONE OF THE FACTORS THAT MAY IMPEDE PRENATAL CARE IS IF THE WOMEN IS USING DRUGS. BUT IT

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MAY NOT BE THE DRUG USE ITSELF, IS WHAT I AM TRYING TO SAY.

Q. IN ONE OF YOUR ARTICLES DID YOU DESCRIBE ONE OF THE SIGNS THAT A PREGNANT WOMEN MAY BE USING SUBSTANCE ABUSE TO BE THAT SHE DELAYED GETTING PRENATAL CARE?

A. THAT IS A RETROSPECTIVE STUDY, YES.

Q. DR. CHASNOFF, IN 1989 YOU TESTIFIED BEFORE CONGRESS ABOUT THE MEDICAL CRISES POSED BY COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. I DID TESTIFY BEFORE CONGRESS. I'M NOT - I DON'T RECALL I SAID MEDICAL CRISES, BUT-

Q. YOU DID SAY -

A. I --

Q. I'M SORRY.

A. I DON'T REMEMBER THOSE WORDS.
Q. YOU DID SAY THAT THERE WAS AN URGENT NEED TO ESTABLISH PROTOCOLS FOR EARLY RECOGNITION OF SUBSTANCE-ABUSING WOMEN AND PROVIDING TREATMENT AND INTERVENTION PROGRAMS?
A. I DID SAY THAT, YES.
Q. YOU ALSO TESTIFIED THAT THERE HAD BEEN A RAPID RISE IN REPORTED INSTANCES OF COCAINE USE DURING PREGNANCY, DID YOU NOT?
A. YES.
Q. AND THAT IN 1989 SUBSTANCE ABUSE WAS ASSOCIATED WITH APPROXIMATELY 64 PERCENT OF ALL REPORTED CHILD ABUSE CASES?
A. THAT'S RIGHT.

[CHASNOFF 43]

Q. AND YOU ADVOCATED IN THE LATE 1980'S THAT SOMETHING NEEDED TO BE DONE IMMEDIATELY ABOUT THE PROBLEM OF COCAINE USE DURING PREGNANCY?
A. YES.
Q. AND YOU AGREE WITH ME THAT IT WAS ESSENTIAL FOR MEDICAL PROFESSIONALS TO DEVELOP PROTOCOLS AND CRITERIA TO TEST PREGNANT WOMEN FOR COCAINE USE DURING PREGNANCY?
A. YES.
Q. AND YOU ARE NOT AN ALARMIST IN THE 1980'S ABOUT THE PROBLEMS OF COCAINE USE DURING PREGNANCY?

A. YOU ASKED THAT DIFFERENTLY THAN YOU DID LAST TIME. YES, I AM NOT AN ALARMIST.
Q. AND YOUR RESEARCH WAS NOT FAULTY?
A. OH, NO ONE HAS DONE ANYTHING TO SHOW THAT OUR RESEARCH WAS FAULTY.
Q. AND THE GOAL OF THE INTERAGENCY POLICY, AS YOU UNDERSTAND IT, WAS TO ENHANCE OUTCOMES IN PREGNANCY, TRUE?
A. THAT'S TRUE, I HAVE NO ARGUMENT WITH THE GOAL OF THE POLICY.
Q. IT WAS NOT TO PUT WOMEN IN JAIL?
A. THE STATED GOAL OF THE POLICY WAS TO ENHANCE THE OUTCOMES OF WOMEN AND CHILDREN.
Q. AND AS FAR AS THE CRITERIA THAT WERE DEVELOPED FOR THE POLICY, THEY WERE NOT IN ANY WAY BASED ON RACE; IS THAT TRUE?
A. WELL, NOW WE'RE HAVING A LITTLE BREAKDOWN HERE. I THINK

[CHASNOFF 44]

YOU HAVE TO - I MEAN, YOU DON'T - POLICY IS NOT DEVELOPED IN ISOLATION. AND I DON'T THINK ANYONE WHO SAT DOWN AT THE TABLE AND SAID WE'RE GOING TO DEVELOP THIS POLICY AND WE'RE GOING TO DISREGARD WHAT REALITY IS IN OUR COMMUNITY. IT IS KNOWN THAT WOMEN WHO ARE NOT GETTING PRENATAL CARE, WOMEN WHO HAVE A

RECORD OF HAVING ADMITTED TO SUBSTANCE ABUSE PREVIOUSLY, THOSE WOMEN TEND TO BE POOR AND BLACK. AND SO WHEN THAT POLICY IS SET UP IN SUCH A WAY TO SAY THAT THE CRITERIA ARE NO PRENATAL CARE OR POOR PRENATAL CARE, RIGHT FROM THE BEGINNING YOU'RE SETTING UP ONE GROUP OF WOMEN TO BE SELECTED OUT.

Q. DR. CHASNOFF, COULD YOU LOOK AT PAGE 32, LINE 18 OF YOUR DEPOSITION?

A. I'M SORRY, PAGE 32?

Q. YES, SIR. WHEN ASKED ABOUT THE CRITERIA, YOUR ANSWER AT LINE 18?

A. YOU WANT ME TO READ IT?

Q. YES, SIR.

A. BECAUSE IF YOU WERE TALKING ABOUT THESE NINE CRITERIA THAT ARE IN FRONT OF ME RIGHT NOW, RACE DOES NOT ENTER INTO ANY OF THE CRITERIA AS FAR AS WHAT IS WRITTEN ON THE PAPER.

Q. THANK YOU, DOCTOR.

YOU'RE NOT FAMILIAR WITH THE SOUTH CAROLINA CHILD ABUSE REPORTING STATUTE, ARE YOU, DOCTOR?

A. NO.

Q. AND THE IMPACT OF THE MEDICAL PRACTITIONER'S DUTY TO

[CHASNOFF 45]

REPORT SUSPECTED CHILD ABUSE IS NOT TAKEN INTO ACCOUNT IN YOUR

OPINIONS EXPRESSED HERE TODAY, IS IT, DOCTOR?
A. WELL - I'M NOT QUITE WITH YOU. THERE ARE - EVERY STATE - EVERY STATE MANDATES REPORTING OF CHILD ABUSE.
Q. AND YOU'RE NOT FAMILIAR WITH SOUTH CAROLINA?
A. SOUTH CAROLINA SPECIFICALLY? NO, I'M NOT.
Q. AND IF IN SOUTH CAROLINA HEALTH CARE PROFESSIONAL IS MANDATED TO REPORT SUSPECTED CHILD ABUSE AND NEGLECT, WHICH UNDER SOUTH CAROLINA LAW INCLUDES PREGNANT -
MS. DUNN: OBJECTION, YOUR HONOR, HE HAS ALREADY STATED THAT HE IS NOT COMPETENT IN THIS AREA.
MS. SHOWERS: IT GOES TO HIS OPINION, YOUR HONOR. I MEAN.
MS. DUNN: HE DIDN'T GIVE AN OPINION ABOUT THAT AREA.
THE COURT: WELL, THAT DOESN'T LIMIT HER NECESSARILY IN CROSS-EXAMINATION.
MS. SHOWERS: I JUST WANT TO ESTABLISH -
THE COURT: I'LL LET YOU ASK THE QUESTION. I THINK I KNOW WHAT YOU'RE GOING TO SAY, BUT GO AHEAD AND SAY IT.
Q. (BY MS. SHOWERS, CONTINUING) YOU DID NOT TAKE INTO ACCOUNT THE FACT THAT REPORTING COCAINE USE DURING PREGNANCY

IS MANDATORY UNDER THE SOUTH CAROLINA CHILD ABUSE STATUTE, DID YOU, DOCTOR?
A. OH, NO, I DON'T HAVE ANY INTERACTION WITH THAT.

[CHASNOFF 46]

Q. AND YOU AGREE WITH ME THAT GETTING SUBSTANCE-ABUSING WOMEN INTO TREATMENT IS HELPFUL TO BOTH THE MOTHER AND THE CHILD?
A. ABSOLUTELY.
Q. AND YOU WERE NOT FAMILIAR WITH THE SUBSTANCE ABUSE AVAILABLE IN CHARLESTON BETWEEN 1988 AND 1990, WERE YOU, DOCTOR?
A. NO.
Q. AND COERCIVE TREATMENT IN TERMS OF SUBSTANCE ABUSE TREATMENT IN GENERAL IS NOT SOMETHING THAT YOU'RE FAMILIAR WITH OR AN EXPERT IN, TRUE?
A. WELL, CAN WE BREAK THAT DOWN? I AM FAMILIAR WITH IT. I WOULD NOT CONSIDER MYSELF AN EXPERT IN IT.
Q. WHEN I TOOK YOUR DEPOSITION YOU TOLD ME THAT THAT WAS OUT OF YOUR AREA OF EXPERTISE?
A. THAT'S WHAT I JUST SAID, I THOUGHT.
MS. SHOWERS: YOUR HONOR, THERE IS ONE OTHER AREA THAT I WANTED TO GO INTO, BUT I WANTED TO BRING IT UP AT SIDEBAR FIRST.
THE COURT: ALL RIGHT.

(SIDEBAR AS FOLLOWS:)
MS. SHOWERS: I WANTED TO GO INTO HIS TESTIMONY BEFORE CONGRESS AND THE COST OF COCAINE EXPOSURE IN UTERO.
THE COURT: THE COST OF?
MS. SHOWERS: THE COSTS ASSOCIATED WITH IT.

* * *

[CHASNOFF 49]

MS. DUNN: SHE ALSO SAID THEY WERE RANDOMLY SELECTED AND IT WAS ALL AFTER THE FACT AND IT DIDN'T HAVE TO DO -
THE COURT: I'LL PERMIT TO YOU ASK THE QUESTION. I REALLY DON'T SEE ANY REAL PREJUDICE TO RESULT FROM IT, UNLESS IT COMES IN AND THEY ARGUE IT STRONGLY AS SOMETHING THEY RELIED ON.
EVERYBODY - EVERYBODY WHO KNOWS ANYTHING KNOWS THAT IF YOU HAVE A CHILD, THAT IT IS AFFECTED IN A WAY THAT HE HAS DESCRIBED BABIES COULD BE, THAT SOMEBODY IS GOING TO HAVE TO TAKE CARE OF IT AND MEDICAL COSTS ARE SO EXPENSIVE, SO IT'S A CONSIDERATION. SO I ASK THEM TO DISREGARD IT, I THINK THEY WILL BE ABLE TO DISREGARD IT. I DON'T SEE ANY INHERENT, INDELIBLE PREJUDICE RESULTING FROM IT. AND IN ORDER TO SAVE TIME, I'M GOING TO LET HIM ANSWER IT. AND THEN IF IT'S NOT

RELEVANT, WHEN YOU GET TO THE END OF THE CASE IF YOU LET ME KNOW, I'LL STRIKE IT.

MS. SHOWERS: THANK YOU, YOUR HONOR.

Q. (BY MS. SHOWERS, CONTINUING) DR. CHASNOFF, IN 1989 WHEN YOU TESTIFIED BEFORE CONGRESS YOU ESTIMATED THAT THE NATIONAL COST TO CARE FOR COCAINE EXPOSED INFANTS WOULD BE SOMEWHERE BETWEEN THREE HUNDRED EIGHTY-FIVE MILLION AND THREE BILLION DOLLARS ANNUALLY?

MS. DUNN: OBJECTION, YOUR HONOR. I DON'T BELIEVE THIS IS RELEVANT.

THE COURT: AS I STATED AT THE SIDEBAR, WE'LL JUST

[CHASNOFF 50]

HAVE TO WAIT AND SEE. I'M GOING TO LET THE TESTIMONY COME IN AND THEN SOME LATER DATE IF IT APPEARS THAT IT'S NOT RELEVANT TO THIS CASE, I'LL INSTRUCT YOU TO DISREGARD IT. BUT FOR THE TIME BEING IT'S IN AND YOU MAY CONSIDER IT TO SUCH EXTENT AS YOU THINK HAS RELEVANCE IN THE CASE.

YOU MAY PROCEED.

Q. (BY MS. SHOWERS, CONTINUING) AND THOSE FIGURES WERE BASED ON FIGURES THAT YOU OBTAINED FROM THE GOVERNMENT ACCOUNTING OFFICE?

A. YES.

Q. AND AT THAT TIME YOU FELT THAT THE THREE BILLION DOLLAR FIGURE MAY BE A LOW ESTIMATE AS ONLY ONE-THIRD TO ONE-FOURTH OF THE DRUG EXPOSURES WERE PICKED UP THROUGH DRUG SCREENING?

A. YES.

Q. AND THE HYPOTHESIS IN 1989 WAS THAT THE FIGURES FOR CARING FOR THESE INFANTS WAS GOING TO BE ASTRONOMICAL, TRUE?

A. TRUE.

Q. IN THE PINELLAS COUNTY STUDY THAT YOU TESTIFIED ABOUT EARLIER, ISN'T IT TRUE THAT THE DRUG RATES FOR BLACKS WERE HIGHER FOR COCAINE WHILE FOR THE WHITE WOMEN THEY WERE SHOWN MORE LIKELY TO BE ASSOCIATED WITH MARIJUANA USE?

A. THE RATES OF OVERALL ILLICIT DRUG USE, WHICH THE POLICY WAS WRITTEN FOR ALL DRUGS, WAS SIMILAR FOR BOTH BLACK AND WHITE WOMEN. BUT THE RATES OF COCAINE USE WERE HIGHER IN BLACK WOMEN. AND THE RATES OF MARIJUANA USE WERE HIGHER FOR

[CHASNOFF 51]

WHITE WOMEN AND ALCOHOL USE.

MS. SHOWERS: CAN I HAVE A MOMENT, YOUR HONOR, PLEASE.

THE COURT: SURE.

MS. SHOWERS: NOTHING FURTHER.

<u>REDIRECT EXAMINATION</u>

BY MS. DUNN:

Q. DR. CHASNOFF, IN ANSWERING SEVERAL OF THE QUESTIONS THAT WERE PUT TO YOU BY MS. SHOWERS, SHE ASKED YOU ABOUT DOES COCAINE CAUSE. YOUR RESPONSE OFTEN WAS, COCAINE IS ASSOCIATED WITH. WHAT IS THE DIFFERENCE BETWEEN CAUSE AND ASSOCIATED WITH?

A. WELL, IN DOING HUMAN - I MEAN, IT WOULD BE MUCH EASIER IF WE COULD JUST TAKE A BUNCH OF LITTLE BABIES RATHER, OR MOTHERS RATHER, AND GIVE HALF OF THEM COCAINE AND A HALF OF THEM NOTHING, AND YOU CAN ACTUALLY DO STUDIES OF CAUSE AND EFFECT. BUT IN HUMANS YOU CAN'T DO THOSE KIND OF STUDIES, AND SO WE HAVE TO LOOK AT LARGE GROUPS OF WOMEN WHO ARE USING A SPECIFIC SUBSTANCE OR SUBSTANCES AND GROUPS OF WOMEN THAT ARE COMPARABLE THAT ARE NOT. AND THEN YOU LOOK AT OVERALL RATES.

AND WE FIND THAT MANY OF THE COMPLICATIONS THAT WE TALKED ABOUT ARE ASSOCIATED WITH, MEANING THEY OCCUR AT HIGHER RATES. BUT WHEN YOU LOOK AT THE BIG PICTURE, WHEN YOU LOOK AT ALL OF THE STUDIES THAT WE HAVE DONE AND PUBLISHED, IF YOU TAKE ALL OF THE WOMEN WHO ARE USING COCAINE AND OTHER DRUGS,

[CHASNOFF 52]

AND LOOK AT THE OUTCOMES OF THEIR CHILDREN, ABOUT 25 PERCENT OF THE CHILDREN ARE AFFECTED. 75 PERCENT OF THE CHILDREN ARE NOT AFFECTED MEDICALLY. SO THAT ALTHOUGH THAT 25 PERCENT RATE IS HIGHER THAN WHAT WE WOULD BE IN THE GENERAL POPULATION, IT'S NOT A HUNDRED PERCENT.

IT GOES BACK TO THIS POLICY THEN, WHEN YOU START USING SWEEPING GENERALIZATIONS TO APPROACH EVERY PREGNANCY IN THE SAME WAY, THEN YOU'RE NOT ACCOMPLISHING ANYTHING ABOUT REACHING THE REALLY HIGHEST RISK POPULATION AND REALLY HELPING THEM.

Q. SO THAT WHEN YOU RESPONDED TO THE ENTIRE LITANY IN SAYING THAT THOSE DIFFICULTIES, YOU KNOW, LIKE ABRUPTIO PLACENTA OR THE CONGENITAL ANOMALIES WERE ASSOCIATED WITH COCAINE, WERE YOU SAYING ANYTHING MORE THAN THERE WAS AN -

MS. SHOWERS: OBJECTION.

THE COURT: THAT'S A LEADING QUESTION.

MS. DUNN: I WITHDRAW THE QUESTION.

THE COURT: DISREGARD THE QUESTION OR ANY INFERENCE YOU DRAW THEREFROM AS TO HIS ANSWER MIGHT BE.

Q. (BY MS. DUNN, CONTINUING) IN RESPONSE TO YOUR THE QUESTIONS ASKED YOU BY MS. SHOWERS, YOU TALKED ABOUT IMPAIRED

NEUROBEHAVIORAL ABILITIES AND THAT HAD AN ASSOCIATION WITH COCAINE?

A. YES.

Q. DOES YOUR RESEARCH SHOW ANYTHING ABOUT THE RELATIVE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF DENA CLAIR

[CLAIR 3]

(TESTIMONY EXCERPT OF DENA CLAIR 12-4-96.)
MS. DUNN: DENA CLAIR.

- - -

DENA CLAIR, PLF. WITNESS, SWORN.
DIRECT EXAMINATION

BY MS. DUNN:

Q. WOULD YOU STATE YOUR NAME FOR THE COURT, PLEASE.

A. DENA CLAIR.

Q. AND WHERE ARE YOU EMPLOYED?

A. DEPARTMENT OF FAMILY MEDICINE AT THE MEDICAL UNIVERSITY.

Q. WHAT DO YOU DO THERE?

A. I'M A REGISTERED NURSE.

Q. AND AS A REGISTERED NURSE IN THAT PROGRAM, WHAT ARE YOUR -- WHAT ARE YOUR JOBS?

A. MY MAIN RESPONSIBILITY IS PATIENT EDUCATION.

Q. WHAT DO YOU DO IN THAT CAPACITY?

A. I COUNSEL PATIENTS WITH CERTAIN DISEASES. I DO PRENATAL COUNSELING WITH OUR PATIENTS THAT WE FOLLOW WHO ARE PREGNANT.

Q. CAN YOU TELL US WHAT THE DEPARTMENT OF FAMILY MEDICINE IS WITHIN THE MEDICAL UNIVERSITY?

A. FAMILY MEDICINE IS A RESIDENCY PROGRAM FOR DOCTORS WHO ARE TRAINED TO BE FAMILY PHYSICIANS. WE HAVE 40 SOME ODD RESIDENTS AT DIFFERENT LEVELS OF TRAINING, AND WE HAVE FACULTY WHO ARE THEIR INSTRUCTORS, AND WE HAVE SEVERAL NURSES THAT

* * *

[CLAIR 5]

MEDICAL UNIVERSITY?
A. THAT'S RIGHT.
Q. AND PART-OF ALL OF ITS POLICIES?
A. THAT'S RIGHT.
Q. DID YOU WORK AT THE DEPARTMENT OF FAMILY MEDICINE IN THE FALL OF 199?
A. I DID.
Q. AND IN THE FALL OF 1989, WHAT WAS YOUR JOB THERE?
A. I WAS DOING WHAT I DO NOW, PATIENT EDUCATION.
Q. WERE YOU AWARE OF ANY SPECIAL TRAINING THAT WAS PROVIDED TO THE RESIDENTS AT FAMILY MEDICINE TO APRISE THEM OF A NEW POLICY THAT HAD BEEN ADOPTED RELATING TO THE TESTING OF COCAINE AND PRENATAL CARE?
A. THEY WOULD HAVE BEEN INFORMED OF THE POLICY DURING MY BRIEF ORIENTATION WITH THEM. I -- THAT'S ALL I KNOW. I DON'T KNOW OF ANY OTHER TRAINING THAT WOULD HAVE BEEN DONE.
Q. DID YOU SEND OUT ANY MEMOS THAT

A. YES, I DID.
Q. TO THE RESIDENTS?
A. IN 1989?
Q. 1989, DID YOU SEND OUT-
A. I DON'T KNOW IF I DID OR NOT. I DIDN'T HAVE ANYTHING TO - IN MY FILES TO THAT.
Q. DO YOU RECALL IF YOU GOT ANY VIDEOS TO SHOW?
A. I DO HAVE VIDEOS. I DON'T KNOW WHEN I RECEIVED THEM.

[CLAIR 6]

Q. DO YOU HAVE ANY IDEA WHEN YOU RECEIVED THEM?
A. NO, I DON'T.
Q. DO YOU RECALL ANY SPECIFIC TRAINING THAT WAS PROVIDED TO THE RESIDENTS IN TERMS OF WHAT THE PURPOSE OR THE GOALS OF THE POLICY MIGHT HAVE BEEN?
A. I DON'T KNOW ANYTHING ABOUT THAT.
Q. DO YOU HAVE KNOWLEDGE OF ANY SPECIFIC PROVISIONS THAT ARE IN PLACE TO PROTECT THE CONFIDENTIALITY OF YOUR PATIENTS' RECORDS?
A. IT'S THE PATIENT CONFIDENTIALITY CODE THAT WE HAVE ALWAYS FOLLOWED. THE PATIENTS' RECORDS ARE HELD IN CONFIDENCE AND -- UNLESS WE HAVE WRITTEN PERMISSION TO SHOW THEM TO ANYONE.
Q. DO YOU HAVE WORKING AT FAMILY MEDICINE, ON SITE, ANYONE WHO HAS SPECIFIC TRAINING IN SUBSTANCE ABUSE COUNSELING?

A. YES, WE DO.
Q. AND WHO IS THAT?
A. HER NAME IS MARTHA THOMLIN.
Q. DID SHE WORK AT FAMILY MEDICINE IN THE FALL OF 1989?
A. I THINK SO. I'M NOT SURE. I THINK SO.
Q. DOES SHE STILL WORK THERE NOW?
YES, SHE DOES..
Q. ISN'T MS. THOMLIN FULLY CAPABLE OF WORKING WITH YOUR PRENATAL PATIENT IN TERMS OF EVALUATING AND MAKING REFERRALS FOR THEM ON SUBSTANCE ABUSE TREATMENT IF THEY NEED IT?
A. I WOULD ASSUME THAT SHE IS, BASED ON HER CREDENTIALS.

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[CLAIR 8]

A. YES, I DO.
Q. WHAT IS IT?
A. IT'S A MEMO THAT I WROTE TO FACULTY RESIDENTS AND STAFF RELATING TO THE MEDICAL UNIVERSITY POLICY ABOUT SUBSTANCE ABUSE AND PREGNANCY.
Q. HAVE YOU EVER WRITTEN ANY OTHER MEMOS ABOUT THIS POLICY, TO THE BEST OF YOUR KNOWLEDGE?
A. YES, I HAVE.
Q. DID YOU KEEP ANY OF THOSE?
A. YES, I DID.
Q. PARDON?
A. YES, I DID.
Q. WHEN DID YOU WRITE THIS MEMO?
A. NOVEMBER 1, 1993.
Q. AND DO YOU RECALL WHY YOU WROTE THAT MEMO?

A. NOT SPECIFICALLY, OTHER THAN AS I STATED IN IT, I HAVE RECENTLY HAD MANY QUESTIONS RELATED TO THIS POLICY AND I WAS RESPONDING TO THOSE QUESTIONS.
Q. AND WHAT WERE THOSE QUESTIONS?
A. I DON'T RECALL SPECIFICALLY OTHER THAN DOES IT APPLY TO FAMILY MEDICINE.
Q. AND WERE THERE CONCERNS WITHIN FAMILY MEDICINE RELATING TO THIS POLICY?.
A. THERE WERE QUESTIONS RELATING TO THE POLICY.
Q. AND WHAT WERE THE QUESTIONS?

* * *

[CLAIR 10]

MS. DUNN: GIVE IT BACK TO HER.
THE COURT: I WOULD GIVE IT TO THE CLERK AND LET HER MARK IT.
DEPUTY CLERK: PLAINTIFF'S EXHIBIT 126 IN EVIDENCE.
Q. (BY MS. DUNN, CONTINUING) MS. CLAIR, DOES THIS DOCUMENT THAT YOU HAD IN FRONT OF YOU REFER TO THE INTERAGENCY POLICY?
A. YES, IT DOES.
Q. DOES IT REFER TO ANY - TO THE SCREENING FOR ANY DRUGS OTHER THAN COCAINE?
A. IT DOESN'T SPECIFY THAT, BUT IT DID NOT APPLY TO ANYTHING OTHER THAN COCAINE.
Q. DOES THE DOCUMENT THAT YOU HAVE IN FRONT OF YOU REFER TO

WHOM THE POSITIVE DRUG SCREENS MUST BE REPORTED?
A. IT DOES.
Q. AND WHO IS THAT?
A. TO SHIRLEY BROWN.
Q. WHY SHIRLEY BROWN?
A. SHIRLEY AT THAT TIME, WAS THE CASE MANAGER FOR OB/GYN AT THE MEDICAL UNIVERSITY.
Q. DID SHIRLEY BROWN NECESSARILY HAVE ANY OTHER RELATIONSHIP WITH YOUR PATIENTS AT FAMILY MEDICINE?
A. ONCE OUR PATIENTS ARE ADMITTED TO THE HOSPITAL THEN SHE WOULD. I DON'T KNOW - I DON'T KNOW OF ANY OTHER RELATIONSHIP.
Q. WOULD SHIRLEY BROWN HAVE HAD ANY DIRECT INVOLVEMENT IN

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[CLAIR 13]

THE COURT: IS THERE A CHANGE?
MS. DUNN: THIS IS NOT A CHANGE.
MS. SHOWERS: THERE IS NOT ANY CHANGE ON THIS MEMO.
THE COURT: WHY WOULD IT BE REMEDIAL?
MS. SHOWERS: IT CAME OUT WHEN THE OCR CAME TO THE HOSPITAL.
THE COURT: JUST BECAUSE IT'S DATED, IF THEY DON'T KNOW ABOUT THAT AND DON'T CHANGE IT, WHY IS IT REMEDIAL?

MS. SHOWERS: AS LONG AS SHE IS NOT GOING TO BRING THAT INTO IT.

THE COURT: ALL SHE HAS DONE IS INTRODUCE THOSE DOCUMENTS WITHOUT OBJECTION.

GO AHEAD.

Q. (BY MS. DUNN, CONTINUING) DO YOU HAVE THOSE TWO DOCUMENTS - DID YOU END UP WITH THEM IN FRONT OF YOU?

A. I DO.

Q. AND YOU HAVE TESTIFIED THAT YOU WROTE BOTH OF THESE DOCUMENTS?

A. I DID.

Q. AND IN REFERENCE TO SPECIFICALLY DOCUMENT 127?

A. UH-HUH.

Q. THIS IS A MEMO THAT IS ADDRESSED TO JOHN SANDERS, WHO IS THE HOSPITAL ADMINISTRATOR; IS THAT CORRECT?

A. THAT'S RIGHT.

Q. DO YOU RECALL WHY YOU WROTE THIS MEMO?

[CLAIR 14]

A. WE HAD BEEN ASKED TO - WE HAD BEEN ASKED TO SUBMIT A PLAN TO ADMINISTRATION STATING HOW THE POLICY WOULD BE IMPLEMENTED WITHIN OUR CENTER OR HOW -WELL, HOW IT WAS IMPLEMENTED WITHIN OUR CENTER.

Q. AND THE DATE OF THIS WAS MARCH 3, 1994?

A. THAT'S RIGHT.

Q. AND WHY WERE YOU INVOLVED IN THAT?
A. I HAD BEEN TO A MEETING AS A REPRESENTATIVE FROM OUR DEPARTMENT RELATED TO THE POLICY. I'M NOT SURE WHY I WAS ASKED BUT I WAS. AND I JUST ASSUMED RESPONSIBILITY FOR DOING IT.
Q. AND WHEN WAS THE DATE OF THAT MEETING?
A. I DON'T RECALL THE DATE. IT WAS SOMETIME RIGHT AFTER THIS.
Q. DO YOU RECALL ATTENDING ANY - ANY MEETINGS EARLIER THAN AROUND THE TIME OF 1994 IN WHICH YOU DISCUSSED HOW THE POLICY WOULD BE APPLIED AT FAMILY MEDICINE?
A. ANYTIME BETWEEN '89 AND '94?
Q. YES.
A. I RECALL AT SOME POINT, BUT I DON'T REMEMBER SPECIFICALLY WHEN. I DON'T KNOW DATES.
Q. DID YOU HAVE ANY MEMOS IN CONNECTION WITH THAT?
A. NO, I DIDN'T.
Q. AND CALLING YOUR ATTENTION TO EXHIBIT NUMBER 128.
A. UH-HUH.

[CLAIR 15]

Q. WHAT IS THIS DOCUMENT?
A. IN 127 I HAD STATED LET'S SEE, IN ORDER TO IMPLEMENT THE POLICY I WOULD INFORM ALL RESIDENTS, FACULTY AND CLINICAL

STAFF OF THE POLICY BY MEMORANDUM. AND THIS IS THE MEMORANDUM THAT FOLLOWED THAT.

Q. AND WHO DID IT GO TO?

A. THIS WENT TO ALL OF OUR RESIDENT PHYSICIANS, OUR FACULTY AND CLINICAL STAFF.

Q. AND THIS, AGAIN WAS DATED IN 1994?

A. THAT'S RIGHT.

MS. DUNN: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: CROSS-EXAMINATION.

MS. SHOWERS: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MS. SHOWERS:

Q. MS. CLAIR, YOU'RE A REGISTERED NURSE; IS THAT RIGHT?

A. THAT'S RIGHT.

Q. AND CAN YOU TELL THE JURY HOW LONG YOU HAVE BEEN EMPLOYED AT THE MEDICAL UNIVERSITY DEPARTMENT OF FAMILY MEDICINE?

A. ABOUT NINETEEN YEARS.

Q. AND IN YOUR ROLE AT THE FAMILY MEDICINE CENTER, YOU IMPLEMENTED THE INTERAGENCY POLICY; IS THAT TRUE?

A. YES, I DID.

Q. TELL THE JURY, IS THAT PRIOR TO 1993?

A. IT WAS IMPLEMENTED BEFORE THAT, YES.

[CLAIR 16]

Q. AND CAN YOU DESCRIBE YOUR ROLE WITH THE POLICY?

A. PATIENTS - ALL OB PATIENTS ARE REFERRED TO ME FOR PRENATAL CARE. AND SINCE THERE WERE SPECIFIC THINGS OUTLINED IN THE POLICY AS FAR AS THE FILM AND COUNSELING THAT WAS INVOLVED, THAT BECAME OUR RESPONSIBILITY TO DO THAT.

Q. YOU SHOWED THE FILM EXPLAINING -

A. YES.

Q. EXPLAINING THE HARMFUL EFFECTS OF DRUG USE DURING PREGNANCY?

A. I DID.

Q. AND, MS. CLAIR, ARE YOU FAMILIAR WITH THE SOUTH CAROLINA CHILD ABUSE STATUTE?

A. YES, I AM.

Q. WHAT ARE THE REQUIREMENTS FOR YOU AS A HEALTH CARE PROFESSIONAL?

A. TO REPORT SUSPICIONS OF CHILD ABUSE.

Q. AND IS IT YOUR UNDERSTANDING IN YOUR ROLE AT THE MEDICAL UNIVERSITY THAT YOU ARE REQUIRED TO REPORT POSITIVE URINE DRUG SCREENS FOR COCAINE IN PREGNANT WOMEN?

A. BASED ON THE POLICY?

Q. YES.

A. YES.

MS. SHOWERS: NOTHING FURTHER.

THE COURT: ANY REDIRECT?

MS. SHOWERS: COULD I JUST HAVE ONE MOMENT, YOUR

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CHARLES CONDON

[CONDON 4]

AND BECOMING AN ATTORNEY LICENSED TO PRACTICE IN THIS STATE, WHERE DID YOU PRACTICE?

A. THE FIRST JOB THAT I HAD WAS WITH A BIG LAW FIRM IN COLUMBIA CALLED NEXIN, PRUIT, JACOBS AND POLLARD FOR ABOUT A YEAR.

Q. ALL RIGHT, SIR. IF YOU WILL, JUST TAKE US THROUGH YOUR CAREER UP UNTIL NOW, PLEASE?

A. WELL, I LEFT THAT POSITION AND TOOK AN APPOINTMENT HERE IN CHARLESTON AS AN ASSISTANT SOLICITOR IN THE CHARLESTON COUNTY COURTHOUSE ACROSS THE STREET. AND ABOUT A YEAR LATER I RAN FOR CIRCUIT SOLICITOR OF THE NINTH JUDICIAL CIRCUIT. AND WAS ELECTED IN 1981 AND SERVED IN THAT POSITION UNTIL 1992. THEN WENT INTO PRIVATE PRACTICE FOR ABOUT A YEAR AND A HALF, TWO YEARS, AND THEN WAS ELECTED ATTORNEY GENERAL IN SOUTH CAROLINA. AND I HAVE BEEN IN THIS POSITION FOR ABOUT TWO YEARS NOW.

Q. AND HOW LONG IS YOUR TERM?

A. IT'S A FOUR-YEAR TERM.
Q. AND YOU'RE UP FOR REELECTION WHEN?
A. TWO YEARS FROM NOW, 1998.
Q. ALL RIGHT. MR. CONDON, THE POLICY THAT IS AT ISSUE IN THIS CASE, I WOULD LIKE FOR YOU TO TAKE THE JURY THROUGH THE EVOLUTION OF YOUR INVOLVEMENT IN THE POLICY THAT ULTIMATELY BECAME ADOPTED AT THE MEDICAL UNIVERSITY, JUST IN YOUR OWN WORDS?

[CONDON 5]

A. SURE. WELL, THE FIRST TIME THAT I EVEN HEARD OF COCAINE USE OR CRACK COCAINE USE DURING PREGNANCY, I WENT TO A DISTRICT ATTORNEYS' MEETING IN SEATTLE, WASHINGTON. THAT'S AN ASSOCIATION OF DISTRICT ATTORNEYS FROM AROUND THE COUNTRY. AND AT THAT MEETING THERE WERE SEVERAL BIG CITY DISTRICT ATTORNEYS THAT TALKED ABOUT THIS NEW PROBLEM THEY WERE FACING, THE BIGGER CITIES IN THIS COUNTRY, OF CRACK COCAINE USE DURING PREGNANCY. AND I BELIEVE THAT THAT WAS IN THE LATTER PART OF 1988. I REALLY DISMISSED IT FROM MY MIND BECAUSE I JUST ASSUMED, WRONGLY AT THE TIME, THAT THAT WOULD JUST BE A BIG CITY PROBLEM, THAT COULDN'T POSSIBLY OCCUR IN SOUTH CAROLINA AND CERTAINLY NOT IN CHARLESTON.

FASTFORWARDING I GUESS SIX OR SEVEN OR EIGHT MONTHS LATER, I WAS CONTACTED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA ABOUT THEIR HAVING A REAL CRISES WITH CRACK COCAINE USE DURING PREGNANCY. THAT IT WAS OVERWHELMING THEIR HOSPITAL AND THAT THEY WERE FINDING LOTS OF LITTLE CHILDREN, LITTLE BABIES WHO WERE BEING DAMAGED BY CRACK COCAINE USE. AND THEY CONTACTED ME FOR ASSISTANCE. AND WHAT HAPPENED FROM THERE, YOU HAVE TO REMEMBER THE MINDSET AT THIS TIME WAS, THIS WAS VERY NEW, THIS WAS A SITUATION WE DON'T KNOW HOW TO DEAL WITH THIS, WE HAVE BEEN TRYING TO USE AN EDUCATIONAL APPROACH, THEY INFORMED ME, FOR ABOUT A YEAR. THEY WOULD TELL THE LADIES THAT CRACK COCAINE USE WOULD BE DANGEROUS DURING PREGNANCY.

MR. WHERRY: OBJECTION, THIS IS DOUBLE HEARSAY.

* * *

[CONDON 7]

HIM, NOT THEIR TRUTH, BUT FOR THAT PURPOSE ALONE, YOU CAN CONSIDER THIS EVIDENCE.

OKAY. YOU MAY PROCEED.

Q. (BY MR. HOOD, CONTINUING) ATTORNEY GENERAL CONDON, YOU WERE TELLING US ABOUT WHAT YOU WERE INFORMED. PLEASE CONTINUE.

A. YES, THE INFORMATION THAT I HAD RECEIVED IS THAT THEY HAD USED AN EDUCATIONAL MODEL FOR ABOUT A YEAR. THEY INFORMED THE LADIES ABOUT THE DANGERS OF CRACK COCAINE USE DURING PREGNANCY. MADE FREE DRUG TREATMENT AVAILABLE TO THEM, AND NO ONE WENT THERE MAY HAVE BEEN ONE PERSON THAT WENT MAYBE ONE TIME TO ONE FREE DRUG TREATMENT APPOINTMENT. AND THE EPIDEMIC CONTINUED. IN FACT, I WAS TOLD THAT THERE HAD BEEN A NUMBER OF PEOPLE WHO WERE ON THEIR SECOND CRACK BABY, IN EFFECT.

SO, WHAT I DID IS I WENT DOWN TO THE MEDICAL UNIVERSITY AND LOOKED AT THE SITUATION FIRSTHAND IN TERMS OF GOING THROUGH THEIR NEONATAL UNIT. AND WHEN YOU WENT IN THERE, IT WAS VERY OBVIOUS THAT THERE WAS A REAL CRISES. THERE WERE BABIES IN LITTLE IC UNITS, ALL OVER THE PLACE. IT WAS A PROBLEM TO MY MIND THAT WAS TOTALLY PREVENTABLE, SHOCKING AND VERY DAMAGING TO INNOCENT LITTLE BABIES HERE IN CHARLESTON.

SO WHAT I DID WITH THAT INFORMATION I CONTACTED EVERYONE THAT I COULD THINK OF THAT WOULD HAVE A ROLE IN HELPING TO SOLVE THE PROBLEM. CONTACTED THE POLICE CHIEF

CONTACTED THE PEOPLE WHO RAN THE DEPARTMENT OF SOCIAL SERVICES, CONTACTED THE PEOPLE AT SUBSTANCE ABUSE, CONTACTED MEDICAL UNIVERSITY OFFICIALS, AND WE HAD A MEETING WITH THE INTENTION OF DEVELOPING A MULTIDISCIPLINARY APPROACH TO THIS PROBLEM TO HELP SOLVE IT.

AND I CAN TELL YOU WE LOOKED AT A NUMBER OF DIFFERENT WAYS TO SOLVE IT. THE FIRST THOUGHT THAT CROSSED MY MIND WOULD BE TO GO TO THE PROBATE COURT. IN OUR SYSTEM OF LAW THE PROBATE JUDGE HAS THE POWER TO COMMIT PEOPLE WHO ARE A DANGER TO THEMSELVES OR OTHERS THROUGH THE USE OF DRUGS. BUT MY OFFICE WAS TOLD THAT PROBATE JUDGE --

MR. WHERRY: OBJECTION. THIS HAS TO BE BEING OFFERED FOR THE TRUTH WHAT HE WAS TOLD ABOUT THE PROBATE JUDGE.

THE COURT: WHAT ABOUT THAT, MR. HOOD?

MR. HOOD: THEY BROUGHT THIS ISSUE UP, YOUR HONOR. AND WHAT WE BASICALLY WANT TO DO IS ESTABLISH WHAT WAS AVAILABLE, WHAT THE ALTERNATIVES WERE AND WHAT WENT THROUGH THE SOLICITOR'S MIND IN FORMULATING THE POLICY AND TRYING TO DEAL WITH THIS PROBLEM.

THE COURT: WELL, THE FACT THAT THEY BROUGHT IT UP DOESN'T AFFECT THE QUESTION OF HEARSAY.

MR. HOOD: YES, SIR.

THE COURT: AND IF YOUR OBJECTIVE IS TO PROVE WHAT WAS AVAILABLE, THEN THAT MEANS THAT IT'S BEING OFFERED FOR THE

[CONDON 9]

TRUTH.

MR. HOOD: WE WANT TO PROVE WHAT HE WAS INFORMED THROUGH HIS STAFF AND HIS OWN EFFORTS WHAT WAS AVAILABLE, NOT FOR ITS TRUTH, BUT THIS IS WHAT HE PERCEIVED THE BASIC SITUATION WAS IN THIS COMMUNITY AT THE TIME TO DEAL WITH ITS PROBLEM. IT'S NO DIFFERENT THAN A DOCTOR EXAMINING A PATIENT --

THE COURT: I UNDERSTAND. I UNDERSTAND.

MR. HOOD: ASSUMING ALL OF THE DIFFERENT PROBLEMS. THAT'S WHAT HE IS SAYING.

THE COURT: AGAIN, LADIES AND GENTLEMEN, I THINK YOU UNDERSTAND THE PROBLEM WITHOUT ME REPEATING IT. AND AGAIN LET ME CAUTION YOU THAT THIS EVIDENCE IS BEING RECEIVED NOT FOR ITS TRUTH, BUT JUST FOR THE FACT THAT THESE STATEMENTS WERE MADE TO MR. CONDON, SO THAT YOU WILL KNOW WHAT WAS IN HIS HEAD

AND THEREFORE YOU CAN HAVE A BETTER CHANCE OF DETERMINING WHAT HIS INTENT WAS IN THE PROCEEDINGS THAT WE HAVE.

OKAY. YOU MAY PROCEED.

A. SO WE CONTACTED THE PROBATE JUDGE'S OFFICE, JUDGE FIELDING, AND WAS TOLD VERY FORCEFULLY THERE WERE NO FACILITIES FOR THEM TO BE INVOLVED WITH AND THEY DIDN'T WANT TO BE INVOLVED. AND THAT THAT WOULD NOT BE AN OPTION IN TERMS OF HELPING TO PROTECT THESE LITTLE BABIES.

SO THE OTHER THOUGHT OCCURRED, WELL, THE DEPARTMENT OF SOCIAL SERVICES, WHICH WOULD BE A VERY NATURAL WAY TO GO IN

[CONDON 10]

TERMS OF PROTECTING THESE LITTLE BABIES. BUT AT THE MEETING THAT WE HAD AT THE MEDICAL UNIVERSITY IT BECAME VERY OBVIOUS THAT THE OFFICIAL POLICY OF THE DEPARTMENT OF SOCIAL SERVICES WOULD BE THAT THEY WOULD NOT TAKE JURISDICTION OVER UNBORN CHILDREN FROM THEIR PERSPECTIVE.

SO HERE WE WERE WITH LOTS OF LITTLE BABIES WHO WERE BEING DAMAGED THROUGH THE USE OF AN ILLEGAL DRUG, THE POSSESSION OF WHICH IS A FELONY IN SOUTH CAROLINA. AND THE PROBLEM PRESENTED TO US AT THAT TIME WOULD BE IS, HOW TO HELP

THESE BABIES AND HOW TO STOP THE TOTALLY PREVENTABLE DAMAGE BEING DONE TO THESE INNOCENT LITTLE CHILDREN.

SO, WE MET. AND THE FORCEFUL PEOPLE IN TERMS OF TALKING IN TERMS OF LEGAL INTERVENTION WERE THE DRUG TREATMENT PEOPLE. THE IDEA FROM THEIR PERSPECTIVE, IN FACT THEY SORT OF MOCKED US, WHY DO YOU EXPECT THEM TO DO ANYTHING HAVING SOME SORT OF CONSEQUENCE TO THEIR ACTION, MUCH LIKE AA WOULD HAVE IN TERMS OF BEING RESPONSIBLE FOR WHAT YOU DO.

SO WE DEVELOPED AT THAT TIME, WE GOT INVOLVED AT THE REQUEST OF THE MEDICAL UNIVERSITY WITH A MULTIDISCIPLINARY APPROACH TO SOLVING THIS CRISES. AND IT WENT FROM THERE.

Q. ALL RIGHT, SIR. AND AS THE POLICY-EVOLVED, HOW WOULD YOU CHARACTERIZE THE POLICY ITSELF? WHAT WAS GOING TO HAPPEN TO THESE WOMEN?

A. THE POLICY FROM ITS INCEPTION WAS AMNESTY-BASED. I MEAN, THE IDEA HERE WAS THAT IF YOU LIVED UP TO SOME VERY BASIC

[CONDON 11]

REQUIREMENTS, NUMBER ONE BEING DRUG FREE, DON'T TAKE THE ILLEGAL COCAINE, AND, NUMBER TWO, IF YOU WOULD GO TO FREE DRUG

TREATMENT, NOT A THING WOULD HAPPEN TO YOU.

NOW, INITIALLY THE WAY WE DEVELOPED THE POLICY IS THAT WE WANTED TO GET INVOLVED AS EARLY AS POSSIBLE TO PREVENT HARM TO THE CHILDREN.

AS A COROLLARY TO THAT OR THE OPPOSITE TO THAT THINKING WAS INITIALLY IS IF THE DAMAGE IS ALREADY DONE, THAT IS IF THE BABY IS BORN DAMAGED BY COCAINE, SINCE THE DAMAGE IS ALREADY DONE, AND THAT COULDN'T BE PREVENTED, TO TREAT THAT SEPARATELY WITH A NORMAL CRIMINAL ARREST PROCESS.

THERE IS A STATUTE THAT REQUIRES HEALTH CARE PROFESSIONALS TO REPORT CHILD ABUSE. AND THE INITIAL THINKING THE FIRST COUPLE OF MONTHS WAS THAT THERE WOULD BE A DISTINCTION. WHEN IT WAS IN UTERO, THE CHILD IN UTERO, IF YOU COULD PREVENT THE HARM, IT WAS A TOTALLY AMNESTY-BASED PROGRAM. AFTER THAT IF THE CHILD WAS BORN WITH CRACK COCAINE, USE THE NORMAL ARREST FUNCTIONS OF THE CRIMINAL JUSTICE SYSTEM AND TREAT IT LIKE A REGULAR CRIMINAL CASE.

WE QUICKLY CHANGED THAT POLICY AT THE REQUEST OF THE DOCTORS, PRIMARILY THE NEONATOLOGISTS AT MUSC BECAUSE THEY THOUGHT THERE WAS ADDICTION THERE.

MR. WHERRY: YOUR HONOR, THAT'S HEARSAY ALSO. CLEARLY THIS IS OFFERED FOR THE TRUTH.

THE COURT: I THINK THAT IT FALLS WITHIN THE SAME

[CONDON 12]

CATEGORY. IT'S BEEN CONTENDED THAT HE HAD CONSIDERABLE INFLUENCE IN THE DEVELOPMENT OF THIS POLICY. WHETHER THAT'S TRUE OR NOT IS FOR THE JURY TO DETERMINE. BUT -- AND THERE HAS ALSO BEEN TESTIMONY THAT THE POLICY WAS CHANGED FROM TIME TO TIME. AND I THINK THAT WHAT IS IN HIS MIND, WHAT CAUSES HIM TO ACT AS HE ACTED, IS SOMETHING THAT THE JURY IS ENTITLED TO KNOW.

AND SO, AGAIN, THIS IS NOT OFFERED FOR ITS TRUTH. IT MAY BE FALSE, IT MAY BE TRUE, BUT IT'S NOT OFFERED FOR THAT. AND HE CAN'T VOUCH FOR ITS TRUTH, AND THEREFORE IT'S NOT ADMITTED FOR ITS TRUTH. IT'S ADMITTED BECAUSE IT WAS TOLD TO HIM. AND THAT'S THE ONLY VALUE THAT IT HAS AT THIS TIME.

NOW IF THESE FACTS ARE PROVED BY SOMEONE ELSE THAT HAS KNOWLEDGE, THAT'S A DIFFERENT MATTER. BUT COMING FROM HIM, THEY HAVE RELEVANCE ONLY BECAUSE THE STATEMENTS WERE MADE TO HIM AND CAN BE CONSIDERED ONLY FOR THAT BY YOU.

YOU MAY PROCEED.
MR. HOOD: THANK YOU, YOUR HONOR.
Q. (BY MR. HOOD, CONTINUING) THE NEONATOLOGIST YOU WERE MENTIONING?
A. YES. THEY FELT THAT WE HAD A DISTINCTION WITHOUT AREAL DIFFERENCE. CONFUSING MESSAGES BEING SENT OUT AND IT WAS HARD TO EXPLAIN THE DIFFERENCE BETWEEN A CHILD BEING BORN 24 HOURS EARLIER AND WE'RE GIVING COMPLETE AMNESTY. SO AT THE REQUEST OF OFFICIALS AT MUSC WE CHANGED THE POLICY TO HAVE AMNESTY FOR

[CONDON 13]

EVERYBODY. THAT IT WAS TOTALLY AN AMNESTY-BASED PROGRAM.
IN FACT WE DEVELOPED A PUBLIC SERVICE ANNOUNCEMENT WITH A NUMBER TO CALL, THAT IF YOU HAD A DRUG PROBLEM, LET US COME IN TO TRY AND HELP YOU. YOU WOULD BE GIVEN COMPLETE AMNESTY, NO ARRESTS. BUT WE DID INSIST. AND THIS WAS THE WHOLE PURPOSE HERE, THAT YOU HAD TO STOP USING THE CRACK COCAINE SO THAT YOU WOULDN'T HURT YOUR OWN LITTLE BABY.
AND I FELT VERY STRONGLY THAT WE HAD AN OBLIGATION AS THE OFFICIALS HERE IN CHARGE OF LAW ENFORCEMENT IN TERMS OF PROTECTING INNOCENT CHILDREN, THAT WE HAD TO DO SOMETHING TO

STEP IN THERE TO USE WHATEVER MEANS THAT WE COULD WITHIN THE LAW TO SIMPLY GET THEM TO STOP USING A DRUG, THE POSSESSION OF WHICH WAS A FELONY, THAT WOULD HURT INNOCENT CHILDREN.

SO, WE WERE TRYING TO USE A CARROT-AND-STICK APPROACH. AND IN TERMS OF OUR DUTIES, OF COURSE I GUESS ANY SOLICITOR'S OFFICE OR DISTRICT ATTORNEY'S OFFICE IS VERY BUSY. AND IT WAS UNUSUAL TO BE CONTACTED BY HEALTH CARE OFFICIALS, BUT WE MONITORED VERY CAREFULLY WITH MUSC TO KEEP ASKING THE QUESTION, IS THIS HELPING, IS THIS HELPING STEM THE TIDE, IS IT HELPING TO PROTECT LITTLE CHILDREN. AND WE WOULD ROUTINELY BE TOLD THAT IT WAS.

MR. WHERRY: OBJECTION, HEARSAY. OBJECTION, HEARSAY. WE CONTINUE TO BE TOLD DOT, DOT, DOT.

THE COURT: OKAY. GO AHEAD, MR. CONDON.

A. SO THE REPORTS BACK WERE THAT IN EFFECT THE STRONGEST

[CONDON 14]

ADVOCATES WERE THE NEONATOLOGISTS WHO WERE SAYING IT WAS VERY HELPFUL IN TERMS OF PROTECTING CHILDREN, THAT THEY FELT IT WAS DECREASING THE PROBLEM THEY WERE DEALING WITH, AND IT WAS VERY

HELPFUL IN TERMS OF PROTECTING INNOCENT CHILDREN. AND IT WAS NOT A PROSECUTION PROGRAM, IT WAS AN AMNESTY-BASED PROGRAM TO GET THEM TO CHANGE BEHAVIOR, WHICH WE USED ROUTINELY IN THE CRIMINAL JUSTICE SYSTEM FOR OTHER TYPES OF PROBLEMS.

THE COURT: I THINK IT FALLS WITHIN THE SAME CATEGORY AND WITH THE SAME LIMITING INSTRUCTIONS. I'M GOING TO OVERRULE YOUR OBJECTION.

Q. (BY MR. HOOD, CONTINUING) IN THAT VEIN, MR. CONDON, DID YOU WANT TO HAVE THESE WITNESSES THAT TURNED OUT, 253 OF THEM TESTED OUT POSITIVE UNDER THIS POLICY, DID YOU WANT TO HAVE THEM ARRESTED AND PUT IN JAIL?

A. THE -- THE ENTIRE PROTOCOL THAT WAS DEVELOPED FROM THE BEGINNING, AND AS I SAID WE HAD EVERYONE I COULD IMAGINE COULD BE AFFECTED WITH THE POLICY, IN FACT WE HAD THE PUBLIC DEFENDER COME AND TALK AT SOME POINT IN DEVELOPING FURTHER TREATMENT FACILITIES THAT MIGHT BE HELPFUL FOR INPATIENTS, BUT THE IDEA WAS NOT PROSECUTION -- IT WAS NOT MATERNAL PROSECUTION, IT WAS FETAL PROTECTION.

NOW WE DID INITIALLY HAVE THIS ASPECT OF PROTOCOL WHEREBY PEOPLE WERE ARRESTED IN THE FIRST FEW MONTHS OF THE PROGRAM. ONCE THE DAMAGE HAD BEEN DONE IN OUR VIEW. BUT THAT

QUICKLY CHANGED AND WE FELT AS IF WE WERE MAKING A REAL

[CONDON 15]

DIFFERENCE IN THE LIVES OF THESE LITTLE CHILDREN.

Q. MR. CONDON, YOU'RE A NAMED DEFENDANT IN THIS CASE AND SO I'M GOING TO GO TO SEVERAL OTHER MATTERS. THE FIRST OF ALL WHY DID YOU -- WHY WAS THE MEDICAL UNIVERSITY THE FACILITY WHERE THIS POLICY WAS IMPLEMENTED?

A. WHEN YOU LOOKED INTO THE SITUATION, YOU LEARNED THAT UNIQUELY IN THIS PART OF SOUTH CAROLINA THE MEDICAL UNIVERSITY WOULD BE THE POINT AT WHICH DAMAGED COCAINE BABIES WOULD EVENTUALLY HAVE TO GO BECAUSE IT WAS THE ONLY FACILITY WITH NEONATOLOGISTS, THAT IS DOCTORS THAT SPECIALIZE IN NEWBORNS, AS WELL AS AN INTENSIVE CARE UNIT FOR NEWBORNS. SO I WAS CONTACTED BY THEM, THEY HAD THIS CRISES ON THEIR HANDS. AND IN TERMS OF BEING CONCERNED ABOUT THE LAW APPLYING TO EVERYONE, I MUST SAY THAT IN TERMS OF BEING VERY FORCEFUL IN SAYING THAT HEALTH CARE PROFESSIONALS HAD A DUTY TO REPORT CHILD ABUSE THAT WAS OCCURRING PREBIRTH, I ROUTINELY LET DOCTORS KNOW IT WAS THE OFFICE'S POSITION THAT THAT WOULD BE REQUIRED.

AND I KNOW I ADDRESSED ONE MEETING OF OB/GYN DOCTORS HERE IN CHARLESTON AND THAT WAS OUR POSITION, IT WAS GOING TO BE ENFORCED FROM OUR PERSPECTIVE.

Q. WAS THAT A STATEWIDE MEETING THAT WAS HELD IN CHARLESTON?

A. IT WAS.

Q. AND WHAT DID YOU TELL THE OBSTETRICIANS AT THAT MEETING?

* * *

[CONDON 17]

LITERAL READING THAT YOU MAKE OF THE RULE MAY SEEM TO MAKE IT HEARSAY, BUT HE IS THE DECLARANT. HE IS TESTIFYING AND HE IS MAKING THAT STATEMENT AGAIN. AND THAT TAKES IT OUTSIDE OF THE HEARSAY RULE BECAUSE IT GIVES YOU ALL OF THE PROTECTION THAT YOU NEED, TO WIT, CROSS-EXAMINATION OF HIM AS TO ITS TRUTH.

NOW, WHETHER IT'S ADMISSIBLE FOR -- INADMISSIBLE FOR SOME OTHER REASON I DON'T KNOW UNTIL I HEAR IT, BUT IT'S NOT HEARSAY. YOU MAY PROCEED.

Q. (BY MR, HOOD, CONTINUING) ALL RIGHT.

A. TO GET BACK TO THE POINT. I WAS THE CIRCUIT SOLICITOR, DISTRICT ATTORNEY IN CHARLESTON AND BERKELEY COUNTIES, WHICH HAD THE MAJORITY OF THE POPULATION IN THIS AREA, BUT NOT

CERTAINLY ALL OF IT. BUT IN TERMS OF MY JURISDICTIONAL RESPONSIBILITY WE MADE IT VERY CLEAR THAT IT WAS OUR VIEW OF THE LAW THAT THERE WAS A DUTY TO REPORT ACROSS THE BOARD EVERYONE WHO CAME ACROSS COCAINE BABIES DURING THEIR PRACTICES.

UNIQUELY THE MEDICAL UNIVERSITY ASKED US TO ENTER INTO A PARTNERSHIP WITH THEM TO HELP SOLVE THE PROBLEM AT THEIR NEONATOLOGY LEVEL. AND WE REALLY FELT LIKE THAT THAT WAS A VERY GOOD FOCAL POINT BECAUSE IF THERE WERE A CRACK BABY IN THIS PART OF THE STATE, IT WOULD EVENTUALLY HAVE TO GO TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA.

Q. AND, SIR, DID YOU BECOME AWARE OF TWO LOCAL PHYSICIANS THAT PRACTICED OBSTETRIC MEDICINE THAT IMPLEMENTED A SIMILAR

[CONDON 18]

POLICY IN THEIR OWN PRACTICE?

MR. WHERRY: OBJECTION, LEADING.

THE COURT: I THINK THE QUESTION WAS LEADING.

Q. (BY MR. HOOD, CONTINUING) FOLLOWING THAT SPEECH TO THE STATEWIDE GROUP OF OB DOCTORS, DID YOU LEARN WHAT LOCAL DOCTORS DID IN REACTION TO YOUR TALK?

A. WELL, IN THE COURSE OF THE POLICY ONGOING AT MUSC, THIS WENT ON FOR A NUMBER OF MONTHS, EVEN YEARS, OTHER DOCTORS IN THE AREA, PRIMARILY OB/GYNS WOULD CONTACT US WANTING TO IN EFFECT DEVELOP THE PROTOCOL THAT WE DEVELOPED AT MUSC.

SO THERE WERE OTHER DOCTORS IN THE PRIVATE PRACTICE SECTOR THAT CAME INTO THE PROGRAM, BUT WE WEREN'T -- IN OTHER WORDS, WE WERE FOCUSED IN ON SOLVING A PROBLEM THAT WE WERE TOLD ABOUT AT THE MUSC. WHEN WE LOOKED INTO THE PROBLEM IT SEEMED A VERY LOGICAL POINT TO STAY FOCUSED THERE BECAUSE THAT IS WHERE THE CRISES WAS DEVELOPED IN TERMS OF HELPING CHILDREN, THE DAMAGE OF WHICH WOULD BE TOTALLY PREVENTABLE.

Q. IS IT WITHIN THE POWER OF THE SOLICITOR'S OFFICE THAT YOU HELPED TO INVESTIGATE THE COMMITTING OF A CRIME?

A. IN THE STATE SYSTEM THE TYPICAL CRIMINAL CASE THAT YOU COME ACROSS IS SOMEONE BEING ARRESTED WITH AN ARREST WARRANT, AND THAT'S IN THE SYSTEM. BUT THE OFFICE OF CIRCUIT SOLICITOR HAS THE INHERENT POWER, EITHER THROUGH THE GRAND JURY OR THROUGH ITS INVESTIGATIVE POWER, TO INVESTIGATE ANY CRIMINAL CASE THAT IT DESIRES.

[CONDON 19]

SO, IN TERMS OF WHILE IT WAS UNIQUELY REQUESTED BY DOCTORS TO HELP OUT WITH LAW ENFORCEMENT PROBLEM, IT WAS NOT UNIQUE IN TERMS OF THE OPERATIONS OF THE OFFICE THAT WE OFTEN OR SOMETIMES DID GET INVOLVED IN CASES THAT DIDN'T HAVE THE FORMAL ARREST AT THE TIME, BUT WERE CRIMES THAT EITHER LOCAL LAW ENFORCEMENT OR CITIZENS WANTED US TO LOOK INTO.

Q. SO THE JURY WON'T THINK THIS WAS ALL YOU WERE DOING AS SOLICITOR, APPROXIMATELY HOW MANY CASES WOULD BE HANDLED THROUGH YOUR OFFICE IN YOUR EIGHT OR NINE YEARS AS SOLICITOR?

A. PART OF WHAT WAS GOING ON HERE AT THE TIME IN TERMS OF THE SOLICITOR'S OFFICE BACK IN 1988, 1989, WITH THE THOUSANDS AND THOUSANDS OF ARREST WARRANTS IN OTHER CRIMINAL MATTERS THAT WE BY LAW DEALT WITH, I KNOW I WAS PERSONALLY ACTIVE IN PROSECUTING CAPITAL CASES, WE WEREN'T LOOKING FOR ADDITIONAL WORK. BUT WHEN YOU LOOKED INTO THE SITUATION AT MUSC, AND LOOK INTO THE DAMAGE THAT WAS BEING DONE, AGAIN TOTALLY PREVENTABLE TO INNOCENT CITIZENS HERE IN CHARLESTON, I KNOW I FELT THAT IN TERMS OF OUR EFFORTS HERE THAT WHATEVER EFFORTS

THAT WE COULD CONTRIBUTE TO HELP SOLVE THE PROBLEM WE WERE GLAD TO DO IT. BUT IN TERMS OF THE OVERALL OPERATIONS OF THE OFFICE, IT WAS NOT THE MAJOR FOCAL POINT OR THE FOCAL POINT OF THE OFFICE, WE HAD GENERAL CRIMINAL PROSECUTION, GENERAL PROSECUTION THROUGHOUT BOTH COUNTIES.

Q. AS TO THE NUTS AND BOLTS OF THE POLICY, AFTER YOU GOT TO

[CONDON 20]

THE POINT WHERE A SOLICITOR LETTER WAS GIVEN TO THE PATIENT, DID YOUR OFFICE THEN START TRACKING THESE PATIENTS?

A. AS THE POLICY DEVELOPED, AS I RECALL, THE OFFICIALS AT MUSC THOUGHT IT WOULD BE VERY HELPFUL TO HAVE SOMETHING WRITTEN BY THE SOLICITOR'S OFFICE TO GIVE TO THE PEOPLE THAT WERE SUSPECTED OF ABUSING COCAINE. SO THEY HELPED DRAFT SOME LETTERS FOR ME TO SIGN TO GIVE TO THE PATIENTS TO LET THEM KNOW THE SEVERITY OF WHAT WAS GOING ON, BUT ALSO LET THEM KNOW THAT WE WERE GOING TO WORK WITH THEM IN TERMS OF AMNESTY.

SO AS THE POLICY DEVELOPED AND AS THINGS WENT ON, WE FELT LIKE IT WAS WORKING, WE WERE MAKING A CONTRIBUTION. I KNOW I INITIALLY ASKED A COUPLE OF ASSISTANT SOLICITORS AND

ONE OF THEIR INVESTIGATORS TO BE INVOLVED WITH HANDLING OR WORKING WITH MUSC ON THE PROTOCOL. BUT -

Q. WAS - I'M SORRY, GO AHEAD.

A. AS THE NUMBERS DEVELOP, WE WERE GETTING INTO THE HUNDREDS OF PEOPLE THAT WE WEREN'T PROSECUTING PER SE. WE WANTED TO BE SURE THAT THE REQUIREMENTS OF THE PROGRAM WERE BEING MET. I KNOW I ASKED A PART-TIME SOCIAL WORKER TO COME INTO THE OFFICE, GARDEN BLINCOW, TO HELP OUT IN TERMS OF KEEPING UP WITH THE CASES THEMSELVES. IT DEVELOPED WE THOUGHT VERY WELL. OTHERS DIDN'T THINK IT WAS GOING SO WELL WITH OTHER THINGS GOING ON WITH THE OUTSIDE WORLD, AND THAT'S HOW IT DEVELOPED THAT WE WERE PROSECUTING.

Q. WAS THIS TRACKING BY YOUR OFFICE, AFTER THE SOLICITOR

[CONDON 21]

LETTER GIVEN TO THE PATIENT, DONE IN THE HOPE OF ARRESTING THIS PATIENT?

MR. WHERRY: OBJECTION, LEADING.

THE COURT: OBJECTION SUSTAINED. PLEASE DISREGARD THE QUESTION, LADIES AND GENTLEMEN.

Q. (BY MR. HOOD, CONTINUING) WHAT WAS THE PURPOSE OF TRACKING THESE PATIENTS?

A. THE NUMBERS OF PEOPLE INVOLVED IN TERMS OF GIVING THEM AMNESTY, AS I SAID WE HAD A PUBLIC SERVICE ANNOUNCEMENT, OR ANYONE COULD CALL UP AND GET FREE DRUG HELP IF THEY NEEDED IT OR WANTED IT. SO THE NUMBERS WERE RELATIVELY LARGE. BUT WE WERE VERY PLEASED AND WANTED TO KEEP A TRACK OF THOSE THAT WERE SUCCESSFULLY COMPLETING DRUG TREATMENT, THAT WERE STAYING OFF DRUGS, THAT WERE HAVING HEALTHY BABIES. SO WE WANTED TO GET INVOLVED IN SAYING HOW IT WAS GOING AND MAKE SURE THAT WE SHOULD STAY INVOLVED, AND WE ASKED MS. BLINCOW TO HELP OUT WITH THAT WHOLE ASPECT.

THE IDEA THAT WE WERE INVOLVED IN A PROSECUTION PROGRAM IS ALMOST LAUGHABLE BECAUSE THIS WAS A SOFT AREA WE WERE IN, WE'RE HERE TO GIVE THEM AMNESTY. THE PATIENT OR THE WOULD-BE DEFENDANT WOULD HAVE TO BREAK INTO JAIL TO GET PROSECUTED. THAT'S ABOUT WHAT YOU HAD TO DO. YOU HAD TO NOT ONLY REFUSE AMNESTY, YOU WOULD HAVE TO CONTINUE TO TAKE THE DRUGS, YOU WOULD HAVE TO NOT GO TO FREE DRUG TREATMENT. AND EVEN IF YOU DID THAT, I KNOW THERE WERE A COUPLE OF WOMEN THAT

WENT THAT ROUTE, EVEN IF YOU DID THAT, WE REMAINED VERY FLEXIBLE, THAT IF THE PUBLIC DEFENDER ASKED US TO RECONSIDER DRUG TREATMENT, WE WOULD.

SO YOU WOULD HAVE TO SCOFF AT THE NOTION OF BEING RESPONSIBLE FOR YOUR ACTIONS. AND EVEN THEN WHEN THE TWO, I BELIEVE IT WAS, TWO LADIES THAT WENT TO COURT, WE WERE NOT OPPOSED TO PUTTING THEM ON PROBATION. THE IDEA WAS NOT TO PROSECUTE PEOPLE AND PUT THEM IN JAIL, THE IDEA WAS TO USE LEGAL INTERVENTION THAT WAS WORKING TO CHANGE HUMAN BEHAVIOR TO PROTECT CHILDREN, TO PROTECT BABIES.

Q. MR. CONDON, YOU MENTIONED THE PUBLIC SERVICE ANNOUNCEMENT. WOULD YOU EXPLAIN WHAT THAT WAS FOR THE JURY, PLEASE.

A. WE THOUGHT IT WOULD BE A GOOD IDEA TO JUST LET PEOPLE KNOW FROM THE TELEVISION, SEEMS TO BE THE WAY A LOT OF PEOPLE GET THEIR INFORMATION. SO THE IDEA WAS THAT WE WOULD DEVELOP A PUBLIC SERVICE ANNOUNCEMENT TO ANNOUNCE TO THE GENERAL PUBLIC THAT IF THERE WERE A DRUG PROBLEM, A COCAINE PROBLEM IN THE HOME, THAT RATHER THAN WAIT UNTIL IT GOT TO THE END OF THE LINE WITH THE GRANDBABY, WE WANTED TO GET THEM INVOLVED AS

EARLY AS POSSIBLE TO PREVENT DAMAGE TO CHILDREN. SO WE FILMED A PUBLIC SERVICE ANNOUNCEMENT THAT WAS CARRIED WIDELY IN THIS AREA. AND IT WAS SHOWN MANY TIMES WITH THE NUMBER TO CALL IF YOU WANTED FREE DRUG TREATMENT. AND THAT WAS PART OF THE PHILOSOPHY OF THE PROGRAM. THE PROGRAM WAS NOT TO ARREST

[CONDON 23]

PEOPLE AND PUT THEM IN JAIL, THE IDEA BEHIND THE PROGRAM WAS TO HELP PEOPLE STOP HURTING INNOCENT BABIES THROUGH THE USE OF ILLEGAL DRUGS.

Q. WAS THERE ANY DEVIATION FROM THE NORMS AND STANDARDS OF THE SOLICITOR'S OFFICE AND THE POLICIES AND PROCEDURES THERE IN THIS POLICY, THE INTERAGENCY POLICY?

A. NO. THE PROCEDURES THAT WE USED WERE USED ROUTINELY IN OTHER AREAS. IN FACT, AS THE PROGRAM DEVELOPED, THE PROGRAM CALLED PRETRIAL INTERVENTION THAT INITIALLY USED TO BE OPTIONAL BY THE SOLICITOR, I HAD SUCH A PROGRAM. WE CALLED IT THE DEFERRED PROSECUTION FOR STREET CRIME. THE GENERAL ASSEMBLY PASSED THE LAW I BELIEVE ABOUT '85 OR '86 THAT PUT IT IN THE LAWS OR CODIFIED THAT ALLOWED THE CIRCUIT SOLICITOR TO DEVELOP A PROGRAM. IN FACT IT REQUIRED IT FOR NONVIOLENT

FIRST TIME OFFENDERS THAT WANTED TO GET INTO A PROGRAM THAT WAS TREATMENT BASED WITH THE IDEA THAT THERE WOULDN'T BE A PERMANENT RECORD OF THE ARREST.

AS THIS PROGRAM DEVELOPED WE THOUGHT IT WOULD BE A GOOD IDEA TO HAVE A PRETRIAL INTERVENTION PROGRAM INVOLVED. WE WAIVED THE FEES, THERE WAS A FIFTY DOLLAR APPLICATION AND, I BELIEVE, $250 ONGOING FEE THAT WAS WAIVED TO PUT EVERYBODY IN THIS PROGRAM SO THAT WE COULD HELP THEM. AND WE HAVE USED THIS OR I DID USE IT AS THE CIRCUIT SOLICITOR FOR DRUG CASES, GENERAL DRUG CASES, SIMPLE POSSESSION CASES, SMALL PROPERTY OFFENSES. AND THE IDEA BEING THAT THE CARROT AND STICK, THERE

[CONDON 24]

WOULD BE A POTENTIAL PENALTY OVER SOMEONE'S HEAD THAT COULD BE IMPOSED IF THEY DIDN'T CHANGE THEIR BEHAVIOR. IF THEY DID CHANGE THE BEHAVIOR THERE WOULD BE NO PENALTY, THERE WOULD BE NO RECORD, THERE WOULD BE NO ARREST.

AND IT'S A SYSTEM THAT HAS BEEN USED AND IS USED TO THIS DAY FOR OTHER CASES TO TRY TO STOP THE COCAINE BABY CRISES.

Q. MR. CONDON, I HAVE THE PUBLIC SERVICE ANNOUNCEMENT THAT I

HAVE SHOWN TO COUNSEL. I WOULD LIKE TO NOW SHOW TO THE JURY.
DEFENDANT'S EXHIBIT 148.
MR. WHERRY: MAY I BE HEARD
THE COURT: YES, SIR.
MR. WHERRY: I DON'T THINK IT'S RELEVANT WHAT THE TELEVISION PROGRAM SHOWS. THIS CASE IS NOT ABOUT TELEVISION PROGRAMS, THIS CASE IT NOT ABOUT COMMUNICATION OF THE POLICY, THE CASE IS ABOUT THE CONSTITUTIONALITY OF THE POLICY. THIS TAPE HAS NOTHING TO DO WITH THE CONSTITUTIONALITY OF THE POLICY, IT'S MERELY AN ADVERTISING FOR GENERAL CONDON AND FOR THE POLICY. AND WHERE THE POLICY WAS ADVERTISED OR WHETHER IT'S A GOOD POLICY OR NOT HAS NOTHING TO DO WITH THE LEGALITY OF THE POLICY.
THE COURT: I'M NOT SURE THAT THE TAPE HAS BEEN PROPERLY AUTHENTICATED. I DON'T KNOW IF YOU OBJECT ON THAT GROUND.
MR. WHERRY: NO, SIR, I DON'T DO THAT. IT IS THE

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[CONDON 27]

THE COURT: YES.
MR. WHERRY: THIS WASN'T MADE OR SHOWN UNTIL MID MARCH OF 1990. SO I DON'T THINK IT CAN BE CONSIDERED FOR THE

PURPOSE OF WHAT THEY CONSIDERED IN FORMULATING THE POLICY THAT WAS PASSED AND IN PLACE AT THE END OF THE YEAR BEFORE.

THE COURT: WELL, I ASKED YOU ABOUT THE DATES EARLIER, AND YOU VERIFIED THAT THE DATES WERE, THERE WAS NO OBJECTION TO THE DATES, THAT'S THE REASON I ASKED YOU.

MR. WHERRY: I --

THE COURT: I WAS GOING TO REQUIRE MR. HOOD TO GO FURTHER AND ESTABLISH THE TIME FRAME IN WHICH THIS TAPE WAS SHOWN.

MR. WHERRY: MY UNDERSTANDING -

THE COURT: YOU, IN ANSWER TO MY QUESTION, SAID THAT WAS NOT A PROBLEM AND SO I DIDN'T PURSUE IT.

MR. WHERRY: I'M SORRY. I MISUNDERSTOOD YOUR QUESTION. MY ANSWER WAS, THAT IT WAS SHOWN IN A TIME FRAME RELEVANT TO THE POLICY BECAUSE IT WAS DURING THE POLICY.

THE COURT: WHEN WAS IT SHOWN, MR. HOOD, DO YOU KNOW? WILL THE TAPE ITSELF SHOW?

MR HOOD: NO, SIR. MR. CONDON MAY KNOW.

THE WITNESS: ABOUT MARCH.

MR. WHERRY: MARCH OF 1990. LIKE I SAID.

THE WITNESS: FOUR OR FIVE MONTHS AFTERWARD.

THE COURT: I'LL PERMIT IT. THE TESTIMONY IS TO THE

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[CONDON 29]

SHOW THAT THE TAPE WAS MADE AND THAT IT WAS SHOWN AND CAN BE CONSIDERED BY YOU ONLY FOR THAT FACT.

Q. (BY MR. HOOD, CONTINUING) YOU MENTIONED PTI. EXPLAIN THAT TO THE JURY AND HOW IT WAS HANDLED UNDER THE POLICY?

A. WELL, THERE IS A GENERAL PROGRAM THROUGHOUT THE ENTIRE STATE OF SOUTH CAROLINA CALLED PRETRIAL INTERVENTION PROGRAM. AND IT'S DESIGNED FOR FIRST TIME, NONVIOLENT OFFENDERS. AND THE IDEA BEING BASICALLY AMNESTY-BASED AGAIN. IF YOU'RE ARRESTED FOR A FIRST-TIME NON-VIOLENT OFFENSE, IF YOU WENT TO THE PROGRAM, WHICH PRIMARILY IS ABOUT SIX MONTHS TO ONE YEAR TIME FRAME, AND DIDN'T VIOLATE THE LAW FURTHER, AND EITHER GOT A JOB OR PAID RESTITUTION OR WENT TO SCHOOL, YOU WOULD SUCCESSFULLY COMPLETE IT AND YOUR RECORD WOULD BE TOTALLY EXPUNGED.

AS THE NUMBERS INCREASED IN THIS PROGRAM WITH THE CRACK BABIES, I FELT THAT IT WOULD BE A GOOD IDEA TO USE THE ADVANTAGES OF THAT PROGRAM IN TERMS OF KEEPING EVERYONE IN THE

SAME SYSTEM AND EVERYONE BEING FED OUT OF THE SAME SPOON AND MAKING SURE THEY WERE ALL DRUG FREE AND GOING TO DRUG TREATMENT BECAUSE THE NUMBERS CAME UP THERE. AND SO WHAT WE DID AS IT DEVELOPED, WE WAIVED THE FEES, ABOUT THREE HUNDRED DOLLARS IN FEES FOR ALL OF THE PEOPLE IN THE AMNESTY-BASED CRACK COCAINE PROGRAM AND GOT THEM INVOLVED IN THAT PROGRAM TO TAKE ADVANTAGES OF THE ADMINISTRATIVE ASPECTS OF THAT PROGRAM

[CONDON 30]

PRIMARILY.

Q. NOW OTHER PERSONS CHARGED WITH CRIMES GOING THROUGH PRETRIAL INTERVENTION, DID THEY HAVE TO PAY A FEE?

A. YES. YES. THE GENERAL - IT'S A SELF-SUFFICIENT PROGRAM, THE OFFENDERS WERE EXPECTED TO SUPPORT IT FINANCIALLY. BUT WE JUST WAIVED THE FEES ACROSS THE BOARD FOR THOSE AT MUSC, JUST IN TERMS OF REALLY BENDING OVER BACKWARD TO MAKE SURE THERE WASN'T AN ASPECT TO BE CONCERNED ABOUT THE FINANCIAL ASPECTS OF THEM HAVING TO PAY.

SO WHILE OTHERS HAD TO PROVE INDIGENCY AND INABILITY TO PAY, FOR THE CRACK COCAINE MOMS, PEOPLE IN THE PROGRAM, WE

ACROSS THE BOARD WAIVED THE FEES.
Q. MR. CONDON, WHY WAS COCAINE SELECTED AS OPPOSED TO ALCOHOL OR SMOKING OR SOMETHING ELSE?
A. GOING BACK, AND I GUESS IT'S A REFLECTION OF HOW SOCIETY IS, GOING BACK TO 1988, 1989, IT WAS JUST A SHOCK THAT A MOTHER WOULD TAKE AN ILLEGAL DRUG, CRACK COCAINE, THE POSSESSION OF WHICH WAS A FELONY. AND ON TOP OF THAT THE MEDICAL EVIDENCE THAT WAS REPORTED TO US WOULD BE THAT UNLIKE ALCOHOL, WHICH WOULD BE LEGAL OF COURSE TO POSSESS IT, OR TOBACCO, WHICH WOULD BE LEGAL TO POSSESS, THAT IF YOU TOOK ONE HIT OF CRACK, ONE HIT, THAT POTENTIALLY IT COULD KILL A CHILD IN UTERO. IN THE WOMB.
SO, WHEN WE DEVELOPED THE PROTOCOL, AND OF COURSE I WAS RELYING, AND THERE WAS NO EXPERT, NO DOCTOR HERE, IN TERMS

[CONDON 31]

OF THE DAMAGE, BUT IN DEVELOPING THE PROTOCOL WITH THE OFFICIALS AT MUSC, IT WAS FELT FROM THEIR REVIEW OF THE LITERATURE, THAT THIS WAS A CRISES IN PROGRESS, THAT THE BASIC PROBLEM THERE REVOLVED AROUND CRACK COCAINE OR COCAINE IN TERMS OF THE TREMENDOUS RISE IN DAMAGES THAT THEY WERE SEEING

TO NEWBORNS. SO THAT WAS THE FOCAL POINT OF THE PROGRAM WAS CRACK COCAINE.

Q. DID YOU GET INVOLVED IN TRYING TO INCREASE TREATMENT AND FUNDING FOR TREATMENT IN CHARLESTON COUNTY OR IN BERKELEY COUNTY?

A. AS THE PROGRAM DEVELOPED WE FELT THAT THERE WAS ADEQUATE TREATMENT FOR THOSE IN THE PROGRAM, THAT IT WOULD BE GOOD TO AUGMENT IT OR SUPPLEMENT IT PERHAPS WITH INPATIENT TREATMENT. SO I CONTACTED, I KNOW WE HAD THE PUBLIC DEFENDER INVOLVED AT THE TIME, AND I HAPPENED TO MEET, AT ONE OF THE CONFERENCES I WENT TO, AN OFFICIAL WITH THE FEDERAL GOVERNMENT WITH HHS, AND WE TRIED TO SUBMIT A GRANT APPLICATION TO OBTAIN THE FEDERAL FUNDING.

I KNOW WE WERE THINKING ABOUT USING THE PSYCHIATRY DEPARTMENT AT MUSC TO GET A LARGE FEDERAL GRANT, VERY EXPENSIVE, COST MILLIONS OF DOLLARS, BUT TO GET A FEDERAL GRANT TO ACTUALLY BUILD A WING OF THE HOSPITAL FOR INPATIENT TREATMENT FOR THOSE THAT WOULD BENEFIT FROM IT.

SO WE HAD SEVERAL MEETINGS. IT TOOK LOTS OF TIME. BUT AT THE END OF THE DAY THE FUNDS WERE NOT AVAILABLE. BUT

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[CONDON 39]

IT IS ESTABLISHED AND IT IS DESIRABLE TO DISPOSE OF THAT ISSUE AT AN EARLY STAGE. AND THAT'S WHAT THE UNITED STATES SUPREME COURT HAS TOLD US. AND ALL COURTS FOLLOW THAT. BUT IT STILL IS A DEFENSE, EVEN THOUGH IT'S BETTER TO BE DISPOSED OF AS A MATTER OF LAW. SO, I DON'T THINK THAT DISPOSED OF THE ISSUE, BUT I THINK IN ADDITION TO WHAT I SAID AT THE SIDEBAR, I THINK IT'S ALSO ADMISSIBLE FOR OVERALL INTENT. AND NOT JUST ON THE ISSUE THAT I STATED.

MR. WHERRY: THANK YOU, SIR.

THE COURT: IT'S 11:30. GO AHEAD AND ASK THIS QUESTION AND LET'S GET AN ANSWER, SINCE WE'RE ON THAT, AND THEN WE'LL TAKE A BREAK.

MR. HOOD: THANK YOU, YOUR HONOR.

A. THE QUESTION BEING THE STATUTE ON CHILD ABUSE.

Q. YES, SIR. AND THE PHYSICIAN'S OBLIGATION UNDER THE STATUTE?

A. THE STATUTE, THEY WERE TOLD, IN MY VIEW, REQUIRES --

MR. WHERRY: I OBJECT. THE STATUTE, THEY WERE TOLD, IN MY VIEW. HE IS NOW GIVING HIS OPINION OF WHAT THAT STATUTE IS.

THE COURT: WELL, I HAVE TOLD THE JURY THAT THEY

CANNOT CONSIDER WHAT HIS INTERPRETATION OF THE STATUTE WAS FOR ITS TRUTH, ONLY THE FACT THAT IT WAS TOLD TO THESE PEOPLE.
AND SO I DON'T KNOW HOW I COULD BE MORE EXPLICIT AND I THINK THE JURY UNDERSTANDS IT.

[CONDON 40]

GO AHEAD.
A. THERE WOULD BE AN AFFIRMATIVE DUTY. THERE WOULD BE A LEGAL OBLIGATION UNDER A CRIMINAL PENALTY IF YOU DON'T DO IT, TO REPORT CHILD ABUSE TO EITHER THE DEPARTMENT OF SOCIAL SERVICES OR LAW ENFORCEMENT. THERE WOULD BE THAT DUTY TO DO THAT. THAT WOULD INCLUDE COCAINE USE, CRACK COCAINE USE THAT HARMED BABIES.
Q. AND DID YOU IMPART THAT VIEW TO SOME OF THE MEDICAL NAMED DEFENDANTS IN THIS CASE, SUCH AS DR. HORGER, DR. NEWMAN, DR. PITTARD?
A. ABSOLUTELY.
MR. WHERRY: OBJECTION, YOUR HONOR, LEADING.
THE COURT: IT IS LEADING. AND, LADIES AND GENTLEMEN, STRIKE THE QUESTION AND THE ANSWER.
MR. HOOD: I'LL RE-ASK IT.
THE COURT: OKAY.
Q. (BY MR. HOOD, CONTINUING) DID YOU IMPART THAT SAME VIEW

AS OUR SOLICITOR TO SOME OF THE NAMED DEFENDANTS IN THIS CASE?

MR. WHERRY: OBJECTION.

THE COURT: OBJECTION SUSTAINED.

Q. (BY MR. HOOD, CONTINUING) DID YOU IMPART IT TO ANY PHYSICIAN?

THE COURT: SUSTAINED.

MR. HOOD: TO ANYONE?

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[CONDON 43]

CROSS-EXAMINATION TO LET THE MEDICAL BOARD MEMBER DR. BING, WHO IS HERE FROM THE UPPER PART OF THE STATE, ANSWER FOUR OR FIVE QUESTIONS, AND HE HAS AGREED TO IT. BUT I HAVE GOT A FEW MORE QUESTIONS ON DIRECT. DO YOU WANT ME TO DO THE NON-JURY STUFF NOW OR AT THE END OF CROSS?

THE COURT: LET JUST WAIT UNTIL THE END.

MR. HOOD: YES, SIR.

THE COURT: BRING THEM IN, PLEASE.

(JURY ENTERS.)

Q. (BY MR. HOOD, CONTINUING) MR. CONDON, IN THE CONTEXT OF THIS POLICY, WAS THERE A REQUIREMENT TO OBTAIN A SEARCH WARRANT, SUBPOENA OR ARREST WARRANT BEFORE ARRESTING THESE WOMEN?

A. NO. THE CASES WOULD INVOLVE ADMISSIONS. THE DEFENDANTS

WOULD ADMIT TO ROUTINELY THE COCAINE USE, AND THE REQUIREMENT IS TO REPORT ANYWAY.

Q. IF YOUR OFFICE RECEIVED A REPORT FROM THE HOSPITAL OTHER THAN THE MEDICAL UNIVERSITY OR FROM A PRIVATE PHYSICIAN THAT A PREGNANT WOMEN WAS USING COCAINE, WHAT WOULD YOUR OFFICE HAVE DONE?

MR. WHERRY: OBJECTION, THAT'S HYPOTHETICAL. SPECULATIVE.

THE COURT: I WILL OVERRULE THE OBJECTION.

A. THE CASES WOULD BE TREATED THE SAME WAY. IN FACT, THERE WERE A NUMBER OF PRIVATE PHYSICIANS. I CAN RECALL A DOCTOR

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[CONDON 48]

A. NO. THE -- AS I WAS SAYING EARLIER, IN THE LOWER PART HERE OF SOUTH CAROLINA, IF YOU HAVE GOT A CHILD, I KNOW THIS FIRSTHAND FROM HAVING FRIENDS OF MINE HAVE TO GO THROUGH TRYING TO SAVE PREMATURE BABIES, IF YOU HAVE GOT A PREMATURE BABY IN THIS PART OF THE STATE, AND SOMEONE WHO HAS SERIOUS DAMAGE AND NEEDS HELP FROM A NEONATOLOGIST, IT GOES TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA.

SO IN TERMS OF THE THOUGHT OF HOW TO ADDRESS THE

PROBLEM THAT WAS HERE, THAT WAS A VERY LOGICAL PLACE TO BE.

Q. GENERAL, IT WAS PART OF THE INTERAGENCY POLICY, WASN'T IT, THAT BABIES BORN OUTSIDE OF MUSC, KNOWN AS OUTBORN BABIES THAT CAME INTO THE NEONATAL INTENSIVE CARE UNIT WERE NOT SUBJECT TO THE POLICY, ISN'T THAT SO?

A. NO. IT WOULD BE MY UNDERSTANDING THAT IF THERE WERE A NEWBORN TRANSFERRED TO MUSC THAT WAS DAMAGED FROM CRACK COCAINE, THAT THEY HAD A DISTINCT LEGAL OBLIGATION TO REPORT IT AND THAT THAT CHILD WOULD BE PART OF THE PROGRAM AND THE PROTOCOL.

Q. YOU KNOW SHIRLEY BROWN, DON'T YOU?

A. I DO.

Q: SHE WAS NOT MENTIONED DURING YOUR DIRECT TESTIMONY. IN FACT, GENERAL, YOU WORKED VERY CLOSELY WITH SHIRLEY BROWN ON THE DEVELOPMENT AND THE IMPLEMENTATION OF THIS POLICY, DIDN'T YOU?

A. I WORKED WITH LOTS OF OFFICIALS AT THE MEDICAL UNIVERSITY

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[CONDON 50]

HE CAN TESTIFY. AND THEN IF THERE IS A DISCREPANCY YOU CAN POINT THAT OUT TO THE JURY, BUT TO PHRASE THE QUESTION AS YOU

DID, IT'S INAPPROPRIATE AND I SUSTAIN THE OBJECTION. SO REPHRASE IT.

Q. (BY MR. WHERRY, CONTINUING) GENERAL, YOU DIDN'T MEET WITH DOCTOR EDWARDS AT ANYTIME PRIOR TO THE ADOPTION OF THE POLICY CONCERNING THE POLICY, DID YOU?

A. WELL, IF YOUR QUESTION RELATES TO THE TIME PERIOD BEFORE THE ADOPTION OF THE POLICY, WHICH WOULD BE A TIME FRAME OF --

Q. THAT'S WHAT I ASKED.

A. I'M SORRY, I MISUNDERSTOOD. WHICH WOULD BE A TIME FRAME OF THREE OR FOUR WEEKS, I CAN'T RECALL A SPECIFIC FORMAL MEETING WITH HIM. BUT YOU'RE TALKING OF A TIME PERIOD FIVE, SIX, SEVEN YEARS AGO. I CAN AND DO KNOW THAT I WOULD EITHER BUMP INTO HIM AT INFORMAL OCCASIONS OR SEE HIM AND WE WOULD DISCUSS THE -- REALLY, FRANKLY, I WAS VERY PROUD THAT THEY WERE WILLING TO GET INVOLVED IN TRYING TO DO SOMETHING TO HELP SOLVE A PROBLEM THAT WAS AFFECTING THE ENTIRE COUNTRY.

Q. GENERAL, YOUR JURISDICTION, YOUR JURISDICTION RAN TO BERKELEY COUNTY ALSO, DIDN'T IT?

A. I WAS THE SOUTH CAROLINA -- SOUTH CAROLINA IS DIVIDED INTO 16 JUDICIAL CIRCUITS.

THE COURT: MR. CONDON, JUST ANSWER HIS QUESTION.

YOUR JURISDICTION EXTENDED TO BERKELEY COUNTY, YES OR NO?

A. WELL, IT INCLUDED BERKELEY COUNTY, YES.

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[CONDON 52]

ABOUT IN TERMS OF HAVING KNOWLEDGE OF IT, I CAN'T RECALL. I'M SURE THAT THEY GAVE IT TO ME AND I'M SURE IT WAS ON MY DESK WITH LOTS OF OTHER THINGS, BUT IN TERMS OF INTIMATE KNOWLEDGE OF THE REPORT THERE, I WOULD NOT HAVE IT.

Q. WELL, AS WITH ALL PEOPLE IN POSITIONS OF AUTHORITY AND POWER, WOULD YOU AGREE WITH ME, SIR, THAT THE BUCK STOPPED WITH YOU THAT YOU WERE RESPONSIBLE FOR WHAT THE PEOPLE UNDER YOUR SUPERVISION DID?

A. OH, YES. I WAS THE CIRCUIT SOLICITOR OF THE NINTH CIRCUIT. SURE.

Q. LET ME HAND YOU, SIR, WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 176 C. AND I'M GOING TO SPECIFICALLY REFER YOU TO -

MR. WHERRY: BEAR WITH ME FOR A MOMENT, YOUR HONOR, I HAD IT JUST A SECOND AGO.

MR. HOOD: I'M NOT FAMILIAR WITH WHAT C IS. I THINK IT MIGHT BE A.

Q. (BY MR. WHERRY, CONTINUING) THE PAGE IS BATE STAMPED THE LAST FOUR DIGITS 2643.

FIRST OF ALL YOU RECOGNIZE THAT DOCUMENT THAT WAS IN

EVIDENCE AS THE TRACKING LIST KEPT BY REPRESENTATIVES OF YOUR OFFICE AT OUR DIRECTION WHILE YOU WERE THE SOLICITOR FOR THIS DISTRICT; ISN'T THAT RIGHT?

A. I CAN'T SAY THAT.

Q. SO YOU DON'T RECOGNIZE THE DOCUMENT?

A. WELL, GENERALLY -- I MEAN, GENERALLY LOOKING AT THE

[CONDON 53]

DOCUMENT IT APPEARS TO BE WHAT YOU SAY IT IS. BUT I CAN'T -- I MEAN --

Q. WELL, WOULD YOU AGREE WITH ME, SIR, THAT THE DOCUMENT SAYS, AND IT'S IN EVIDENCE SO IT IS WHAT IT IS WHAT IT IS, WOULD YOU AGREE WITH ME, SIR, THAT WITH RESPECT TO THAT DOCUMENT ON PAGE 2643, SECOND ENTRY DOWN FOR, PATIENT NUMBER 78, IT SAYS, HAMPTON COUNTY 11/91, PARENTHESIS, DON'T COUNT.

A. IT SAYS THAT.

Q. AND FOR PATIENT NUMBER 206, IT SAYS DORCHESTER COUNTY, DON'T COUNT?

A. YES. IT SAYS THAT.

Q. AND AT THE BOTTOM OF PATIENT NUMBER 110 IT SAYS BERKELEY COUNTY, DON'T COUNT?

A. IT SAYS THAT.

Q. AND FOR PATIENT 34, IT SAYS BERKELEY COUNTY, DON'T COUNT?

A. NO, 34 IT SAYS APRIL 1990, BERKELEY COUNTY WARRANT

ISSUED.
Q. AND WAS THAT, SIR, A PROSECUTION DONE IN BERKELEY COUNTY?
A. I DON'T KNOW. I DON'T -- I DON'T HAVE ANY KNOWLEDGE OF THE DETAILS OF THIS DOCUMENT.
Q. WHEN YOU WENT TO THE NEONATAL INTENSIVE CARE UNIT, SIR, AT MUSC, YOU SAID THAT YOU SAW THESE BABIES. SIR, NO ONE THERE TOLD YOU THAT THESE BABIES THAT YOU SAW WERE THE RESULT OF CRACK COCAINE, DID THEY?
A. NO, I WAS TOLD THAT -- AS I RECALL WE WENT AND LOOKED AT

[CONDON 54]

- THERE WAS A WALL OF THEM AND THEY WERE RUNNING OUT OF THE VENTILATORS. AND I WAS TOLD THEM SOME OF THEM WERE NOT OBVIOUSLY COCAINE BABIES. AND I WAS TOLD THIS ONE WOULD BE AND THIS ONE WOULDN'T BE.
Q. WHO TOLD YOU THAT? SHIRLEY BROWN?
A. NO, I RECALL IT BEING WHOEVER WAS IN CHARGE OF THE UNIT AT THAT TIME WHEN WE WENT IN TO LOOK. BUT IT'S BEEN SIX OR SEVEN YEARS AGO, BUT I DO -- I DO REMEMBER THE BABIES. YOU DON'T FORGET THAT.
Q. SIR, ON YOUR DIRECT EXAMINATION, YOU TALKED ABOUT THE AVAILABILITY OF USING THE PROBATE COURT. THERE WAS A

PROCEDURE IN SOUTH CAROLINA, NOW, GENERAL, NOT WHETHER THE JUDGE WANTED TO USE IT, BUT THERE WAS A PROCEDURE FOR INVOLUNTARY CIVIL COMMITMENT FOR PEOPLE WHO WERE A DANGER TO THEMSELVES OR OTHERS IN SOUTH CAROLINA AT THE TIME OF THIS POLICY WAS FORMED, ISN'T THAT SO?

A. A PROCEDURE IN TERMS OF THE WRITTEN STATUTE?

Q. THE LAW.

A. WELL, IN TERMS OF THE WRITTEN STATUTE THERE WAS A STATUTE THAT COULD HAVE COVERED THIS.

Q. AND ALL THAT IT TOOK, GENERAL,TO ACCOMPLISH THAT WAS THE FILING OF A LAWSUIT IN THE PROBATE COURT TO ACCOMPLISH THAT INVOLUNTARY CIVIL COMMITMENT; ISN'T THAT SO?

A. NO. I MEAN -- I DON'T KNOW HOW ELSE TO ANSWER THIS. WE MET WITH JUDGE FIELDING, WHO WAS THE PROBATE JUDGE, AND HE WAS

[CONDON 55]

VERY STRONG ABOUT THESE CASES WOULD NOT BE HEARD IN THIS COURT BECAUSE HE DIDN'T HAVE FACILITIES TO COMMIT.

Q. WELL, BECAUSE HE DIDN'T HAVE FACILITIES TO COMMIT, YOU MEAN THERE WAS NO PLACE TO SEND THE WOMEN?

A. ALL I KNOW IS MY OFFICE CONTACTED HIM AND I WAS TOLD THAT

JUDGE FIELDING WOULD NOT HEAR THESE CASES.

Q. WELL, GENERAL, IT WAS YOU WHO CONTACTED JUDGE FIELDING, WASN'T IT? WASN'T THAT WHAT YOU SAID IN YOUR DEPOSITION?

A. I DON'T.KNOW WHAT I SAID IN DEPOSITION. I KNOW THAT IN TERMS OF EITHER I PERSONALLY OR MY OFFICE, IT WAS DONE. IN FACT I THINK WE HAD A COUPLE OF CONVERSATIONS TO SEE IF HE MIGHT CHANGE HIS MIND.

Q. GENERAL, YOU KNEW THAT THERE WERE AVAILABLE REMEDIES, DIDN'T YOU, WHEN A JUDGE REFUSED TO PERFORM THE JUDGE'S DUTIES?

A. WELL, IN TERMS OF BEING EFFECTIVE, WE HAD A CRISES HERE, SIR.

Q. SIR, MY QUESTION WAS SIMPLY NOT WHETHER YOU HAD A CRISES, BUT YOU KNEW THERE WERE PROCEDURES THAT WERE AVAILABLE WHEN A JUDGE REFUSED TO PERFORM THE JUDGE'S REQUIRED DUTIES?

A. NO. AGAIN IN LOOKING AT THE SITUATION HERE, THIS ISN'T HYPOTHETICAL, THESE ARE BABIES THAT ARE DYING. THE IDEA THAT WE WOULD SEEK SOME SORT OF JUDICIAL MANDATE TO FORCE JUDGE FIELDING TO DO SOMETHING, YOU WOULD CHASE THAT RABBIT A LONG WAY BEFORE YOU COULD GET SOME HELP FOR THESE BABIES. AND WE

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[CONDON 62]

Q. (BY MR. WHERRY, CONTINUING) GENERAL, THE POLICY AT SOME POINT IN TIME STOPPED BEING USED IN THE WAY THAT IT WAS CONCEIVED WHEN IT BEGAN, FAIR?

A. I HAVE BEEN TOLD THAT IT'S BEEN STOPPED, YES.

Q. AND AT THE PRESENT TIME IN FACT TO ACCOMPLISH THE SAME PURPOSES, THE PROBATE COURTS OF THIS DISTRICT ARE BEING USED TO INVOLUNTARILY COMMIT WOMEN FOR THE PROTECTION OF THEMSELVES AND OTHERS FOR SUBSTANCE ABUSE DURING PREGNANCY; ISN'T THAT SO?

A. I DON'T HAVE PERSONAL KNOWLEDGE OF THAT.

Q. AS THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, I TAKE IT, SIR, THAT YOU'RE THE CHIEF LAW ENFORCEMENT OFFICER OF THE STATE?

A. I AM.

Q. AND IN THAT REGARD, SIR, EACH OF THE SOLICITORS ARE RESPONSIBLE TO YOU?

A. THAT WOULD BE MY VIEW.

Q. AND SO, SIR, YOU ARE IN IN EFFECT THE SUPERIOR, AT LEAST IN THE LAW ENFORCEMENT COMMUNITY, OF SOLICITOR SCHWACKE?

A. YES.

Q. HAVE YOU NOT, SIR, KEPT UP-TO-DATE ON THIS POLICY?

A. YES. I MEAN, IN TERMS.

Q. AND -

MR. HOOD: LET HIM ANSWER THE QUESTION.
A. I HAVE - SINCE BEING ELECTED ATTORNEY GENERAL OF SOUTH

[CONDON 63]

CAROLINA, I HAVE ACTUALLY FORMED A STATEWIDE TASK FORCE TO LOOK AT THIS PROBLEM AND --
Q. AND, SIR, YOU HAVE --
MR. HOOD: ARE YOU THROUGH?
THE COURT: I THINK HE HAS ANSWERED THE QUESTION.
Q. (BY MR. WHERRY, CONTINUING) YOU HAVE TAKEN VARIOUS POSITIONS IN FAVOR OF THIS POLICY IN VARIOUS SPEECHES THAT YOU HAVE MADE, FAIR?
A. FAIR.
Q. AND SO, SIR, I TAKE IT THAT YOU ARE AT LEAST GENERALLY FAMILIAR WITH WHAT THE STATUS OF THE POLICY IS IN THE CHARLESTON AREA BECAUSE YOU'RE THE CHIEF LAW ENFORCEMENT OFFICER OF THIS STATE?
A. WELL, I HAVE BEEN INFORMED OF THINGS WITH -- YES. IN THIS AREA.
Q. AND SO YOU KNOW THAT WHAT IS BEING DONE NOW, RATHER THAN ARRESTING AND PROSECUTING WOMEN?
MR. HOOD: THE COURT PLEASE, HE IS NOW TESTIFYING.
THE COURT: HE IS ON CROSS-EXAMINATION.
MR. HOOD: I OBJECT. THERE IS NO FOUNDATION BEEN

LAID AND UNDER 403. I THINK IT'S IMPROPER.
Q. (BY MR. WHERRY, CONTINUING) SO, SIR, YOU'RE AWARE RATHER THAN ARRESTING AND PROSECUTING WOMEN FOR SUBSTANCE ABUSE DURING PREGNANCY, WHAT IS IN EFFECT HAPPENING, THEY'RE BEING BROUGHT BEFORE THE PROBATE COURT FOR INVOLUNTARY COMMITMENT

[CONDON 64]

WHEN THEY HAVE USED SUBSTANCES DURING PREGNANCY; ISN'T THAT FAIR?
A. WHAT I HAVE BEEN TOLD, I DO KNOW THIS IS A CHANGED ADMINISTRATION IN THE PROBATE COURT. MY BROTHER IS NOW THE PROBATE JUDGE.
Q. CONGRATULATIONS. BUT MY QUESTION IS --
MR. HOOD: HE IS IN THE MIDDLE OF ANSWERING HIS QUESTION.
MR. WHERRY: HE IS IN THE MIDDLE OF GIVING A SPEECH THAT ISN'T RESPONSIVE. I'M GOING BACK TO THE SAME QUESTION.
THE COURT: NO, YOU ASKED HIM ABOUT HIS KNOWLEDGE OF WHAT WAS GOING ON IN THE AREA. AND HE WAS EXPLAINING IN GENERAL TERMS WHAT HE KNEW. AND I THINK HE HAS A RIGHT TO DO THAT. I MEAN, HE IS RESPONDING TO YOUR QUESTION.
GO AHEAD.

A. MY BROTHER IS NOW THE PROBATE JUDGE. I KNOW HE IS MORE SYMPATHETIC TO TRY HELP SOLVE THE PROBLEM. I DO KNOW AT THIS TIME THAT I'M NOW CONDUCTING MEETINGS ON A STATEWIDE BASIS OF OFFICIALS THROUGHOUT THE STATE OF SOUTH CAROLINA IN TRYING TO COME UP WITH A COHERENT STATEWIDE POLICY TO ADDRESS THE SERIOUS PROBLEM ACROSS THE ENTIRE STATE OF SOUTH CAROLINA.

Q. AND ONE OF THE WAYS -- WELL, LET ME ASK YOU THIS, SIR. THE LAW, AS YOU UNDERSTAND IT, OF ACCESS TO PROBATE COURTS DIDN'T CHANGE, DID IT, BETWEEN WHEN YOU FORMULATED THIS POLICY AND NOW?

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[CONDON 66]

MR. WHERRY: HE CAN REDIRECT HIM ON THAT, I THINK.

MR. HOOD: THEREFORE, I ASK YOU TO TELL THE JURY TO STRIKE ALL OF THIS AS IRRELEVANT.

THE COURT: NO. HE HAS A RIGHT TO ASK HIM THESE QUESTIONS.

MR. HOOD: YES, SIR.

(SIDEBAR TERMINATED.)

Q. (BY MR. WHERRY, CONTINUING) GENERAL, YOU SAID A NUMBER OF TIMES DURING YOUR DIRECT THAT, I THINK YOUR WORDS WERE: THESE LITTLE BABIES WERE BEING DAMAGED BY THE USE OF DRUGS,

THAT WAS A FELONY, RIGHT?
A. THE USE OF CRACK COCAINE, POSSESSION OF IT IS A FELONY.
Q. THE SAME WAS TRUE OF HEROIN, ISN'T IT?
A. I DON'T SPECIFICALLY RECALL, BUT I WOULD IMAGINE IT TO BE A FELONY.
Q. METHAMPHETAMINES?
A. I DON'T KNOW SPECIFICALLY, BUT IT COULD BE.
Q. BARBITURATES?
A. AGAIN, I DON'T KNOW WHETHER IT'S A MISDEMEANOR OR FELONY FOR BARBITURATES.
Q. IT'S CRIMINAL, RIGHT, GENERAL?
A. YES.
Q. CRIMINAL?
A. WITHOUT A PRESCRIPTION.
Q. OPIATES?

[CONDON 67]

A. YES.
Q. HALLUCINOGENS?
A. YES.
Q. EVEN WITH PRESCRIPTIONS FOR THEM, RIGHT, BECAUSE YOU CAN'T GET PRESCRIPTIONS FOR THEM?
A. HALLUCINOGENS?
Q. YES.
A. THAT WOULD BE MY UNDERSTANDING.
Q. SO, GENERAL, THIS POLICY, HOWEVER -

JUST BY THE WAY, EACH OF THOSE THAT I MENTIONED, THE OPIATES, THE HEROIN, WHICH IS AN OPIATE, METHAMPHETAMINE,

BARBITURATES, EACH OF THOSE IS POTENTIALLY DAMAGING TO A FETUS; ISN'T THAT RIGHT?
A. THAT WOULD BE MY UNDERSTANDING.
Q. BUT, GENERAL, THIS POLICY DIDN'T FOCUS ON ANY OF THEM, DID IT?
A. WELL, IT WAS MY UNDERSTANDING THAT THEY SCREENED FOR A NUMBER OF DRUGS, BUT IT WOULD BE FAIR TO SAY THAT THE - THAT THE PRIMARY FOCUS FROM WHAT THEY WERE SAYING IN TERMS OF WHAT WAS ACTUALLY CAUSING DAMAGE TO CHILDREN WOULD BE CRACK COCAINE OR COCAINE.
Q. WELL, LET ME COMEBACK TO WHERE MY ORIGINAL QUESTION WAS IN A MOMENT. BUT THE PRIMARY FOCUS OF WHAT THEY WERE SAYING WAS COCAINE AND ALCOHOL, WASN'T IT, BECAUSE THAT'S WHAT THE POLICY SPECIFICALLY MENTIONED, FAIR?

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[CONDON 69]

ISN'T THAT SO?
A. I DON'T KNOW THAT.
Q. WELL, GENERAL, LET'S TALK ABOUT THE SELECTION OF MUSC AND THE SELECTION OF COCAINE, BECAUSE YOU WILL AGREE THAT YOU DID FOCUS ON COCAINE WHETHER IT WAS EXCLUSIVELY OR NOT?
A. THAT WOULD BE A FAIR STATEMENT.
Q. MUSC, GENERAL, YOU KNEW, WHEN YOU STARTED WORKING WITH

MUSC, THAT IN FACT 70 PERCENT OF THE POPULATION OF MUSC, THE PATIENT POPULATION WAS BLACK, 30 PERCENT NON-MINORITY, FAIR?

A. NO, I DID NOT KNOW THAT.

Q. WELL, YOU HAVE COME TO LEARN THAT HAVEN'T YOU, GENERAL?

A. IN FACT, I HEARD IT TODAY FOR THE FIRST TIME.

Q. GENERAL, YOU ALSO KNOW THAT THE GENERAL RACIAL MAKEUP OF THE CHARLESTON, SOUTH CAROLINA, AREA, THE JUDICIAL CIRCUIT THAT YOU WERE THE SOLICITOR OF WAS JUST ABOUT THE OPPOSITE, 30 PERCENT BLACK, 70 PERCENT WHITE?

A. I MEAN I WOULD KNOW THAT, YES. BUT I DID NOT KNOW THE NUMBERS AT MUSC.

Q. GENERAL, YOU KNOW THAT CRACK COCAINE USE IS MUCH MORE PREVALENT AMONG THE MINORITY POPULATION THAN THE MAJORITY? THAT IS, MORE BLACK PEOPLE USE IT THAN WHITE, YOU KNEW THAT, DIDN'T YOU, AS SOLICITOR?

A. NO, NOT AT THE TIME. THIS WAS VERY NEW. CRACK COCAINE, WHICH IS NOW I GUESS A COMMON WORD, BUT IN THE LATE '80S CRACK COCAINE WAS A NEW DRUG, A NEW EPIDEMIC, AND I DID NOT HAVE ANY

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[CONDON 78]

Q. GENERAL, THE ORIGINAL LETTERS THAT YOU SENT OUT, YOU NEED

TO LOOK AT THEM YOU CAN LOOK AT THEM, BUT THE ORIGINAL LETTERS THAT YOU SENT OUT ABOUT THIS POLICY INVITING PEOPLE TO MEETINGS, LETTERS TO CHIEF GREENBERG, ALL REFER TO YOUR INTENTION TO PROSECUTE, DIDN'T THEY? NONE REFERRED TO AMNESTY?

A. I'M FAMILIAR WITH THE LANGUAGE YOU'RE REFERRING TO.

Q. YEAH.

A. THE LANGUAGE WAS USED IN TERMS OF THE OFFICE BEING INVOLVED WITH THE DEVELOPMENT OF THE PROTOCOL AND USE OF THE PROSECUTION AUTHORITY. AS THE POLICY WAS DEVELOPED FROM THE GET GO, IT WAS AMNESTY-BASED FOR THOSE IN UTERO. AND THERE WAS A GENERAL DECISION TO USE THE REGULAR CRIMINAL PROCESS AFTER DAMAGE BEING DONE, AFTER BIRTH, WHICH WAS QUICKLY CHANGED THREE OR FOUR MONTHS INTO IT.

Q. WELL, NOW YOU SAY THAT THE GENERAL CRIMINAL PROCESS ORIGINALLY WAS AFTER THE DAMAGE HAD BEEN DONE YOU WOULD PROSECUTE CRIMINALLY. THERE WAS NOT ONE CASE, WAS THERE, IN WHICH THERE WAS ANY EVIDENCE OF ANY DAMAGE BEING DONE TO THE CHILDREN OF THE MOTHERS WHO YOU ARRESTED AFTER GIVING BIRTH IN THE ORIGINAL STAGES OF THE POLICY?

MR. HOOD: IF THE COURT PLEASE, I THINK YOU RULED ON THIS SUBJECT. THE HEALTH OF THE BABIES.

THE COURT: I THOUGHT THAT I DID. I THOUGHT THAT I SAID THAT THE HEALTH OF THE BABIES WAS SOMETHING THAT I WAS

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[CONDON 81]

DEPOSITION AND, GENERAL, FIRST OF ALL YOU DO REMEMBER GIVING THAT DEPOSITION, DON'T YOU?

A. I REMEMBER GIVING ONE, YES.

Q. GENERAL, WOULD YOU LOOK AT EXHIBIT -- YOU PICK, FOUR, FIVE, SIX, SEVEN, EIGHT THE EXHIBITS THAT WERE ATTACHED TO IT. IT'S THE OTHER PILE THERE?

A. EXCUSE ME. THESE PINK SHEETS HERE.

Q. THE PINK SHEETS SEPARATE THE EXHIBITS BY NUMBER, AND THEY'RE EACH CONSECUTIVELY NUMBERED, AND SO IF YOU LOOK AT EXHIBIT 4 OR 5 OR EXHIBIT 7 OR EXHIBIT 8.

A. RIGHT.

Q. IT REFERS, DOESN'T IT, GENERAL, TO AN INTERAGENCY POLICY CONNECTED WITH THE IDENTIFICATION AND PROSECUTION OF COCAINE AND ALCOHOL OR DRUGS AND ALCOHOL?

A. RIGHT, THE LETTER SAYS THAT.

Q. YES. AND THAT LETTER, BY THE WAY, WAS A LETTER THAT YOU WROTE, RIGHT?

A. I THINK I PREPARED IT. I KNOW CHIEF GREENBERG IS A CO-SIGNATURE. I THINK WE PREPARED IT.

Q. CHIEF GREENBERG, RIGHT HERE IN THE COURTROOM?

A. YES.
Q. BECAUSE THE INTERAGENCY POLICY WAS A POLICY AMONG THE FOLLOWING AGENCIES, YOUR OFFICE AS SOLICITOR, CHIEF GREENBERG AS THE CHIEF OF POLICE, THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, AT SOME POINT IN TIME DSS, RIGHT?

[CONDON 82]

A. CORRECT.
Q. SO, TWO OF THE PEOPLE WHO HEADED AGENCIES THAT WERE PART OF THE INTERAGENCY POLICY AT LEAST IDENTIFIED IT WHEN THAT LETTER WAS WRITTEN AS FOCUSING ON DRUGS AND ALCOHOL, FAIR?
A. RIGHT. THE LETTER INVITED PEOPLE TO COME AND DISCUSS A POLICY.
Q. AND IN FACT, GENERAL, AS THE POLICY DEVELOPED, THE CRITERIA USED TO IDENTIFY THOSE WOMEN WHO WOULD BE TESTED IN THE DRUG SCREEN CONTAINED THE CRITERIA OF KNOWN DRUG OR ALCOHOL ABUSE, DIDN'T IT?
A. YES. I THINK THAT'S CORRECT.
Q. BUT ALCOHOL HAD NOTHING TO DO WITH THE POLICY?
A. AS I RECALL, WHEN WE GOT AROUND TO TALK ABOUT IT, IT WAS THE GROUP'S DECISION THAT SINCE ALCOHOL WAS LEGAL, THAT IT WOULD BE BEST TO ATTACK THE PROBLEM -- THE MAIN PROBLEM AS WE

SAW IT, WHICH WOULD BE THE ILLEGAL USE OF CRACK COCAINE, AS I RECALL.

Q. WELL, GENERAL, WAS THE MAIN PROBLEM AS YOU SAW IT THE ILLEGAL USE OF CRACK COCAINE OR THE DANGER TO UNBORN CHILDREN?

A. WELL BOTH. THE DANGER TO UNBORN CHILDREN OR CHILDREN IN GENERAL THROUGH CRACK COCAINE.

Q. IF THE PROBLEM WAS JUST THE ILLEGAL USE OF COCAINE, HAVING NOTHING TO DO WITH PREGNANT WOMEN, THAT WOULD NOT BE SOMETHING THAT WOULD CONCERN THE HOSPITAL, WOULD IT?

A. WELL, I THINK IMPETUS HERE WERE THE BABIES.

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[CONDON 85]

MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. THAT WOULD BE A FAIR STATEMENT.

Q. GENERAL, AT NO TIME IN THE COURSE OF THIS POLICY DO YOU HAVE ANY KNOWLEDGE OF EITHER YOUR OFFICE OR CHIEF GREENBERG'S DEPARTMENT OBTAINING SEARCH WARRANTS TO GET THAT INFORMATION OR COURT AUTHORIZED SUBPOENAS TO GET THE INFORMATION; ISN'T THAT SO?

A. I DON'T HAVE A SPECIFIC RECOLLECTION OF SEARCH WARRANTS OR NON-SEARCH WARRANTS. I DON'T KNOW.

Q. WELL, GENERAL, IT WAS YOUR POSITION, AS SOLICITOR, WHEN

YOU WERE THE SOLICITOR, TO RECOGNIZE THE LAW FAVORS THE ISSUANCE OF SEARCH WARRANTS, FAIR?
A. WELL, NO, I THINK THAT THE HASSLE FACTOR FAVORS THE ISSUANCE OF A SEARCH WARRANT. IF YOU ISSUE A SEARCH WARRANT, THAT GENERALLY DOESN'T GIVE ARGUMENTS ON THE OTHER SIDE. IT'S A PREFERRED METHOD. I WOULD SAY THAT JUST IN TERMS OF SOLVING PROBLEMS.
Q. YOU REMEMBER IN YOUR DEPOSITION, AND I'LL FIND THE PAGE IF YOU WANT - JUST BY THE WAY, DID YOU REREAD YOUR DEPOSITION IN CONTEMPLATION OF YOUR TESTIMONY HERE?
A. A COUPLE OF WEEKS AGO.
Q. DO YOU RECALL THE DEPOSITION WHEN YOU WERE TALKING ABOUT - WHEN YOU WERE TALKING ABOUT SCHERBER VERSUS CALIFORNIA?
A. VAGUELY.
Q. YOU COMMENTED AS SOLICITOR THAT THE LAW FAVORED SEARCH

[CONDON 86]

WARRANTS. DO I NEED TO FIND THAT?
A. THAT WOULD BE A FAIR STATEMENT TO SAY THAT THERE IS A PREFERENCE, FROM MY VIEW, FOR SEARCH WARRANTS JUST BECAUSE IT SOLVES LOTS OF PROBLEMS.
Q. YOU WERE A MAJOR PARTICIPANT IN GETTING THIS POLICY DEVELOPED, WEREN'T YOU?

A. I THINK THAT WOULD BE A FAIR STATEMENT.
Q. DID YOU MAKE ANY PROVISION IN THE POLICY FOR OBTAINING SEARCH WARRANTS OR SUBPOENAS FOR THIS MEDICAL INFORMATION?
A. WELL, TO GIVE YOU THE BACKDROP HERE -
Q. NO, SIR. NO, I DON'T NEED THE BACKDROP. I ASKED WHETHER YOU MADE ANY PROVISION FOR IT?
A. NOT THAT I CAN RECALL.
Q. AND IN FACT, GENERAL, THERE WERE NO INTERNAL DISCUSSIONS IN YOUR OFFICE OR WITH CHIEF GREENBERG ABOUT OBTAINING SEARCH WARRANTS OR SUBPOENAS, WERE THERE?
A. SIX OR SEVEN YEARS AGO, I CAN'T RECALL.
Q. WELL, LOOK AT PAGE 86 OF YOUR DEPOSITION. BEGINNING ON LINE 21. WHEN YOU GAVE YOUR DEPOSITION, GENERAL, YOU HAD NO RECOLLECTION OF ANY SUCH DISCUSSION, DID YOU?
A. YEAH, I THINK THAT'S WHAT I'M SAYING TODAY, AREN'T I?
MR. HOOD: THE ANSWER IS, YOUR HONOR, HE CAN'T RECALL. I THINK IF HE IS GOING TO REFER TO IT, IT'S IMPROPER USE OF THE DEPOSITION. IT'S THE SAME AS WHAT HE JUST SAID.
THE COURT: LET'S READ THE QUESTION AND ANSWER. I

THINK YOU HAVE CREATED AN INFERENCE, I'M NOT SURE WHAT THE INFERENCE IS, THAT IS AN INFERENCE THAT HE SAID SOMETHING EARLIER ON THE SUBJECT, I THINK.

Q. (BY MR. WHERRY, CONTINUING) QUESTION: DID YOU EVER HAVE ANY INTERNAL DISCUSSION WITHIN YOUR OFFICE THAT YOU RECALL ABOUT WHETHER SUBPOENAS OR SEARCH WARRANTS SHOULD BE OBTAINED FOR MEDICAL RECORDS?

ANSWER: I CAN'T RECALL.

THE COURT: OKAY

Q. (BY MR. WHERRY, CONTINUING) GENERAL, EARLY ON YOU HAD NO COOPERATION OR NO ASSISTANCE FROM DSS WITH THE INTERAGENCY POLICY; IS THAT CORRECT?

A. WELL, THEY WERE INVITED TO THE MEETINGS. I THINK THEY SENT REPRESENTATIVES. AS I RECALL THEIR LEGAL POSITION FOR A GOOD BIT OF TIME WOULD BE THAT THEY WOULD HAVE NO JURISDICTION OVER UNBORN CHILDREN. PERIOD.

Q. SO I TAKE IT THE ANSWER TO MY QUESTION IS: YOU GOT NO COOPERATION WITH THEM IN THE OPERATION OF THE INTERAGENCY POLICY; IS THAT CORRECT?

A. WELL, AS I RECALL THEY WOULD BE COOPERATIVE AFTER THE CHILD WAS BORN IN TERMS OF A REPORT. THEY WOULD BE. COOPERATIVE THERE. WE WANTED TO GET INVOLVED AS EARLY AS POSSIBLE TO STOP THE DAMAGE, AND THEY WOULD NOT COOPERATE IN

TERMS OF DOING THAT WITH THEIR OFFICE.
Q. YOU MENTIONED IT IN YOUR DIRECT TESTIMONY A NUMBER OF

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[CONDON 96]

ASSISTANTS AND ME PERSONALLY.
Q. MR. HEMPHILL WORKED FOR YOU?
A. YES, SIR.
Q. HE TOOK HIS INSTRUCTIONS FROM YOU?
A. YES.
Q. LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 83-A. AND I'M NOT SURE IF IT'S IN EVIDENCE OR NOT, BUT FIRST OF ALL LET ME ASK YOU, AND I'LL MOVE IT IN, DO YOU RECOGNIZE THAT AS BEING A MEMO SENT BY YOU TO MR. HEMPHILL?
A. I DO.
Q. APRIL 2, 1991?
A. YES.
Q. MADE AND DONE IN THE ORDINARY COURSE OF YOUR BUSINESS AS SOLICITOR?
A. YES.
Q. CONTEMPORANEOUSLY WITH THE EVENT THAT IT RECORDS?
A. YES, I WOULD THINK SO.
Q. IT'S A BUSINESS RECORD, RIGHT?
A. I THINK SO.
MR. WHERRY: I MOVE IT INTO EVIDENCE AS PLAINTIFF'S EXHIBIT 83 A.

MR. HOOD: LET ME SEE IT.
THE COURT: ANY OBJECTION?
MR. HOOD: NO, SIR.
THE COURT: LET THE CLERK MARK IT IN, PLEASE.

[CONDON 97]

MR. WHERRY: I'M SORRY.
CLERK. PLAINTIFF'S EXHIBIT 83-A IN EVIDENCE.
Q. (BY MR. WHERRY, CONTINUING) IN THAT DOCUMENT, GENERAL, YOU SAY - WELL, WHY DON'T YOU READ IT WITH THE SENTENCE BEGINNING STARTING NEXT MONTH -
THIS IS A MEMO FROM YOU TO YOUR EMPLOYEES, RIGHT?
A. YES. "STARTING NEXT MONTH, IN ORDER TO BETTER TRACK THE WOMEN WHO ARE ARRESTED IN THE COCAINE BABY PROGRAM BUT ARE NOT PROSECUTED, WE WILL ENROLL THEM IN OUR PTI PROGRAM. I EXPECT ALL FEES WILL BE WAIVED BECAUSE OF THE INDIGENCY OF MOST OF THESE WOMEN."
Q. GENERAL, THAT WAS THE WRITTEN INSTRUCTIONS THAT YOU GAVE TO MR. HEMPHILL?
A. RIGHT. TO GET THEM INVOLVED.
Q. WELL, THE WRITTEN INSTRUCTIONS WAS SO THAT YOU COULD BETTER TRACK THEM, RIGHT?
A. YES.

Q. SO, GENERAL, ASSUMING THAT THE INTERAGENCY POLICY-BEGAN THE END OF '89, THE FIRST YEAR AND A HALF OR SO, PTI WASN'T INVOLVED IN IT, WAS IT?

A. NOT THAT I RECALL, NO.

Q. THAT WAS ANOTHER REVISION OF THE POLICY, RIGHT?

A. WELL, IT WAS AN AUGMENTATION, RIGHT, A CHANGE.

Q. REVISION, CHANGE, ARE ABOUT SYNONYMOUS WORDS, AREN'T THEY?

* * *

[CONDON 100]

WERE GETTING UP THERE. I THINK WE HAD HUNDREDS AND HUNDREDS OF PEOPLE IN DRUG TREATMENT, AND IT SEEMED TO WORK QUITE WELL IN TERMS OF MOST PEOPLE GOING THROUGH, AND WANTED HIM TO HELP US. SO I DON'T RECALL THERE BEING ARRESTS WITH THE COCAINE MOMS.

Q. IT'S YOUR TESTIMONY THAT YOU GET INTO PTI WITHOUT BEING ARRESTED FIRST IN YOUR OFFICE?

A. CORRECT ME IF I'M WRONG, AS I RECALL -

Q. NOT WHAT YOU DID. WHAT THE PTI RULES WERE? COULD YOU GET INTO PTI WITHOUT BEING CHARGED CRIMINALLY?

A. THE GENERAL WAY THAT PRETRIAL INTERVENTION WOULD WORK

THROUGH THE GENERAL STATE CRIMINAL JUSTICE SYSTEM THERE WOULD BE AN ARREST. NOW, IF SOMEONE - I CAN'T RECALL THE CASE, BUT SPEAKING HYPOTHETICALLY, BUT IF SOMEONE CAME AND SAID WITHOUT AN ARREST I HAVE COMMITTED A CERTAIN CRIME AND I WANT TO GO INTO PRETRIAL INTERVENTION, I DON'T THINK OF ANY LAW THAT WOULD STOP THAT. SO USING THE GENERAL INHERENT POWER OF THE HOSPITAL, I ASKED MR. HEMPHILL TO TAKE ALL OF THE CASES INVOLVING CRACK COCAINE WITH THE MOTHERS WHO DIDN'T - WHO WEREN'T INVOLVED WITH AN ARREST.

Q. IT'S YOUR TESTIMONY THAT THE STATE STATUTE AUTHORIZES PTI DOES NOT REQUIRE THAT A PERSON BE ARRESTED BEFORE PTI BEING AVAILABLE?

A. I HAVEN'T LOOKED AT THE STATE STATUTE.

Q. THANK YOU. IT WASN'T IMPORTANT?

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF FRANCIS CORNELY

[CORNELY 316]

(EXCERPT OF FRANCIS J. CORNELY, 12-6-97.)

- - -

FRANCIS J. CORNELY, PLF.
WITNESS, SWORN
DIRECT EXAMINATION
BY MS. DUNN:

Q. YOU'RE FRANK CORNELY; IS THAT CORRECT?
A. I AM.
Q. YOU WERE FORMERLY EMPLOYED AS AN ATTORNEY WITH THE SOLICITOR'S OFFICE WITH THE NINTH JUDICIAL CIRCUIT?
A. YES.
Q. YOU HAD THAT POSITION DURING THE FALL OF 1989?
A. I DID.
Q. AND I'M HANDING YOU A DOCUMENT PREMARKED PLAINTIFF'S EXHIBIT NUMBER 3. DO YOU RECOGNIZE THAT DOCUMENT?
A. YES, MA'AM, I DO.
Q. DID YOU WRITE THAT DOCUMENT?
A. YES, MA'AM, I DID.
Q. IS THE HANDWRITING ON THAT YOUR HANDWRITING?
A. YES, MA'AM, IT IS.

Q. AS YOU LOOK AT THE DOCUMENT, IT APPEARS THAT THIS IS A COPY OF A HANDWRITTEN DOCUMENT THAT HAD LIKE A BUSINESS CARD STAPLED ON THE TOP OF THAT. IS THAT AN ACCURATE DESCRIPTION OF WHAT YOU'RE HOLDING?
A. THIS LOOKS LIKE IT WAS AN OFFICE MEMORANDUM FROM THE SOLICITOR'S OFFICE AND IT HAS A - YES, IT HAS A BUSINESS CARD

[CORNELY 317]

STAPLED TO THE TOP OF ITS OVER THE OFFICE MEMORANDUM.
Q. AND TO WHOM DID YOU WRITE THIS LETTER?
A. IT APPEARS THAT I WROTE THE LETTER TO CHARLIE CONDON, WHO WAS SOLICITOR AT THE TIME.
MS. DUNN: YOUR HONOR, I WOULD LIKE TO MOVE THIS INTO EVIDENCE.
MS. COMPANION: NO OBJECTION.
DEPUTY CLERK: PLAINTIFF'S EXHIBIT NUMBER 3 IN EVIDENCE.
Q. (BY MS. DUNN, CONTINUING) MR.CORNELY, I'M HANDING YOU A DOCUMENT MARKED PLAINTIFF'S EXHIBIT 14. DO YOU RECOGNIZE THIS DOCUMENT?
A YES, MA'AM, I DO.
Q. AND IS THIS A COPY OF A DOCUMENT THAT YOU SENT IN YOUR CAPACITY AS ASSISTANT SOLICITOR IN 199?
A. YES, MA'AM.

Q. AND THIS DOCUMENT APPEARS TO HAVE BEEN SENT TO SHIRLEY BROWN?
A. THAT'S CORRECT.
Q. AND DO YOU HAVE ANY DOUBT THAT THAT DOCUMENT WAS SENT FROM YOUR OFFICE TO MS. BROWN?
A. I HAVE NO INDEPENDENT RECOLLECTION THAT IT WAS SENT, BUT IT APPEARS TO HAVE BEEN TYPED AND SENT AND FROM ME TO SHIRLEY BROWN AT THE MEDICAL UNIVERSITY.
Q. AND WOULD A COPY OF SUCH A DOCUMENT HAVE BEEN KEPT IN

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[CORNELY 319]

THAT I KNOW THAT AS YOU SAID THAT PART OF IT WAS OBSCURED BY A BUSINESS CARD.
A. THAT'S CORRECT.
Q. CAN YOU TELL ME WHAT THAT DATE WAS? IT LOOKS LIKE 11-89?
A. IT JUST HAS A SLASH MARK AND '89. I CAN'T TELL, BUT IT WOULD HAD TO HAVE BEEN EITHER 10 - IT WOULD HAVE TO BE OCTOBER, NOVEMBER OR DECEMBER '89, BECAUSE I LEFT THE SOLICITOR'S OFFICE IN DECEMBER OF '89.
MS. COMPANION: THANK YOU.
Q. (BY MS. COMPANION, CONTINUING) MR. CORNELY, SHIRLEY BROWN DIDN'T WORK FOR THE SOLICITOR'S OFFICE, DID SHE?
A. NO, MA'AM.
Q. AND WHAT WAS YOUR UNDERSTANDING OF THE GOAL OF THE

POLICY?

MS. DUNN: OBJECTION, YOUR HONOR, THIS IS BEYOND THE SCOPE OF THE WITNESS.

THE COURT: WHAT WAS THE QUESTION?

MS. COMPANION: WHAT WAS HIS UNDERSTANDING OF THE GOAL OF THE POLICY.

THE COURT: YOU'LL HAVE TO LAY A FOUNDATION FOR THAT

Q. (BY MS. COMPANION, CONTINUING) MR. CORNELY, WHAT WAS YOUR JOB AT THE SOLICITOR'S OFFICE?

A. AT THIS TIME WE'RE TALKING ABOUT THE FALL OF '89, I WAS ASSISTANT SOLICITOR WHO PROSECUTED ALL OF THE CHILD ABUSE AND

[CORNELY 320]

NEGLECT CASES. WHICH WOULD MEAN THAT I PROSECUTED ALL OF THE CASES WHERE CHILDREN WERE VICTIMS.

Q. AND DID YOU HAVE ANY INVOLVEMENT WITH WHAT CAME TO BE KNOWN AS THE INTERAGENCY POLICY?

A. INTERAGENCY POLICY CONCERNING?

Q. CONCERNING SUBSTANCE-ABUSING PREGNANT WOMAN?

A. YES, VERY BRIEFLY BECAUSE I - IF I UNDERSTAND THE TIME FRAME CORRECTLY, IT WAS - WE WERE TALKING ABOUT SEPTEMBER, OCTOBER AND NOVEMBER OF '89. AND I LEFT IN DECEMBER OF '89, SO THREE OR FOUR MONTHS I WAS SOMEWHAT INVOLVED, YES, MA'AM.

Q. AND WHAT WAS YOUR INVOLVEMENT?
A. AS I RECOLLECT, CHARLIE CONDON, WHO WAS THE SOLICITOR AT THE TIME, ASKED MYSELF AND CINDY LEGARE, WHO WAS MY INVESTIGATOR, TO GO TO THE MEDICAL UNIVERSITY TO MEET WITH SHIRLEY BROWN AND DR. SCHUH BECAUSE THEY HAD SOME - THEY WERE INTERESTED IN ESTABLISHING SOME PROCEDURES AND POLICIES IN DEALING WITH MOTHERS WHO WERE BEING INVOLVED WITH DRUGS OR GETTING INVOLVED IN DRUGS WHILE THEY WERE PREGNANT.
Q. WHEN YOU SAY THEY WERE INTERESTED, TO WHOM DO YOU REFER?
A. I DON'T KNOW WHETHER I CAN DO THAT OR NOT BECAUSE I ASSUME THAT MR. CONDON GOT A PHONE CALL FROM SOMEONE AT THE MEDICAL UNIVERSITY WHICH PROMPTED HIM TO ASK ME TO GO OVER THERE.
Q. AND WHAT WAS YOUR UNDERSTANDING OF THE GOAL OF THE POLICY?

[CORNELY 321]

MS. DUNN: OBJECTION AGAIN.
THE COURT: AGAIN, I DON'T THINK YOU HAVE LAID A PROPER FOUNDATION. JUST BECAUSE HE WENT OVER THERE ONE TIME, I DON'T THINK THAT'S ENOUGH.
Q. (BY MS. COMPANION, CONTINUING) DID YOU HAVE ANY OTHER

INVOLVEMENT, MR. CORNELY?
A. I OBVIOUSLY WROTE SOME MEMOS AND A LETTER, BUT I DON'T HAVE ANY INDEPENDENT RECOLLECTION OF ANYTHING ELSE THAT I DID TOWARD THAT BECAUSE, AGAIN, I LEFT SHORTLY THEREAFTER.
Q. IS IT FAIR TO SAY THAT YOU WERE INVOLVED WITH THE - SOME ASPECT OF THE FORMULATION OF THE POLICY?
A. YES.
Q. AND FROM THAT DID YOU GAIN AN UNDERSTANDING OF WHAT THE GOAL OF THE POLICY WAS TO BE?
A. YES.
Q. AND WHAT WAS THAT UNDERSTANDING?
A. WE - THE WAY I UNDERSTOOD IT WAS THAT IT WAS AN ATTEMPT TO INTERVENE ON BEHALF OF THE UNBORN CHILDREN AND OFFER THE MOTHERS SOME SUBSTANCE ABUSE COUNSELING OR SOMETHING ELSE IN AN EFFORT TO KEEP THEM OFF OF CRACK COCAINE, BECAUSE I BELIEVE THAT IT WAS BECOMING A PROBLEM AT THE MEDICAL UNIVERSITY THE NUMBER OF BABIES WHO WERE BORN WITH HEALTH PROBLEMS AS A RESULT OF THEIR MOTHERS INGESTING DRUGS WHILE THEY WERE PREGNANT.
Q. WAS IT YOUR UNDERSTANDING THIS WAS TO BE A

[CORNELY 322]

MULTIDISCIPLINARY APPROACH?

A. YES, MA'AM.
Q. CAN YOU EXPLAIN WHAT MULTIDISCIPLINARY APPROACH MEANS?
A. WELL DIFFERENT AGENCIES, A NUMBER OF DIFFERENT AGENCIES, I BELIEVE THE CITY OF CHARLESTON WAS INVOLVED, DSS WAS INVOLVED, THE SOLICITOR'S OFFICE WAS INVOLVED, SOME REPRESENTATIVES OF THE MEDICAL UNIVERSITY WERE INVOLVED. SO THAT IS WHY IT WAS CALLED MULTIDISCIPLINARY.
Q. AND IN YOUR POSITION IN THE SOLICITOR'S OFFICE HAD YOU EVER BEEN INVOLVED - WITH YOUR POSITION IN THE SOLICITOR'S OFFICE AS PROSECUTOR FOR CHILD - EXCUSE ME, FOR CHILD ABUSE AND NEGLECT CASES, HAD YOU EVER BEEN INVOLVED IN ANY OTHER MULTIDISCIPLINARY FORCES ADDRESSING CHILD ABUSE?
MS. DUNN: OBJECTION, YOUR HONOR, I DON'T KNOW WHAT THAT'S RELEVANT TO, AND CERTAINLY BEYOND THE SCOPE.
THE COURT: GO AHEAD. IT.
Q. (BY MS. COMPANION, CONTINUING) DID YOU DO THIS WITH ANY OTHER HOSPITAL OR ANY OTHER AGENCY?
A. YES, I WAS.
Q. AND CAN YOU EXPLAIN THAT TO ME, PLEASE.
A. JUST PRIOR TO LEAVING THE SOLICITOR'S OFFICE I WAS INVOLVED IN A TASK FORCE TO ESTABLISH A MULTIDISCIPLINARY

APPROACH TO THE PROSECUTION OF CHILD ABUSE AND NEGLECT CASES.
I WENT WITH A NUMBER OF DIFFERENT PEOPLE TO ALABAMA TO VIEW A FACILITY THEY HAD THERE. AND AFTERWARD WE ESTABLISHED THE LOW

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF VICTOR DEL BENE

[DEL BENE 486]

THE COURT: JUST AS EASY TO ASK HIM WHERE DO YOU LIVE.

MR. HOOD: NO PROBLEM.

Q. (BY MR. HOOD, CONTINUING) YOU WENT TO COLLEGE WHERE, DOCTOR?

A. MANHATTAN COLLEGE.

Q. OKAY. GRADUATED WHEN?

A. IN 1961.

Q. WENT TO MEDICAL SCHOOL WHERE?

A. YES, AT COLLEGE OF MEDICINE, GEORGETOWN UNIVERSITY.

Q. GRADUATED WHEN?

A. IN '65.

Q. AFTER DOING YOUR INTERNSHIP AND TRAINING AND FELLOWSHIP YOU ENDED UP BECOMING SPECIALIZED IN WHAT FIELD OF MEDICINE?

A. I'M AN INTERNIST AND I'M ALSO AN INFECTIOUS DISEASE PHYSICIAN.

Q. ALL RIGHT, SIR. AND ARE YOU A LICENSED PRACTICING PHYSICIAN IN THE STATE OF SOUTH CAROLINA IN THOSE FIELDS?

A. I AM. I AM.

Q. AND IN 1967 AND '69 DID YOU SERVE IN THE UNITED STATES

MILITARY?
A. I WAS IN THE NAVY.
Q. WHAT WAS YOUR HIGHEST RANK?
A. LIEUTENANT COMMANDER.
Q. HOW LONG HAVE YOU BEEN HERE AT THE MEDICAL UNIVERSITY IN

[DEL BENE 487]

CHARLESTON?
A. SINCE 1972.
Q. AND YOU ARE CURRENTLY EMPLOYED AT THE MEDICAL UNIVERSITY IN WHAT CAPACITY, DOCTOR?
A. I'M A PHYSICIAN IN INTERNAL MEDICINE AND INFECTIOUS DISEASES. AND I'M ALSO ASSOCIATE DEAN OF STUDENTS IN THE COLLEGE OF MEDICINE.
Q. ALL RIGHT, SIR. AND STARTING IN 1986 FOR SIX CONTINUOUS YEARS, UP UNTIL 1996, HAVE YOU RECEIVED AWARDS FOR TEACHING AT THE MEDICAL UNIVERSITY?
A. YES.
Q. AND WHAT IS THE AWARD THAT YOU HAVE RECEIVED EACH OF THOSE YEARS?
A. TEACHING EXCELLENCE.
Q. ALL RIGHT, SIR. CONGRATULATIONS.
NOW, OF THE MANY COMMITTEES THAT ARE LISTED ON YOUR BIOGRAPHICAL SKETCH I'M INTERESTED IN ONE. IN OCTOBER OF '88 WHAT COMMITTEE DID YOU SERVE ON AT THE-MEDICAL UNIVERSITY?
A. I WAS THE CHAIRMAN OF THE HOSPITAL EXECUTIVE COMMITTEE.

Q. AND DID YOU REMAIN ON THAT COMMITTEE UNTIL A CERTAIN TIME? AND IF SO, WHEN?
A. NOVEMBER 1990.
Q. BY THE WAY, HAVE YOU PUBLISHED ARTICLES IN THE MEDICAL LITERATURE IN YOUR FIELD OF EXPERTISE?
A. I HAVE.

* * *

[DEL BENE 489]

A EIGHT THOUSAND.
Q. AND OF THOSE, ABOUT HOW MANY ARE PHYSICIANS?
A. IT DEPENDS IF YOU COUNT THE HOUSE STAFF PHYSICIANS AND THE ATTENDING PHYSICIANS. THERE ARE ABOUT 450 SOME ODD HOUSE STAFF PHYSICIANS, THOSE ARE INTERNS, RESIDENTS AND FELLOWS.
Q: YES, SIR.
A. AND I THINK PROBABLY AROUND FOUR HUNDRED PHYSICIANS ATTENDANT.
Q. OKAY. DOCTOR, WE ARE HERE TRYING A CASE INVOLVING THE. INTERAGENCY POLICY. WAS THAT POLICY PRESENTED TO THE COMMITTEE THAT YOU WERE CHAIRMAN OF, THE EXECUTIVE COMMITTEE OF THE MEDICAL UNIVERSITY?
A. THE HOSPITAL EXECUTIVE COMMITTEE, YES. YES, THAT'S THE COMMITTEE.
Q. YES, SIR.
A. YES, IT WAS PRESENTED.
Q. AND WAS THAT POLICY ULTIMATELY APPROVED BY THE COMMITTEE

YOU WERE CHAIRMAN OF?
A. IT WAS.
Q. AND WAS THE POLICY AS PROPOSED CONSISTENT WITH THE NORMS AND STANDARDS FOR THE APPROVAL OF PROTOCOLS AND POLICIES AT THE MEDICAL UNIVERSITY?
A. YES.
Q. AND WHEN WAS THE POLICY CONSIDERED BY THE EXECUTIVE COMMITTEE APPROVED APPROXIMATELY?

[DEL BENE 490]

A. NOVEMBER OF 1989.
Q. ALL RIGHT, SIR. AND YOU WERE CHAIRMAN AT THAT TIME
A. I WAS.
Q. YOU ALSO SIT ON THE BOARD OF THE MEDICAL UNIVERSITY?
A. NO, I DON'T.
Q. YOU DON'T?
A. NO.
Q. WAS THIS POLICY ULTIMATELY SUBMITTED TO THE ENTIRE BOARD OF THE MEDICAL UNIVERSITY FOR APPROVAL?
A. IT WAS.
Q. AND IS THAT CONSISTENT WITH THE NORMS AND STANDARDS FOR THE APPROVAL OF SUCH A POLICY?
A. YES.
Q. AND WAS IT APPROVED BY THE BOARD OF THE MEDICAL UNIVERSITY?
A. IN JANUARY OF 1990.
Q. WHY DID IT TAKE SO LONG TO GET IT APPROVED?
A. UMM -

Q. NOVEMBER OF '89 TO JANUARY?
A. I KNOW. THERE WAS A - NOT A REGULAR MEETING OF THE BOARD BETWEEN THOSE TWO, BECAUSE OF AN EMERGENCY MEETING OF THE BOARD WAS CALLED TO ASSESS THE DAMAGE TO THE MEDICAL UNIVERSITY FROM THE STORM THAT CAME THROUGH.
Q. HURRICANE HUGO.
A. SO REGULAR BUSINESS WAS POSTPONED UNTIL JANUARY OF 1990.

[DEL BENE 491]

Q. DID THIS POLICY GO THROUGH THE NORMAL STANDARDS AND METHODS BY WHICH POLICIES ARE SUBMITTED TO THE EXECUTIVE COMMITTEE AND ULTIMATELY TO THE FULL BOARD THAT GOVERNS THE MEDICAL UNIVERSITY?
A. YES.
Q. ARE THE CONTENTS OF THE POLICY CONSISTENT WITH THOSE NORMAL STANDARDS AND PROTOCOLS AND THE NORMS FOR THE MEDICAL UNIVERSITY?
A. YES.
Q. AND WHEN THE POLICY WAS REVISED, WAS THERE ANY NEED TO TAKE THE POLICY BACK THROUGH YOUR COMMITTEE AND BACK TO THE BOARD?
A. IT DEPENDS. IF - IF THERE ARE MINOR CHANGES AND CHANGES WHICH ARE NOW ADDING TO THE POLICY, THEY MIGHT BE LEFT - THE

REVIEW MIGHT BE LEFT TO THE REGULAR CYCLE FOR REVIEW OF POLICY.

Q. OKAY. HERE THE CHANGE WAS ADDITIONAL CRITERIA FOR TESTING REQUIRING URINE DRUG SCREENS. WOULD THAT REQUIRE GOING BACK THROUGH THE WHOLE DEAL AGAIN?

A. IF IT WAS ADDITIONAL?

Q. YES. ADDED TWO OR THREE ADDITIONAL CRITERIA, I BELIEVE.

A. IF IT WAS ADDING TO THE POLICY, IF IT WAS MAKING IT MORE STRICT OR MORE DIFFICULT, IT PROBABLY SHOULD GO THROUGH. BACK THROUGH.

Q. AND IF THE POLICY ORIGINALLY CALLED FOR THE ARREST ON

[DEL BENE 492]

DELIVERY OF A WOMAN WHO TESTED POSITIVE, AND THREE MONTHS LATER WAS CHANGED SO THAT THAT WOMAN WAS GIVEN THE OPTION OF AMNESTY IF SHE WENT INTO SUBSTANCE ABUSE, WOULD THAT REQUIRE GOING BACK THROUGH THE EXECUTIVE COMMITTEE AND THE FULL BOARD?

A: IT MIGHT NOT, NO.

Q: THANK YOU. ARE THERE MANY NORMS AND STANDARDS, PROTOCOLS THAT GO THROUGH THE EXECUTIVE COMMITTEE AND ULTIMATELY TO THE BOARD AT THE MEDICAL UNIVERSITY THAT END UP BEING POLICIES IN THE HOSPITAL?

A. THE HOSPITAL, YES, QUITE A FEW.

Q. AND WAS THIS INTERAGENCY POLICY ANY DIFFERENT THAN ANY OF THE OTHERS?
A. WELL, EACH ONE ADDRESSES A DIFFERENT PROBLEM OR TOPIC. BUT THEY - THEY COME THROUGH THE SAME PROCESS. AND THEY ARE CONSIDERED IN THE SAME WAY. AND THEY ARE EITHER APPROVED OR NOT.
Q. WAS THERE ANYTHING ABOUT THIS POLICY WHICH WAS FORMULATED OR IMPLEMENTED, TO YOUR PERSONAL KNOWLEDGE, IN A DISCRIMINATORY FASHION?
A. NOT TO MY KNOWLEDGE.
Q. WOULD THE EXECUTIVE COMMITTEE OF THE BOARD HAVE APPROVED ANY POLICY THAT DISCRIMINATED?
MR. WHERRY: OBJECTION. -
MR. HOOD: YOU WERE CHAIRMAN.
MR. WHERRY: COMPETENCE.
* * *

[DEL BENE 507]

Q. HOW IT WOULD WORK?
A. I WOULD PRESENT IT. PRESENT THE POLICY TO THEM. IT'S -
Q. AND ONE OF THE THINGS THAT WAS PART OF HOW IT WOULD WORK WAS WHETHER OR NOT THE PATIENTS WOULD BE ARRESTED, FAIR?
MR. HOOD: IF THE COURT PLEASE, THE POLICY DOES NOT MENTION ARREST.
THE COURT: I'LL PERMIT IT. I THINK HE IS LAYING

THE PROPER FOUNDATION FOR IT.
Q. (BY MR. WHERRY, CONTINUING) FAIR?
A. IT WOULD BE - I WOULD PRESENT TO THEM JUST WHAT THE POLICY SAYS. AND WHAT WAS DISCUSSED IN PRESENTING IT AT THE HOSPITAL EXECUTIVE COMMITTEE.
Q. WELL, DOCTOR, WAS - WELL, WAS IT WHAT THE POLICY SAID OR WHAT THE POLICY WAS GOING TO DO?
A. I DON'T GET THE DISTINCTION.
Q. OKAY. IF THE POLICY SAID WE'RE NOT GOING TO ARREST ANYONE, BUT IN FACT THEY HAD ARRESTED PEOPLE AND WERE PLANNING ON DOING IT, IT WOULD BE NOT SO IMPORTANT WHAT THE POLICY SAID BUT WHAT IT WAS GOING TO DO; ISN'T THAT FAIR?
A. I WOULD REPORT WHAT THE POLICY PURPORTED TO BE PUT IN PLACE TO DO.
Q. OKAY. AND IN THIS CASE OF THIS INTERAGENCY POLICY YOU DID NOT KNOW, AND THEREFORE DIDN'T REPORT THAT THE IMPLEMENTATION OF THE POLICY WOULD INVOLVE ARRESTING PATIENTS, DID YOU?

[DEL BENE 508]

A. I REPORTED WHAT THE POLICY WAS.
Q. AND DID THAT INCLUDE THE REST OF THE PATIENTS?
A. WELL I'M NOT SURE. IT'S A LONG TIME AGO. I CAN'T REMEMBER EXACTLY WHAT WAS SAID.

MR. WHERRY: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: REDIRECT?

MR. HOOD: NO.

THE COURT: THANK YOU, DOCTOR. YOU'RE EXCUSED.

ANYTHING ELSE?

MR. HOOD: WE'VE GOT SOME MORE WITNESSES.

THE COURT: HERE?

MR. HOOD: YES, SIR. WHATEVER YOU WANT TO DO.

THE COURT: I TIPPED MY HAND WHEN I TOLD HIM I WANTED TO MOVE.

LADIES AND GENTLEMEN, WE'RE GOING TO RECESS. I HAVE BEEN THINKING ABOUT THE LENGTH OF OUR RECESS AND I HAVE REALLY. REGRETTED THAT WE HAVE GOT TO RECESS, BECAUSE I'M NOT GOING TO BE AVAILABLE THE REST OF THIS WEEK. BUT WHEN I STARTED THINKING ABOUT IT TODAY, AS MUCH AS I LOVE TO PARTICIPATE IN THE TRIAL OF LAWSUITS, I REALLY THOUGHT THAT IT WOULD BE A GREAT RELIEF TO HAVE A FEW DAYS OFF, BECAUSE THIS IS NOT YOUR AVERAGE LAWSUIT, IT'S VERY COMPLICATED. IT'S VERY DIFFICULT I THINK FOR THE LAWYERS, AND CERTAINLY IT'S-DIFFICULT FOR ME TO DETERMINE EXACTLY WHAT IS ADMISSIBLE AND WHAT SHOULD BE HEARD

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF FRAMPTON DURBAN

[DURBAN 71]

PAGE 71, LINE 17-20
PAGE 72, LINE 17-25
PAGE 73, LINE 1.

(REFER TO PREVIOUSLY FILED TRANSCRIPT OF TESTIMONY OF CELESTE PATRICK AND CRYSTAL FERGUSON.)

- - -

FRAMPTON DURBAN, PLF.
WITNESS, SWORN
DIRECT EXAMINATION

MS. DUNN:

Q. WOULD YOU STATE YOUR FULL NAME, PLEASE.

A. YES. FRAMPTON DURBAN.

Q. WHAT DO YOU DO?

A. I'M THE CHIEF LEGAL COUNSEL FOR THE CHARLESTON COUNTY DEPARTMENT OF SOCIAL SERVICES.

Q. AND WHAT DO YOU DO IN THAT CAPACITY?

A. I REPRESENT DSS IN ALL CIVIL ACTIONS INVOLVING ALLEGATIONS OF CHILD ABUSE AND NEGLECT IN CHARLESTON COUNTY.

Q. WHAT DOES IT MEAN WHEN YOU REFER TO A CIVIL ACTION

INVOLVING?
A. AS OPPOSED TO CRIMINAL. THESE ARE FAMILY COURT INTERVENTIONS ON BEHALF OF FAMILIES WHERE THERE WAS BEEN CHILD ABUSE AND NEGLECT.
Q. AND WHAT IS THE PURPOSE OF THOSE FAMILY COURT

[DURBAN 72]

INTERVENTIONS?
A. TO REUNITE THE PARENTS AND THE CHILDREN IF IT CAN BE DONE WITH THE CHILD'S BEST INTEREST.
Q. HOW LONG HAVE YOU HELD THAT POSITION?
A. WITH DSS SINCE NOVEMBER OF '94.
Q. AND WHAT DID YOU DO PRIOR TO TAKING THE POSITION WITH DSS IN 1994?
A. I WAS ASSISTANT SOLICITOR IN CHARGE OF THE FAMILY COURT DIVISION OF THE NINTH CIRCUIT SOLICITOR'S OFFICE.
Q. SO YOU WORKED FOR THE SOLICITOR'S OFFICE AT THAT POINT?
A. YES, I DID.
Q. WHAT DID YOU DO IN THAT CAPACITY?
A. I DID BASICALLY THE SAME THING THAT I'M DOING NOW EXCEPT FOR A DIFFERENT BOSS. AND I ALSO PROSECUTED JUVENILE OFFENSES.
Q. IN EITHER OF THE POSITIONS WHEN YOU WORKED FOR THE SOLICITOR'S OFFICE, OR NOW, DO YOU HAVE ANY DIRECT INVOLVEMENT

WITH ANY CRIMINAL PROSECUTION OF CRIMINAL CHILD ABUSE?
A. NO.
Q. WHEN DID YOU BEGIN YOUR POSITION AS ASSISTANT SOLICITOR?
A. IN THE SUMMER OF 1989.
Q. AND WHAT PART OF THE SUMMER?
A. JULY I BELIEVE IT WAS. FIRST OF JULY.
Q. AND WHEN YOU STARTED THAT JOB, DID YOU START IN THE SAME POSITION THAT YOU HELD UNTIL 1994?

[DURBAN 73]

A. I STARTED IN THE POSITION OF REPRESENTING THE DEPARTMENT OF SOCIAL SERVICES. THERE WERE TWO ATTORNEYS IN THAT OFFICE. WITHIN SIX MONTHS I WAS PROMOTED BY SOLICITOR CHARLIE CONDON TO MANAGING ASSISTANT SOLICITOR IN CHARGE OF ALL JUVENILE PROSECUTION AND CHILD ABUSE.
Q. WERE YOU FAMILIAR WITH THE CHILD ABUSE LAWS IN SOUTH CAROLINA IN THE SUMMER OF 1989?
A. I MADE MYSELF FAMILIAR WITH THEM PRETTY QUICK.
Q. WERE YOU ALSO FAMILIAR WITH THE CHILD ABUSE LAWS OF THE STATE OF SOUTH CAROLINA IN THE FALL OF 1989?
A. YEAH.
Q. WAS THERE ANY SIGNIFICANT CHANGE IN THOSE LAWS FROM JULY OF 1989 TO OCTOBER OF 1989?
A. NOT IN THE STATUTORY LAW, NO.

Q. WERE YOU FAMILIAR WITH A WORKING AGREEMENT THAT WEINT INTO PLACE IN THE CITY OF CHARLESTON POLICE, THE SOLICITOR'S OFFICE AND THE MEDICAL UNIVERSITY OF SOUTH CAROLINA CONCERNING THE MANAGEMENT OF DRUG-USING PREGNANT WOMEN OR POSTPARTUM WOMEN?

A. I WAS MADE AWARE OF THAT WORKING AGREEMENT SOME MONTHS AFTER I STARTED WITH THE SOLICITOR'S OFFICE.

Q. WHEN DID YOU RECALL LEARNING ABOUT IT FOR THE FIRST TIME?

A. I DON'T RECALL, BUT I BELIEVE IT WAS NEAR THE END OF THE YEAR 1989 OR FIRST OF THE YEAR 1990.

Q. DO I TAKE FROM THAT ANSWER THEN THAT YOU WERE NOT IN INVOLVED IN ANY OF THE INITIAL DESIGNING OF THAT POLICY?

* * *

[DURBAN 75]

LEVEL OF THAT RISK, WHETHER IT WAS A RISK SUFFICIENT TO WARRANT THE REMOVAL OF THE CHILD FROM THAT ENVIRONMENT OR WHETHER IT WAS THE RISK THAT COULD BE ADDRESSED WITH THE FAMILY UNIT INTACT. IN OTHER WORDS, LEAVING THE CHILD WHERE THE CHILD WAS AND WORKING WITH THE ENTIRE FAMILY UNIT WITHOUT REMOVING THE CHILD.

Q. MR. DURBAN, I HAD ASKED YOU SPECIFICALLY ABOUT A REPORT

OF SUSPECTED CHILD ABUSE THAT INVOLVED A PREGNANT WOMEN. WOULD THERE BE ANY REMOVAL ISSUES INVOLVED IN THAT SITUATION?

A. I DON'T UNDERSTAND YOUR QUESTION.

Q. IF THERE WAS A REPORT OF SUSPECTED CHILD ABUSE, WHEN WHAT WAS REPORTED IS: I'M WORKING WITH A PREGNANT WOMEN WHO IS USING DRUGS, THIS IS BABY CHILD ABUSE, THE DEPARTMENT SOCIAL SERVICES INVESTIGATES IF THAT WERE THE REPORT?

A. IF YOUR QUESTION IS THAT THE REPORT INVOLVED ALLEGATIONS OF ABUSE TO THE THEN UNBORN CHILD AS OPPOSED TO ANY OTHER CHILDREN THAT MAY BE IN THE HOME, DSS AS A MATTER OF POLICY AT THAT TIME DID NOT GET INVOLVED WITH ALLEGATIONS OF ABUSE TO UNBORN CHILDREN.

Q. AND WHAT TIME ARE YOU REFERRING TO?

A. IN THE SUMMER AND FALL OF 1989.

Q. DID THAT CHANGE IN THE - IN, SAY, THE EARLY PART OF 1990?

A. TO MY KNOWLEDGE IT DID NOT CHANGE UNTIL THE LAW CHANGED EARLIER THIS YEAR.

[DURBAN 76]

Q. SO THAT YOU'RE SAYING THAT IN THE SUMMER OF 1989, THE DEPARTMENT OF SOCIAL SERVICES' POSITION WAS THAT THERE WAS

NOTHING TO INVESTIGATE AT THAT POINT IF THERE WERE NOT OTHER CHILDREN IN THE HOME?

A. THAT'S CORRECT.

Q. IN THE SUMMER OF 1989, IF THE DEPARTMENT OF - SUMMER OF 1989. IF THE DEPARTMENT OF SOCIAL SERVICES HAD RECEIVED A REPORT OF SUSPECTED CHILD ABUSE THAT INVOLVED DRUG USE OF A PARENT, WHAT SORT OF RESOURCES DID THE DEPARTMENT OF SOCIAL SERVICES HAVE TO INVESTIGATE THAT KIND OF REPORT?

A. THEY HAD ASSESSMENT WORKERS, AS I SAID, WHO WERE TRAINED BY THE STATE WHO WORKED HAND-AND-HAND UNDER THE LAW WITH LAW ENFORCEMENT OFFICERS AND OTHER SERVICE PROVIDERS THAT HAD DIRECT KNOWLEDGE OF WHAT WAS GOING ON IN THE FAMILY TO ASSESS WHAT RISK, IF ANY, THERE WAS TO THE CHILDREN BY THE PARENTS.

SO THE INVESTIGATING WORKERS WOULD INTERVIEW, THEY WOULD HAVE AVAILABLE RECORDS, THEY WOULD HAVE AVAILABLE PEOPLE THAT WERE INVOLVED. LAW ENFORCEMENT INVESTIGATIONS WERE REQUIRED BY LAW TO BE SHARED WITH THE DEPARTMENT OF SOCIAL SERVICES. THOSE SORTS OF TOOLS.

Q. BUT WHAT KIND OF THINGS WOULD THE INVESTIGATOR LOOK AT TO DETERMINE WHAT SORT OF INTERVENTION THE DEPARTMENT OF SOCIAL SERVICES NEEDED TO MAKE?

A. THE LEVEL OF RISK. THE WAY THE LAW READS, IF THE RISK RISES TO THE LEVEL OF SUBSTANTIAL RISK OF DEATH OR SERIOUS

[DURBAN 77]

BODILY HARM, THEN THAT UNDER THE LAW WARRANTS THE REMOVAL OF THE CHILD FROM THAT ENVIRONMENT EITHER INTO PROTECTIVE CUSTODY. USUALLY INTO THE PROTECTIVE CUSTODY. IF THE RISK TO THE CHILD, WHATEVER IT MAY BE, DOESN'T RISE TO THAT LEVEL, THEN THE FAMILY CAN STILL BE SUBJECT TO SOCIAL SERVICES INTERVENTION WITHOUT THE CHILDREN BEING REMOVED, EITHER AS I SAID WITH THE CHILDREN REMAINING IN THE HOME WITH THE PARENTS OR BEING PLACED WITH A COLLATERAL RELATIVE WHO CAN TAKE CARE OF THEM WHILE TREATMENT IS BEING GIVEN TO THE PRIMARY PARENTS.

Q. WAS ONE OF THE ISSUES THAT SOMETIMES CAME UP WITH THE PROCESS OF INVESTIGATING SUSPECTED CHILD ABUSE THE FACT THAT A PARENT WHO WAS IN THE HOME WITH THE CHILD NEEDED TO BE IN SUBSTANCE ABUSE TREATMENT BUT WAS NOT?

A. WAS THAT AN ISSUE THAT CAME UP, IS THAT YOUR QUESTION?

Q. YES. YES.

A. WELL THAT WAS ALWAYS AN ISSUE. LOGISTICS OF TREATMENT

WAS ALWAYS AN ISSUE THAT HAD TO BE ADDRESSED. AND IT WAS FACTORED IN WHEN THEY WERE ANALYZING THE RISK AS TO WHETHER OR NOT THE PARENT WITHOUT THE CHILDREN HAVING A PLACEMENT OUT OF THE HOME, WOULD BE AVAILABLE FOR TREATMENT.

Q. WHAT -

A. AT THE LEVEL THAT THE SERVICE PROVIDERS FELT WAS NECESSARY.

Q. IF THE SERVICE PROVIDER FELT THAT A PARENT, A MOTHER OR A FATHER NEEDED TO BE IN SUBSTANCE ABUSE TREATMENT, BUT THAT

[DURBAN 78]

PARENT WASN'T, WHAT RESOURCES DID THE SERVICE PROVIDER HAVE IN ORDER TO PROVIDE THAT PARENT SOME INCENTIVE TO GET INTO TREATMENT?

A. INCENTIVE TO GET INTO TREATMENT?

Q. YES.

A. WOULD BE THE INTERVENTION OF THE FAMILY COURT.

Q. TELL ME WHAT THAT WOULD BE?

A. IT'S A MANDATED TREATMENT PLAN. A TREATMENT PLAN THAT DSS CASES ARE NOT CRIMINAL IN NATURE AND THEY'RE NOT MONETARY, WE'RE NOT SEEKING MONEY DAMAGES FROM ANYBODY AND NOT TRYING TO PUT ANYBODY IN JAIL. THE PURPOSE OF FAMILY COURT INTERVENTION IS COMPULSORY. IT'S TO MAKE THE PARENTS UNDER PENALTY OF A

COURT ORDER TO GO THROUGH WHATEVER TREATMENT PROGRAM HAS BEEN - HAS BEEN DESIGNED BY DSS AND ADOPTED BY THE COURT. SO THE INCENTIVE WOULD BE THE EXISTENCE OF THAT COURT ORDER IN ORDER TO GET TREATMENT.

Q. AND HOW WOULD THE DEPARTMENT OF SOCIAL SERVICE GO ABOUT OBTAINING SUCH A COURT ORDER IF IT WAS DEEMED THAT THAT WAS NECESSARY IN ORDER TO PROTECT THE CHILDREN?

A. THEY WOULD FILE AN ACTION IN FAMILY COURT ASKING FOR INTERVENTION AT SOME LEVEL. ONE OF THOSE THREE LEVELS, EITHER IN HOME SERVICES, COLLATERAL PLACEMENT OR FOSTER CARE REMOVAL.

Q. AND ONCE THAT ACTION WAS FILED, THEN WHAT HAPPENED?

A. THERE WOULD BE A HEARING. A TREATMENT PLAN WOULD BE FORMULATED. AND THAT TREATMENT PLAN WOULD CONTAIN SERVICES TO

[DURBAN 79]

BE OFFERED TO THE FAMILY THAT WERE DESIGNED TO CORRECT THE RISKS THAT HAD CAUSED THE INVOLVEMENT OF DSS. AGAIN WHATEVER THOSE RISKS MAY BE. THAT TREATMENT PLAN WOULD BE OFFERED TO THE PARENTS. THEY WOULD EITHER ACCEPT IT OR THEY WOULD REJECT IT. IF THEY REJECTED IT, DSS HAD THE OPPORTUNITY TO PROVE THE

NEED FOR THOSE SERVICES IN FRONT OF THE FAMILY COURT TO HAVE THAT TREATMENT PLAN MANDATED WITHOUT THE PARENTS' CONSENT. NORMALLY IN 95 PERCENT OF THE CASE THE PARENTS CONSENT TO THE ENTRY OF A TREATMENT PLAN, AND IT'S ADOPTED BY COURT ORDER SUBJECT TO PERIODIC REVIEW BY THE COURT.

Q. ARE THE PARENTS IN THAT SITUATION ACTUALLY SERVED THE DOCUMENT INITIATING THE LEGAL PROCEEDING?

A. YES, THEY ARE.

Q. ARE THEY GIVEN NOTICE OF THE LEGAL PROCEEDING?

A. YES, THEY ARE.

Q. ARE THEY GIVEN THE OPPORTUNITY TO HAVE COUNSEL IN THAT LEGAL PROCEEDING IF THEY SO DESIRE?

A. YES, SIR.

Q. IF PARENTS ARE NOT ABLE TO AFFORD THEIR OWN COUNSEL IS THERE A MECHANISM FOR COUNSEL TO BE APPOINTED FOR THEM?

A. YES. AND THEY'RE NOTIFIED WHEN THE ORIGINAL PAPERS ARE SERVED ON THEM OF THAT RIGHT TO HAVE COUNSEL APPOINTED TO REPRESENT THEM.

Q. IF AN ORDER IS ISSUED EITHER BY AGREEMENT OF THE PARTIES OR AFTER A HEARING THAT MANDATES SUBSTANCE ABUSE TREATMENT,

HOW WOULD THAT ORDER BECOME KNOWN TO THE PARENTS IN THE SITUATION THAT WE HAVE BEEN TALKING ABOUT?

A. THE PARENTS ARE IN THE COURTROOM WHEN THE ORAL ORDER IS ISSUED. AND THEN THE PARENTS ARE SERVED WITH A COPY OF THE WRITTEN ORDER ONCE IT'S BEEN SIGNED BY THE COURT.

Q. IF A SITUATION WERE TO ARISE WERE SUBSTANCE ABUSE TREATMENT HAD BEEN COURT-ORDERED IN THE MANNER THAT YOU HAVE DESCRIBED, EITHER BY AN AGREEMENT OR AFTER A HEARING, AND A PARENT FAILED TO COMPLY WITH THE COURT ORDER, WHAT RESOURCES WERE AVAILABLE THEN TO THE DEPARTMENT OF SOCIAL SERVICES TO PURSUE THE PARENTS' PARTICIPATION IN SUBSTANCE ABUSE TREATMENT?

A. WELL, AGAIN, THERE WERE TWO SIDES TO THE DECISION THAT HAD TO BE MADE. THE FIRST ONE WAS WHETHER THAT FAILURE INCREASED THE LEVEL OF RISK OF THE CHILDREN. IF THE FAILURE TO COMPLETE THE TREATMENT INCREASED THE LEVEL OF RISK TO THE CHILDREN SUCH THAT THE CHILDREN WERE AT RISK OF DEATH OR SERIOUS BODILY HARM IN THE HOME, DSS WOULD ATTEMPT TO REMOVE THE CHILDREN EITHER THROUGH LAW ENFORCEMENT INVOLVEMENT OR THROUGH A FAMILY COURT ORDER.

IF ON THE OTHER HAND THE RISK WAS NOT ENOUGH TO CHANGE THE TREATMENT PLAN TO CHANGE THE ENVIRONMENT OF THE CHILDREN, IF THE CHILDREN COULD STAY WHERE THEY WERE, BUT THE PARENT WAS STILL FLUNKING THE TREATMENT PLAN, AS IT WERE, DSS HAD THE REMEDY OF SEEKING TO BRING THEM BACK BEFORE THE FAMILY

[DURBAN 81]

COURT FOR CONTEMPT OF THAT FAMILY COURT ORDER FOR FAILING TO COMPLY WITH THE ORDER, AND THERE COULD BE AN ACTION BY THE COURT FOR THAT CONTEMPT INCLUDING UP TO A YEAR IN JAIL OR A FINE OR CERTAIN HOURS OF COMMUNITY SERVICE.

Q. MR. DURBAN, YOU HAVE DESCRIBED SOMETHING BUT YOU HAVE USED SOME TERMS OF ART IN THERE THAT PEOPLE FAMILIAR WITH THE LEGAL SYSTEM MIGHT UNDERSTAND BUT PEOPLE NOT FAMILIAR MIGHT NOT UNDERSTAND. CAN YOU TELL ME WHAT A RULE TO SHOW CAUSE HEARING WOULD BE?

A. YEAH. CONTEMPT OF COURT IS A WILLFUL VIOLATION OF A FAMILY COURT ORDER OR A COURT ORDER WITHOUT JUST CAUSE OR EXCUSE IS THE WAY THE LAW READS. A RULE TO SHOW CAUSE IS A DOCUMENT THAT IS SERVED ON SOMEONE NOTIFYING THEM THAT THEY

HAVE TO APPEAR BEFORE THE COURT AND SHOW A REASON WHY THEY SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING THE ORDER OF THE COURT. IT GIVES THEM AN OPPORTUNITY TO BE HEARD WHEN THEY HAVE, ON THE FACE OF IT, VIOLATED THE COURT ORDER. IT GIVES THEM A CHANCE TO SAY I HAD A REASON FOR VIOLATING THAT COURT ORDER, I DIDN'T KNOW ABOUT THE COURT ORDER OR I'M INCAPABLE OF COMPLYING WITH THE COURT ORDER. THERE ARE ANY NUMBER OF REASONS. OR I'M NOW IN COMPLIANCE. I REALIZE I WAS NOT AT THE TIME BUT NOW I AM. THERE ARE ANY NUMBER OF REASONS THAT SOMEONE COULD GIVE. THE RULE TO SHOW CAUSE IS A DOCUMENT TELLING THEM TO COME TO FAMILY COURT AND EXPLAIN WHY THEY VIOLATED THE ORDER.

* * *

[DURBAN 83]

Q. CAN YOU GIVE US A SAMPLE OF THE CATEGORIES OF CHILD ABUSE THAT ARE DEALT WITH, THE GENERAL CATEGORIES?

A. WELL IT'S APPARENT I THINK ONE OF THE BIG MISCONCEPTIONS ABOUT SOCIAL SERVICES THAT IF YOU SPANK YOUR CHILD THE CHILD IS GOING TO BE TAKEN AWAY. THAT'S CERTAINLY NOT THE WAY PROTECTIVE SERVICES OPERATES. THERE IS EVER INCREASING WHAT

WE CALL THRESHOLD LIMIT TO EACH DETERMINATION THAT TAKES PLACE ALONG THE LINE.

THE FIRST THRESHOLD IS A REPORTING THRESHOLD. THERE ARE CERTAIN PROFILES IN SOUTH CAROLINA WHO ARE REQUIRED TO REPORT IF THEY SEE A REASON TO BELIEVE, AND THAT'S A VERY LOW THRESHOLD, IT DOESN'T SAY A GOOD REASON, IT DOESN'T SAY A COMPELLING REASON, IT DOESN'T SAY BEYOND A REASONABLE DOUBT, IT SAYS A REASON TO BELIEVE THAT A CHILD HAS BEEN ABUSED OR NEGLECTED.

THERE ARE CERTAIN PROFESSIONALS, THE MEDICAL COMMUNITY, THE THERAPEUTIC COMMUNITY THAT ARE REQUIRED TO REPORT. ONCE THEY HAVE REPORTED, THE DEPARTMENT OF SOCIAL SERVICES' INVESTIGATIVE THRESHOLD IS TO DETERMINE WHETHER IT IS MORE LIKELY THAN NOT, WHICH IS BASICALLY WHAT IS A CIVIL PREPONDERANCE OF THE EVIDENCE STANDARD. WHAT IS MORE LIKELY THAN THAT 51 PERCENT THAT THIS CHILD WAS ABUSED.

IF THE DSS WORKER DETERMINES THAT IT'S MORE LIKELY THAN NOT THAT THE CHILD WAS ABUSED, THEN YOU HAVE IS KNOWN AS AN INDICATED PROTECTIVE SERVICES CASE. THEN THAT MEANS THAT

DSS HAS THE RIGHT TO PROPOSE A TREATMENT PLAN AND TO SEEK MANDATORY ENFORCEMENT OF A PLAN IF THE PARENTS DON'T AGREE TO IT. AS PART OF THAT ANALYSIS THEY ALSO HAVE TO LOOK AT WHETHER OR NOT IT IS MORE LIKELY THAN NOT THAT THE CHILD IS AT THE SUBSTANTIAL RISK OF HARM THAT JUSTIFIES REMOVAL OF THE CHILD.

NOW THAT IS IF THE DSS INVESTIGATION PROCEEDS AS A DSS INVESTIGATION. THE OTHER WAY WE GET CHILDREN INTO PROTECTIVE CUSTODY IS THROUGH LAW ENFORCEMENT INVOLVEMENT. IF A LAW ENFORCEMENT OFFICER RESPONDS TO A POLICE CALL AND FINDS CHILDREN IN HARMS WAY, THE LAW ENFORCEMENT OFFICER, WITH NO PRIOR NOTICE TO SOCIAL SERVICES, CAN TAKE A CHILD INTO EMERGENCY PROTECTIVE CUSTODY MAKING THE SAME DETERMINATION THAT DSS WOULD MAKE. AND THAT IS THAT THE CHILD - THAT IT'S MORE LIKELY THAN NOT THAT THE CHILD IS AT RISK OF DEATH OR SERIOUS BODILY HARM.

IF A LAW ENFORCEMENT OFFICER DOES SO THEY THEN IMMEDIATELY NOTIFY DSS AND TURN THE CHILD OVER TO DSS FOR PROTECTIVE PLACEMENT UNTIL THERE IS A PRELIMINARY HEARING TO DETERMINE WHAT IS GOING TO HAPPEN UNTIL THE MATTER IS TRIED.

SO AT EACH OF THOSE STAGES THERE IS A THRESHOLD TO THE DETERMINATION. ONCE WE GET INTO COURT, IT'S UP TO A COURT TO DECIDE WHETHER IT IS MORE LIKELY THAN NOT, OR BY A PREPONDERANCE OF THE EVIDENCE, WHETHER OR NOT THE CHILD HAS BEEN SUBJECT TO ABUSE OR NEGLECT OR WHETHER OR NOT THE ABUSE

[DURBAN 85]

OR NEGLECT RISES TO THE LEVEL OF SUBSTANTIAL RISK THAT WOULD JUSTIFY A REMOVAL. IF WE DON'T MEET THAT THRESHOLD THE CASE IS OVER AND EVERYBODY GOES HOME INCLUDING THE CHILD.

SO AT EACH OF THOSE STAGES THERE IS AN OPPORTUNITY FOR A DECISION TO BE MADE BY SOMEONE CULMINATING IN A FAMILY COURT JUDGE HAVING TO EITHER CONFIRM EVERYTHING THAT HAS BEEN DONE AND SAY THAT EVERYTHING THAT WAS DONE WAS ACCORDING TO THE LAW, OR TO SAY THIS INTERVENTION DID NOT ARISE THROUGH SUFFICIENT EVIDENCE TO ALLOW DSS TO INTERVENE.

Q. BUT AT SOME POINT WOULD THE COURT NEED - WOULD THE COURT BE ASKED TO MAKE A FINDING? IF INTERVENTION IS THE ROUTE THAT THE DEPARTMENT OF SOCIAL SERVICES TOOK, WOULD THE COURT BE ASKED TO MAKE A FINDING AS TO WHAT KIND OF ABUSE THIS WAS OR

MIGHT HAVE?
A. YES.
Q. AND WHAT KIND OF FINDING IS THE COURT ASKED TO MAKE?
A. THE CHILDREN'S CODE, WHICH IS THE CHILD PROTECTION CODE IN SOUTH CAROLINA, DEFINES HARM TO A CHILD TO INCLUDE PHYSICAL ABUSE, SEXUAL ABUSE, NEGLECT. WHICH IS FAILURE TO PROVIDE THE CHILD WITH THE NECESSITIES OF LIFE. AND CONTRIBUTING TO THE DELINQUENCY OF THE CHILD IS ALSO BRANDED AS A TYPE OF CHILD ABUSE. THOSE ARE THE MAIN ONES. ALSO DSS CAN INTERVENE IN A CASE WHERE THERE IS A SUBSTANTIAL RISK OF PHYSICAL ABUSE, SEXUAL ABUSE, NEGLECT OR EXPLOITATION.
Q. WHAT WOULD BE THREAT OF HARM? WHAT WOULD A FINDING OF

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[DURBAN 90]

EVERY FACTOR INVOLVING THE ENVIRONMENT OF THE CHILDREN. SO THE ANSWER IS NO.
Q. DO YOU KNOW OF ANY PECULIAR OBLIGATION PLACED UPON WOMEN AS OPPOSED TO MEN BY THE CHILDREN'S CODE OF THE STATE OF SOUTH CAROLINA?
A. I DON'T UNDERSTAND YOUR QUESTION.
Q. DO THEY HAVE ANY PECULIAR RESPONSIBILITIES?

A. NOT THAT I'M AWARE OF, AS I UNDERSTAND YOUR QUESTION.
Q. AND IS THERE ANY PART OF THE CHILDREN'S CODE THAT ADDRESSES ITSELF ONLY TO WOMEN?
A. NOT THAT I'M AWARE OF.
Q. IS THERE ANY PART OF THE CHILDREN'S CODE THAT ADDRESSES ITSELF ONLY TO PREGNANT WOMEN?
A. NOT THAT I'M AWARE OF.
Q. EARLIER IN YOUR TESTIMONY YOU INDICATED THAT YOUR FIRST DIRECT INVOLVEMENT WITH THE POLICY, THE AGREEMENT THAT WE HAVE BEEN TALKING ABOUT TODAY, TOOK PLACE YOU BELIEVED IN THE EARLY PART OF 1990; IS THAT CORRECT?
A. EITHER LATE '89 OR EARLY '90.
Q. WHAT INITIATED YOUR INVOLVEMENT?
A. I WAS ASKED BY CHARLIE CONDON'S SECRETARY TO ATTEND A MEETING AT THE MEDICAL UNIVERSITY CONCERNING THE INTERAGENCY AGREEMENT ON COCAINE BABIES.
Q. AND DID YOU ATTEND THAT MEETING?
A. YES, I DID.

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[DURBAN 92]

C, D, E AND F FOR IDENTIFICATION SHOULD BE DEFENDANT'S 5 C, D, E AND F FOR IDENTIFICATION.
Q. (BY MS. DUNN, CONTINUING) MR. DURBAN, BEFORE I CONTINUE WITH THE QUESTIONS ABOUT THE JANUARY 1990 MEETING, LET ME ASK

YOU A QUESTION CONCERNING THE APPLICABILITY OF THE POLICY THAT WE HAVE BEEN DISCUSSING. TO THE BEST OF YOUR KNOWLEDGE, WHICH HOSPITALS IN CHARLESTON WERE INVOLVED IN THE WORKING AGREEMENT BETWEEN THE CITY OF CHARLESTON, THE SOLICITOR AND THE MEDICAL UNIVERSITY?

A. THE ONLY HOSPITAL THAT I WAS AWARE WAS THE MEDICAL UNIVERSITY AND ANY HOSPITALS THAT OPERATED UNDER THE AUSPICES OF THE MEDICAL UNIVERSITY.

Q. DID IT APPLY AT PRIVATE THEN? PRIVATE HOSPITALS?

A. NOT TO MY KNOWLEDGE.

Q. SO THAT IS A HOSPITAL OTHER THAN THE ONES THAT YOU JUST DESCRIBE?

A. YES.

Q. SAINT FRANCIS?

A. RIGHT.

Q. ROPER?

A. THAT'S CORRECT.

Q. EAST COOPER?

A. THAT'S CORRECT.

Q. YOU WERE DESCRIBING A MEETING THAT YOU WENT TO IN JANUARY OF 1990; IS THAT CORRECT?

* * *

[DURBAN 94]

Q. DID YOU HAVE ANY IDEA WHEN YOU WENT TO THE MEETING WHO ACTUALLY CALLED THE MEETING?

A. NO, I DON'T.

Q. WERE ANY NOTES TAKEN OF THAT MEETING?
A. I TOOK NOTES OF THE MEETING.
Q. I'M GOING TO HAND YOU A BINDER THAT INCLUDES ALL OF THE JOINT EXHIBITS THAT ARE ALREADY IN EVIDENCE IN THIS CASE.
A. OKAY.
Q. MR. DURBAN, I CALL YOUR ATTENTION TO THE DOCUMENT MARKED JOINT EXHIBIT 3. DO YOU RECOGNIZE THAT DOCUMENT?
A. YES, I DO.
Q. CAN YOU TELL US WHAT THAT IS?
A. THIS IS A - AFTER I RETURNED FROM THAT MEETING IN JANUARY OF 1990, I TOOK THE NOTES THAT I HAD TAKEN AT THAT MEETING AND REDUCED THEM TO WRITING OR TYPED THEM ON A WORD PROCESSOR. AND THESE ARE - THIS IS THE DRAFT COPY OF THAT TYPED VERSION OF MY NOTES.
Q. TO THE BEST OF YOUR KNOWLEDGE, WAS THERE ANY OTHER VERSION THAT WAS EVER PRODUCED?
A. NOT THAT I'M AWARE OF, NO.
Q. AND DOES THIS DOCUMENT ACCURATELY REFLECT WHAT WENT ON IN THAT MEETING?
A. TO THE BEST OF MY NOTE TAKING ABILITIES, YES.
Q. THIS DOCUMENT INDICATES THAT THE - AT THAT MEETING A DECISION WAS MADE TO MAKE SOME MODIFICATION IN HOW THIS

WORKING ARRANGEMENT WORKED; IS THAT CORRECT?
A. IF I COULD REVIEW IT. IT INDICATES - THESE NOTES INDICATE THAT THERE WAS A - THERE WERE SUGGESTIONS TO MODIFY THE WAY THE POLICY WAS BEING IMPLEMENTED, YES.
Q. WHAT WAS THAT MODIFICATION?
A. THERE WAS A SUGGESTION AT FIRST THAT IF A PREGNANT FEMALE WERE TO TEST POSITIVE FOR COCAINE DURING A PRENATAL VISIT, AND IT OUTLINES WHAT THE INTERVENTION WOULD BE. THAT WOULD BE PRESENTATION OF A FILM, EXECUTING THE SOLICITOR'S LETTER INDICATING THAT IF THEY WENT INTO TREATMENT THEY WOULD NOT BE PROSECUTED. THE SECOND SUGGESTION -
Q. I'M SORRY. DID THAT PORTION, TO THE BEST OF YOUR RECOLLECTION, REFLECT ANY CHANGE? ANY MODIFICATION?
A. I DON'T BELIEVE THAT IT DID, NO.
Q. ALL RIGHT. YOU MAY CONTINUE.
A. OKAY. THE SECOND SUGGESTION WAS MADE IF A PREGNANT FEMALE TESTED POSITIVE FOLLOWING AN ADMISSION FOR LABOR, AND IT OUTLINES THE STEPS THAT WOULD BE TAKEN INCLUDING THE - REPORT BEING MADE TO DEPARTMENT OF SOCIAL SERVICES AND ASSESSMENT TO BE CONDUCTED BY THE DEPARTMENT OF SOCIAL SERVICES.
THE LETTER OF AGREEMENT, WHICH WAS SIMILAR TO THE

LETTER, THIS WAS EXECUTED BY MOTHERS WHO CAME IN FOR PRENATAL CARE. AND WAS TO BE EXECUTED. AND THE SUGGESTION WAS FOR DSS PERSONNEL TO UNDERTAKE THAT. ATTEMPT AT RELATIVE PLACEMENT.

[DURBAN 96]

PLACING THE CHILD OTHER THAN WITH THE ADDICTED MOTHER WHILE THE MOTHER UNDERWENT TREATMENT.

THE THIRD SUGGESTION WAS THAT FAILURE BY THE MOTHER, AND THIS IS AFTER A LABOR ADMISSION, TO EITHER EXECUTE THE LETTER OF AGREEMENT OR COMPLETE THE COUNSELING OR COOPERATE WITH DSS ON FINDING ALTERNATIVE PLACEMENT WOULD RESULT IN CRIMINAL PROSECUTION CONSISTENT WITH THE ORIGINAL POLICY.

Q. SO, CALLING YOUR ATTENTION TO SUBSECTION 2 OF THAT DOCUMENT, IN WHAT WAYS DO YOU RECALL THAT THAT WAS A MODIFICATION?

A. I WAS NOT AWARE OF HOW THE POLICY WAS OPERATING WHEN I WENT TO THIS MEETING. THESE WERE THE SUGGESTIONS THAT WERE MADE. IT WAS MY UNDERSTANDING FROM THE INTERACTION AT THIS MEETING, AND THIS WAS KIND OF A BRAINSTORMING SESSION TO SEE HOW EVERYTHING WAS GOING, IT WAS MY UNDERSTANDING THAT PREVIOUSLY THERE HAD NOT BEEN THE OPPORTUNITY TO AVOID

PROSECUTION THROUGH AGREEING TO AND UNDERGOING TREATMENT IF A MOTHER CAME IN AND TESTED POSITIVE FOR COCAINE DURING A LABOR ADMISSION AS OPPOSED TO COMING IN FOR PRENATAL CARE.

Q. SO WHAT HAD HAPPENED IF THE MOTHER TESTED POSITIVE WHEN SHE ARRIVED FOR LABOR AND DELIVERY?

A. I BELIEVE A REPORT WAS MADE TO LAW ENFORCEMENT. AND IF LAW ENFORCEMENT DECIDED TO PROSECUTE, THEY WOULD ARREST.

Q. IN THE PORTION THAT YOU JUST READ THERE IS A REFERENCE TO A LETTER OF AN AGREEMENT. CAN YOU TELL US WHAT A LETTER OF

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[DURBAN 98]

ALSO BEFORE YOU. HAVE YOU EVER SEEN THAT DOCUMENT BEFORE?

A. YES. THIS APPEARS TO BE THE LETTER THAT WAS DRAFTED IN RESPONSE TO THAT MODIFICATION OF THE POLICY. IT WAS A LETTER OF AGREEMENT OF THIS ONE IS DATED MARCH 26, 1990. AND JOINT EXHIBIT 5 WHICH REFERS TO TESTING POSITIVE DURING PRENATAL CARE IS DATED OCTOBER OF 1989. SO THE SECOND LETTER JOINT EXHIBIT NUMBER 6 REFERS TO A WOMEN WHO HAD TESTED POSITIVE IN CONNECTION WITH THE BIRTH OF A CHILD. SO THAT WOULD BE THE RESPONSE LETTER IN THE SECOND SITUATION WHERE A WOMEN TESTED

POSITIVE DURING DELIVERY.
Q. LET ME TAKE YOU BACK TO JOINT EXHIBIT NUMBER 3 AGAIN, WHICH IS THE MEMO THAT YOU HAD BEEN TESTIFYING ABOUT BEFORE. IS THAT THE COMPLETE DOCUMENT THAT YOU PREPARED IN JANUARY OF 1990?
A. TO THE BEST OF MY KNOWLEDGE CONTAINS KIND OF A DISCLAIMER AT THE VERY END OF PAGE TWO SAYING ANYBODY THAT WANTED TO MODIFY IT SHOULD GET IN TOUCH WITH ME. SO I THINK THAT'S THE END OF IT.
Q. I'M HANDING YOU A DOCUMENT THAT HAS BEEN PREMARKED PLAINTIFF'S EXHIBIT NUMBER 31. MR. DURBAN. I'M HANDING YOU A DOCUMENT THAT IS MARKED PLAINTIFF'S 31. DO YOU RECOGNIZE THIS DOCUMENT.
A. I DON'T RECALL THIS DOCUMENT, NO. ALTHOUGH IT DOES APPEAR TO BE TYPED ON MY WORD PROCESSOR, SO I MAY HAVE MADE -
Q. SO YOU THINK YOU MAY HAVE WRITTEN THIS?

* * *

[DURBAN 100]

ABUSE, I DO THINK IT'S RELEVANT THAT THE DEPARTMENT OF SOCIAL SERVICES -
THE COURT: I DON'T THINK IT IS. I SUSTAIN THE OBJECTION. DISREGARD THAT, LADIES AND GENTLEMEN.

Q. (BY MS. DUNN, CONTINUING) MR. DURBAN, DID YOU DISSEMINATE THE DOCUMENT THAT YOU HAD ALREADY REFERRED TO AS IN JOINT EXHIBIT NUMBER 3 WHICH IS THE MEMO THAT YOU WROTE?

A. I KNOW I GAVE IT TO CHARLIE CONDON. I BELIEVE I ALSO SENT A COPY OF IT TO THE MEDICAL UNIVERSITY GENERAL COUNSEL, MR. GOOD. AND I SENT A COPY OF IT TO MY CLIENT THE DEPARTMENT OF SOCIAL SERVICES. AS TO WHETHER OR NOT IT GOT TO SUBSTANCE ABUSE I DON'T RECALL.

Q. MR. DURBAN, DO YOU RECALL WHETHER OR NOT THERE WERE ANY CHANGES IN THE UNDERLYING CHILDREN'S CODE INSOFAR AS IT DEALT WITH THE ABUSE OF CHILDREN BETWEEN OCTOBER 1990 AND JANUARY OF 1990?

A. OCTOBER OF '89?

Q. '89. '89, YES.

A. NOT THAT I'M AWARE OF.

Q. MR. DURBAN, COULD I HAVE YOU LOOK AGAIN AT THE JOINT EXHIBIT 5 AND JOINT EXHIBIT 6.

A. YES.

Q. THESE ARE THE DOCUMENTS THAT YOU HAD DESCRIBED IN YOUR MEMO AND IN YOUR TESTIMONY AS A LETTER OF AGREEMENT; IS THAT CORRECT?

[DURBAN 101]

A. THAT'S CORRECT.

Q. HOW ARE THESE DOCUMENT LETTERS OF AGREEMENT?
A. WELL THAT WAS JUST A NAME THAT WAS DISCUSSED. IT WAS AN AGREEMENT BY THE SOLICITOR AS THE CHIEF LAW ENFORCEMENT OFFICER IN CHARLESTON COUNTY NOT TO PROSECUTE, TO IN ESSENCE WAIVE PROSECUTION TO SOMEONE WHO WOULD GO INTO TREATMENT. IT'S A LETTER FROM THE SOLICITOR AGREEING THAT HE WOULD NOT PROSECUTE IF THEY WENT INTO TREATMENT.
Q. IT'S NOT LETTER OF A PATIENT AGREEING TO ANYTHING, IS IT?
A. NO. NO. IN FACT THEIR SIGNATURE ON THESE DOCUMENTS WAS ONLY TO ACKNOWLEDGE THAT THEY HAD RECEIVED IT.
Q. MR. DURBAN, DID YOU HAVE ANY FURTHER ROLE IN THE MODIFICATION OR THE IMPLEMENTATION OF A POLICY INVOLVING THE MEDICAL UNIVERSITY, THE CITY OF CHARLESTON AND SOLICITOR'S OFFICE?
A. I AGREED AS A REPRESENTATIVE OF THE SOLICITOR'S OFFICE - YOU KNOW, AT THAT POINT - AT THIS POINT IN MY POSITION I'M AN EMPLOYEE OF THE STATE AS IN-HOUSE COUNSEL MORE OR LESS FOR DSS. AT THAT TIME I WAS AN EMPLOYEE OF THE SOLICITOR'S OFFICE AND WE REPRESENTED DSS, SO DSS WAS MY CLIENT. I AGREED ON BEHALF OF THE SOLICITOR'S OFFICE TO DISCUSS THIS PROPOSED

MODIFICATION WITH THE DEPARTMENT OF SOCIAL SERVICES. AND SCHEDULED A MEETING WITH THE ADMINISTRATION OF CHARLESTON COUNTY DSS TO DISCUSS WITH THEM WHAT HAD HAPPENED AT THIS MEETING AT THE MEDICAL UNIVERSITY.

[DURBAN 102]

THE ONLY OTHER DEALING THAT I HAD WITH IT, I WAS RESPONSIBLE FOR PRESENTING THE CASES OF ANY COCAINE BABIES IN CHARLESTON COUNTY TO THE FAMILY COURT, WHETHER THEY CAME FROM THE MEDICAL UNIVERSITY OR ANYWHERE ELSE. AND I WROTE A SPEECH THAT SOLICITOR CONDON DELIVERED AT A CONFERENCE I BELIEVE AT THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION SOMETIME IN 1990 OR '91.

Q. MR. DURBAN, PRIOR TO OCTOBER 1989, IF THE DEPARTMENT OF SOCIAL SERVICES HAD RECEIVED A REPORT FROM THE MEDICAL UNIVERSITY OR ANY OTHER HOSPITAL THAT A MOTHER HAD TESTED POSITIVE FOR COCAINE AT THE TIME OF THE BIRTH OF HER CHILD, WHAT WOULD HAVE HAPPENED?

A. DSS WOULD HAVE INVESTIGATED THAT REPORT TO DETERMINE IF THERE WAS SUFFICIENT RISK TO INTERVENE IN THE FAMILY.

Q. WOULD THAT REPORT IN AND OF ITSELF HAVE RESULTED IN THE

REMOVAL OF THE CHILD FROM THE MOTHER'S CUSTODY?
A. I CAN'T ANSWER THAT FOR ANYBODY EXCEPT DSS. DSS DOES NOT HAVE THE AUTHORITY IN SOUTH CAROLINA TO REMOVE A CHILD FROM PARENTS' CUSTODY. ONLY A FAMILY COURT JUDGE OR LAW ENFORCEMENT OFFICER CAN DO THAT.
Q. DID THE DEPARTMENT OF SOCIAL SERVICES CIRCUMSTANCES IN RELATIONSHIP TO CHILDREN WHO HAD BEEN BORN WHO TESTED POSITIVE FOR COCAINE AT THE TIME OF THEIR BIRTH, CHANGE FOR PATIENTS AT THE MEDICAL UNIVERSITY AFTER THE INITIATION OF THIS POLICY?
A. NO.

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[DURBAN 108]

A. YES. I DID SOME BACKGROUND RESEARCH OF MY OWN AND I ALSO HAD AT LEAST ONE MEETING WITH SOLICITOR OF THE CITY OF CHARLESTON, CHARLIE CONDON. HE WANTED ME TO BE THE SOLICITOR'S REPRESENTATIVE FOR THE FAMILY COURT ASPECT OF THE INTERVENTION IN THIS POLICY. AND HE ADVISED ME OF THE ORIGIN AND THE HISTORY OF THE PROGRAM.
Q. AND WHAT WAS YOUR UNDERSTANDING OF THE ORIGIN AND HISTORY OF THE PROGRAM?
THE COURT: I SUSTAIN THE OBJECTION. I THINK THAT

HIM NOT BEING INVOLVED IN THE DEVELOPMENT AND NOT BEING ONE OF THE PEOPLE THAT MADE THE DECISION, HE OF COURSE CAN'T TESTIFY AS TO WHY HE DID WHAT HE DID. AND SO NOW WHAT HE IS TESTIFYING TO OR BEING ASKED TO TESTIFY TO IS WHY OTHER PEOPLE DID WHAT THEY DID. AND THE ONLY WAY THAT HE CAN DO IS THROUGH WHAT THEY HAVE TOLD HIM. NOW IT'S OBVIOUS THAT HE IS GETTING READY TO SAY WHAT MR. CONDON TOLD HIM, AND THAT'S HEARSAY, BECAUSE IT'S OBVIOUSLY OFFERED FOR THE TRUTH OF THE MATTER.

MS. SHOWERS: THANK YOU, YOUR HONOR.

Q. (BY MS. SHOWERS, CONTINUING) AFTER THE JANUARY 1990 MEETING, DID YOU DEVELOP AN UNDERSTANDING OF THE GOAL OF THIS POLICY?

A. YES.

Q. HOW WOULD YOU CHARACTERIZE THE GOAL OF THIS POLICY?

A. TO - I BELIEVE THE BEST WAY TO CHARACTERIZE IT IS THE CARROT AND THE STICK APPROACH. THE CARROT BEING THE

[DURBAN 109]

OPPORTUNITY FOR TREATMENT. THE STICK BEING THE THREAT OF CRIMINAL PROSECUTION IF THEY DID NOT UNDERGO TREATMENT.

Q. AND THE POLICY WAS MEDICALLY DRIVEN WAS IT NOT?

A. YES.
Q. THERE WAS NO ONE IN THE SOLICITOR'S OFFICE THAT STAYED AT MUSC AND TOLD THEM WHO TO TEST FOR DRUGS DID THEY?
MS. DUNN: OBJECTION, YOUR HONOR, I THINK SHE IS GOING BACK INTO IT.
THE COURT: OVERRULED. GO AHEAD.
A. NO, THE MEDICAL UNIVERSITY ESTABLISHED THE CRITERIA FOR INTERVENTION.
Q. AND THERE WAS NO ONE FROM THE SOLICITOR'S OFFICE ANYWHERE AT MUSC TELLING ANYONE TO DO A DRUG TEST, WAS THERE?
A. NO.
Q. AND IF A TEST WAS POSITIVE PRENATALLY ON A WOMAN AND IT WAS REPORTED TO DSS, DSS COULDN'T INTERVENE AND TAKE CUSTODY OF THAT CHILD COULD THEY?
A. IF THE REPORT WAS MADE TO DSS?
Q. YES, SIR.
A. DSS COULD INTERVENE. AND IF THEY FELT THAT THE CHILD WAS AT SUBSTANTIAL RISK, THEY COULD ASK THE FAMILY COURT TO REMOVE THE CHILD, YES. OR LAW ENFORCEMENT.
Q. MY QUESTION WAS A PRENATAL POSITIVE TEST?
A. NO. NO. I'M SORRY. I THOUGHT THAT YOU WERE TALKING AFTER DELIVERY.

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UNDER THIS STATUTE FOR NOT REPORTING CHILD ABUSE?
A. THERE IS A CRIMINAL PENALTY. AND ACCORDING TO THE STATUTE THAT YOU HAVE COPIES, IS A FINE OF UP TO FIVE HUNDRED DOLLARS OR IMPRISONMENT FOR SIX MONTHS.
Q. AND THEY MUST REPORT TO AVOID THAT FINE AND IMPRISONMENT, CORRECT?
A. THE POSSIBILITY OF THAT FINE AND IMPRISONMENT.
Q. THANK YOU.
YOU WERE ASKED BY REPRESENTATIVES OF THE SOLICITOR'S OFFICE TO RESEARCH THE CHILD ABUSE LAW AND ITS APPLICABILITY TO THE PREGNANT WOMEN; IS THAT TRUE?
A. THAT'S CORRECT.
Q. WOULD YOU TELL THE JURY WHAT YOU CONCLUDED?
MS. DUNN: OBJECTION, YOUR HONOR.
MS. SHOWERS: IT GOES TO THE REASONABLE BASIS.
THE COURT: NO, IT DOESN'T. NOT - NOT WITH THE LIMITED FOUNDATION THAT YOU LAID FOR IT. I CAN'T - IT MAY GO TO THAT, BUT YOU CERTAINLY CAN'T DETERMINE THAT BASED ON WHAT YOU ASKED HIM. YOU JUST ASK HIM IF HE RESEARCHED IT, PERIOD. AND WE DON'T KNOW WHEN HE RESEARCHED IT, WE DON'T KNOW THE PURPOSE OF THAT, WE DON'T KNOW WHO GOT THE BENEFIT OF IT, YOU KNOW. SO I SUSTAIN THE OBJECTION.

Q. (BY MS. SHOWERS, CONTINUING) MR. DURBAN, WERE YOU EVER ASKED TO RESEARCH THE CHILD ABUSE STATUTE?
A. THE CHILD ABUSE STATUTE AND THE LAW OF - THE DEFINITION

[DURBAN 116]

OF A CHILD OR PERSON.
Q. WHO ASKED YOU TO DO THAT?
A. SOLICITOR CHARLIE CONDON.
Q. AND WHEN DID HE ASK YOU TO DO THAT?
A. IT WAS AFTER THIS MEETING IN JANUARY OF 1990.
Q. AND WHAT DID YOU CONCLUDE?
MS. DUNN: OBJECTION, YOUR HONOR.
THE COURT: I SUSTAIN THE OBJECTION. I DON'T KNOW HOW THAT COULD BE RELEVANT AT THIS POINT IN TIME. I'LL BE GLAD TO LOOK AT HIS OPINION. OBVIOUSLY THAT WOULD BE THE BEST EVIDENCE. AND SEE WHAT IT SAYS. BUT, YOU KNOW, I DON'T KNOW WHAT IT WOULD BE RELEVANT TO. IF WE'RE TALKING ABOUT THE DEFENSE OF QUALIFIED IMMUNITY, THEN OF COURSE IT'S FOR ME TO DETERMINE WHAT THE ESTABLISHED LAW IS, NOT HIM.
MS. SHOWERS: THE REASONABLE BASIS FOR WHAT THEY WERE DOING, THOUGH, AS SOLICITORS.
THE COURT: I THINK THEY ARE PRESUMED TO KNOW THE

LAW. I DON'T KNOW THAT SOMEONE - I MEAN, WHEN I TELL THE JURY WHAT THE LAW IS, I'M GOING TO. I MEAN, YOU KNOW.

MS. SHOWERS: IT ALSO WOULD GO TO WHAT THE SOLICITORS WERE TELLING REPRESENTATIVES OF MUSC FOR WHAT WAS BEING DONE.

THE COURT: WE DON'T KNOW THAT HE DID.

MS. SHOWERS: THAT THIS WITNESS DID.

THE COURT: WE DON'T KNOW THAT MR. CONDON DID. NOW

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[DURBAN 126]

SO I LIKE TO DO IT IN FRONT OF YOU SO YOU CAN SEE THAT INTERPLAY AND UNDERSTAND WHAT WE'RE DOING THAT NOBODY IS TRYING TO OBSTRUCT THE INTRODUCTION OF EVIDENCE BUT WE'RE TRYING TO SEE WHAT IS ADMISSIBLE UNDER OUR RULES OF EVIDENCE SO YOU WON'T HAVE TO CONTEND WITH ANYTHING THAT IS NOT ADMISSIBLE. AND IT TAKES A LITTLE TIME, AND I APOLOGIZE FOR THAT TIME, BUT I BELIEVE THAT TIME IS WORTH IT AND IT HELPS US TRY TO THE CASE THE WAY OUR RULES REQUIRE IT BE TRIED. AND I THINK THAT'S THE BEST WAY AND THAT WAY YOU DON'T HAVE TO WORRY ABOUT EVIDENCE THAT IS NOT ADMISSIBLE AND SHOULD NOT BE

CONSIDERED BY YOU.
Q. (BY MS. SHOWERS, CONTINUING) MR. DURBAN, YOU WENT THROUGH THIS CHILD ABUSE AND NEGLECT STATUTE?
THE COURT: I'M GOING TO LET YOU READ IT AND YOU CAN PUBLISH IT IF YOU LIKE.
Q. (BY MS. SHOWERS, CONTINUING) I ONLY HAVE ONE QUESTION.
IN YOUR ROLE AS SOLICITOR UNDER THE CHILD ABUSE STATUTE ANY WOMEN WHO TESTED POSITIVE FOR COCAINE WAS COMMITTING A CRIME, WAS SHE NOT?
A. I'M SORRY, YOUR QUESTION AGAIN WAS?
Q. ANY WOMEN WHO WAS TAKING COCAINE AND WAS PREGNANT WAS COMMITTING A CRIME UNDER THAT STATUTE, CORRECT?
A. MY UNDERSTANDING, ANY WOMEN WHO TESTED POSITIVE FOR COCAINE COULD BE ARRESTED AND CHARGED WITH A CRIME.
Q. SHE COULD HAVE BEEN ARRESTED IMMEDIATELY?

[DURBAN 127]

A. YES.
Q. NO ONE HAD TO OFFER THIS WOMEN AMNESTY, DID THEY?
A. NO.
Q. BUT IN FACT THIS POLICY, WHAT HAS BEEN COME TO KNOWN AS THE INTERAGENCY POLICY, DID OFFER AMNESTY DIDN'T IT?
A. YES, IT DID.

Q. AND IT OFFERED TWO KINDS OF AMNESTY, BOTH BEFORE ARREST AND AFTER ARREST. COULD YOU EXPLAIN HOW THAT WORKED TO THE JURY.

A. I'M NOT SURE I UNDERSTAND THE AFTER ARREST PART, SO I CAN'T REALLY ADDRESS THAT. BEFORE ARREST A WOMAN WAS OFFERED THE OPPORTUNITY TO UNDERGO SUBSTANCE ABUSE TREATMENT AND TO REMAIN DRUG FREE. AND IF THEY DID SO THEY WOULD NOT BE ARRESTED, THEY WOULD NOT BE PROSECUTED. NOW I'M NOT AWARE OF WHAT HAPPENED SUBSEQUENT TO THE ARREST.

Q. ALL RIGHT. AND YOU IN YOUR ROLE WITH DSS KEPT FILES ON REPORTS OF CRIME OR SUSPECTED ABUSE, CORRECT?

A. WE KEPT FILES ON SUSPECTED ABUSE, YES.

Q. AND AS PART OF THE SOLICITOR'S OFFICE, THE SOLICITOR'S OFFICE HAD ACCESS TO THOSE SAME FILES?

A. THOSE WERE SOLICITOR'S FILES, YES.

Q. ALSO IN YOUR ROLE WITH THE SOLICITOR'S OFFICE, DID YOU BECOME FAMILIAR WITH A SCAN MEETING

A. YES. SCAN WAS THE SUSPECTED CHILD ABUSE OR NEGLECT COMMITTEE. AND I WAS FAMILIAR WITH THEM, YES.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF JAMES EDWARDS

[EDWARDS 571]

SURGEON, YOU HAVE BEEN INVOLVED IN POLITICS, HAVEN'T YOU?
A. YES, I HAVE.
Q. YOU HELD WHAT POLITICAL OFFICE?
A. I WAS A STATE SENATOR FROM 1972 TO '74. RAN FOR GOVERNOR IN 1974 AND WAS ELECTED TO THE GOVERNORSHIP IN '74. AT THAT TIME YOU COULD ONLY SERVE ONE YEAR - ONE TERM UNDER THE CONSTITUTION. I SERVED FOUR YEARS AND LEFT THE GOVERNOR'S OFFICE IN 1979. AND CAME BACK AND PRACTED IN MY ORAL SURGERY PRACTICE FOR TWO YEARS. AND THEN WAS REQUESTED BY PRESIDENT RONALD REGAN TO BE A MEMBER OF HIS CABINET. I BECAME HIS SECRETARY OF ENERGY FOR THE FIRST TWO YEARS OF HIS ADMINISTRATION, AND RETURNED HOME AFTER SERVING TWO YEARS UP THERE AND BECAME PRESIDENT OF THE MEDICAL UNIVERSITY IN 1982.
Q. AND HAVE YOU CONTINUED IN THAT CAPACITY SINCE 1982?
A. YES, SIR, I HAVE.
Q. DR. EDWARDS, I WOULD LIKE FOR YOU TO TELL THE JURY THE

SEQUENCE OF EVENTS LEADING UP TO THE APPROVAL AND IMPLEMENTATION OF THE INTERAGENCY POLICY WHICH IS THE SUBJECT OF THIS LAWSUIT.

A. TO THE BEST OF MY KNOWLEDGE AND MY MEMORY, ALL OF THIS STARTED WITH OUR PEDIATRIC DEPARTMENT. AND THEN OUR NEONATAL INTENSIVE CARE UNIT, THE PEOPLE IN THE NEONATAL INTENSIVE CARE UNIT WERE QUITE SENSITIVE TO THE PROBLEMS THEY HAD THERE WITH THESE PREMATURE BIRTHS AND NEWBORNS THAT WERE NOT FULLY DEVELOPED. AND IF ANY OF YOU COULD SEE ANY OF THESE LITTLE

[EDWARDS 572]

TWO-POUND BABIES THAT YOU COULD HOLD IN THE PALM OF YOUR HAND AND SEE THE PROBLEMS THEY HAD, YOU COULD UNDERSTAND WHY THEY WERE SO CONCERNED.

AND SO WE REALIZED THAT WE WERE GETTING A LOT OF THESE EARLY BIRTH DEFECTS AND PREMATURE DELIVERIES AND SMALL BABIES BECAUSE OF THE CRACK COCAINE PROBLEM. AND SO THEY DECIDED TO DO SOMETHING ABOUT IT. AND I THINK THAT'S HOW IT ALL ORIGINATED.

AND THEN THEY ALSO GOT INVOLVED WITH THE SOLICITOR. I DON'T KNOW WHICH ONE CAME FIRST. I DON'T REMEMBER THE

DETAILS OF WHICH ONE CAME FIRST, BUT THE SOLICITOR AND THE POLICE DEPARTMENT. I THINK THE DEPARTMENT OF SOCIAL SERVICES BECAME INVOLVED. AND THEN THE SUBSTANCE ABUSE PEOPLE. THEY REQUESTED THEIR HELP TO TRY TO CREATE SOME SORT OF A POLICY THAT WOULD HELP PREVENT THIS FROM HAPPENING IN YEARS TO COME.

WE ALSO FOUND THAT THESE CHILDREN, EACH ONE OF THESE CHILDREN COST ABOUT -

MR. WHERRY: OBJECTION.

THE COURT: HE HAS OBJECTED TO DR. EDWARDS TESTIFYING AS TO THAT. I THINK UNLESS A FOUNDATION CAN BE PROPERLY LAID INDICATING THAT THIS WITNESS HAS SOMETHING TO DO WITH THE FORMATION OF THE INTERAGENCY POLICY AND RELIED ON THAT INFORMATION IN DOING IT, WHICH IS THE WAY YOU CAN GET AROUND THE HEARSAY RULE, OR HE SHOWS PERSONAL KNOWLEDGE, AND THAT THAT - BASED ON THAT PERSONAL KNOWLEDGE HE HAS RELIED

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[EDWARDS 575]

MR. HOOD: TO LAY THE FOUNDATION.

THE COURT: WELL, NO, I DON'T KNOW THAT YOU LAY THE FOUNDATION THAT WAY. YOU MERELY LEAD THE WITNESS INTO

TESTIFYING A CERTAIN WAY. WHETHER YOU DO IT BY ASKING HIM IS IT SUCH AND SUCH AN AMOUNT, THE APPROPRIATE AMOUNT, OR YOU READ A PUBLICATION AND SAY THE PUBLICATION SAID THAT, IN EITHER EVENT YOU'RE LEADING HIM. AND THIS JURY IS ENTITLED TO KNOW WHAT TESTIMONY HE IS GIVING BASED UPON HIS MEMORY AND HIS RECOLLECTION AND NOT BASED UPON A QUESTION THAT YOU ASKED THAT SUGGESTED AN ANSWER.

SO I SUSTAIN THE OBJECTION. AND IF YOU DON'T PUT IT IN THE RIGHT CONTEXT AND DO IT RIGHT, THEN WE'RE GOING ON TO SOMETHING ELSE.

MR. HOOD: OKAY.

Q. (BY MR. HOOD, CONTINUING) WOULD YOU PLEASE TELL US, DON'T GIVE US THE NUMBER, WHAT THE FACTORS WERE, FROM YOUR PERSPECTIVE, OF THE MEDICAL UNIVERSITY FOR THIS POLICY?

A. WELL, THE EXPENSE OF THE CARE OF THESE BABIES WAS ONE OF THE FACTORS THAT I TOOK INTO CONSIDERATION WHEN WE WERE TALKING ABOUT THE DEVELOPMENT OF THIS POLICY.

Q. ALL RIGHT, SIR.

A. HUGE EXPENSES. BOTH WHILE THAT BABY WAS IN OUR HOSPITAL, AND BEFORE THAT BABY WENT HOME. AND IT'S A TERRIBLY EXPENSIVE THING TO MAINTAIN ONE OF THESE BABIES IN A REALLY - YOU'RE

REALLY CREATING A NEW UTERUS FOR THAT BABY TO LIVE IN UNTIL

* * *

[EDWARDS 578]

TALKING ABOUT COSTS. BUT MR. HOOD IS CORRECT, HE DID ASK HIM TO LIST THE FACTORS THAT HE TOOK INTO CONSIDERATION. I OVERRULE THAT.

Q. (BY MR. HOOD, CONTINUING) DR. EDWARDS, YOU WERE IN THE MIDDLE OF A SENTENCE. WOULD YOU GO AHEAD AND CONTINUE THE FACTORS THAT WERE IMPORTANT TO YOU IN ALLOWING THIS?

THE COURT: I WOULD NOTE THAT THE ILLUSTRATIONS ARE SOMEWHAT ARGUMENTATIVE, AND I WOULD ASK THE WITNESS TO TESTIFY TO HIS KNOWLEDGE ALONE.

MR. HOOD: OKAY. GO AHEAD.

THE WITNESS: WHERE WAS I?

THE COURT: YOU MENTIONED THAT THE MONETARY AND THEN YOU MENTIONED THE INTEREST IN THE UNBORN FETUS, THE CHILDREN, AND SO LET'S CONTINUE FROM THERE.

A. THE HUMAN TRAGEDY WAS MUCH MORE IMPORTANT EVEN THAN THE MONETARY. AND THE MONETARY IS ASTRONOMICAL. BUT, YOU KNOW, I JUST FELT LIKE WE WERE DEFENDING THESE LITTLE UNBORN BABIES AND SOMEBODY NEEDS TO REPRESENT THEM. OH, THIS MAY NOT BE THE PERFECT POLICY, I DON'T KNOW. BUT IT'S AS PERFECT A POLICY AS

WE COULD GET. AND IT'S NOT A POLICY THAT DISCRIMINATES AGAINST ANYONE.

MR. WHERRY: I OBJECT.

A. IT'S NOT A POLICY THAT LEADS PEOPLE TO BE PUT IN JAIL.

THE COURT: I SUSTAIN THE OBJECTION. THE ANSWER IS NOT RESPONSIVE TO THE QUESTION. GO AHEAD AND RESTATE THE

[EDWARDS 579]

QUESTION.

Q. (BY MR. HOOD, CONTINUING) DOCTOR EDWARDS, WERE THERE ANY DEPARTURES FROM THE NORMAL PROCEDURE AND SEQUENCE OF EVENTS FOR ADOPTING A POLICY AT THE MEDICAL UNIVERSITY IN THE ADOPTION OF THIS POLICY?

A. NO, SIR. NO.

Q. HAS THE MEDICAL UNIVERSITY, AND SINCE YOU HAVE BEEN THE PRESIDENT OF IT SINCE 1982, ALWAYS COMPLIED WITH MANDATORY REPORTING PURSUANT TO CHILD ABUSE STATUTES?

A. TO THE BEST OF MY KNOWLEDGE, YES.

Q. IS THE POLICY OF THIS INTERAGENCY POLICY CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS AND STANDARDS AND PHILOSOPHY?

A. YES.

Q. WHAT IS THE GOAL OF THIS POLICY? WHAT IS HOPED TO BE ACHIEVED BY AND WHAT WAS HOPED TO BE ACHIEVED BY THIS POLICY?

A. TO PROTECT THESE INNOCENT UNBORN CHILDREN WAS THE GOAL OF THIS POLICY.
Q. WAS THERE ANY INTENTION TO DISCRIMINATE AGAINST BLACKS BY THE ADOPTION OF THIS POLICY?
A. NONE WHATSOEVER. AND I WOULD NOT BE PART OF AN INSTITUTION THAT DID.
MR. HOOD: THOSE ARE ALL OF THE QUESTIONS THAT I HAVE.
THE COURT: CROSS-EXAMINATION.
CROSS-EXAMINATION

* * *

[EDWARDS 583]

CRACK COCAINE.
Q. WHAT IS YOUR AUTHORITY FOR THAT, DOCTOR? DID YOU DO ANY RESEARCH TO DETERMINE WHETHER THAT WAS SO?
A. THE PEOPLE OVER THERE THAT ARE AUTHORITIES IN THE AREA HAVE TOLD ME THAT. AND WE CAN GET SOME HERE TO - IN THIS COURTROOM, IF YOU WOULD LIKE TO GET THEM.
Q. I'M SURE THEY WILL BE CALLED, SIR. IN THE FORMATION OF THE POLICY, YOU WERE NOT PRIVY TO THE ORGANIZATIONAL MEETINGS, WERE YOU, AMONG SOLICITOR CONDON?
A. I DID NOT PARTICIPATE IN THOSE MEETINGS, NO.

Q. SO BY THE TIME THE POLICY WAS FORMED, WAS REDUCED TO WRITING, IN FACT YOU DID NOT PARTICIPATE AT ALL UP TO THAT POINT IN TIME, DID YOU?
A. NO, I DID NOT.
Q. AND THEN, SIR, THE POLICY WAS SUBMITTED TO THE BOARD OF TRUSTEES BY DR. DEL BENE, FAIR?
A. WELL IT WAS FIRST SUBMITTED FROM THE PEOPLE WHO CREATED THE POLICY. AND IT WAS THROUGH THIS DEBATED AND THOUGHTFULLY DEBATED AND PRAYERFULLY DEBATED, AND SENT OVER TO OUR EXECUTIVE COMMITTEE. AND THEY DEBATED IT AND CONSIDERED AND GAVE IT A LOT OF CONSIDERATION AND THOUGHTFULNESS. AND AFTER THEY POLISHED THE POLICY DOWN TO WHERE THEY THOUGHT IT WAS A POLICY THAT WOULD BE ACCEPTABLE, THEY SENT IT TO THE BOARD OF TRUSTEES. AND THE BOARD OF TRUSTEES CONSIDERED IT AND

[EDWARDS 584]

ACCEPTED IT AS INFORMATION IN THEIR MEETING.
Q. THANK YOU, SIR. THESE PRAYERFUL AND THOUGHTFUL CONSIDERATIONS, EACH OF THOSE TWO GROUPS, THE MEDICAL STAFF AND THE PEOPLE THAT FORMED THE ORIGINAL POLICY, YOU WEREN'T PRIVY TO, WERE YOU?
A. NO, SIR, I WAS NOT.

Q. SO, SIR, YOU DON'T KNOW WHETHER THEY PRAYED, WHETHER THEY THOUGHT, OR WHETHER THEY DISCUSSED, ALL YOU KNOW IS THAT IT CAME OUT OF THOSE CONSIDERATIONS, RIGHT?

A. ALL I KNOW IS FROM WHAT I HAVE BEEN TOLD PEOPLE WHO WERE IN THOSE MEETINGS.

Q. I'M SURE, SIR, THAT YOU UNDERSTAND THAT THE INFORMATION WE SEEK IN THE COURTROOM IS THAT FROM A PERCIPIENT WITNESS, ONE WHO PERCEIVED WHAT WAS HAPPENING. SO YOU DIDN'T PERCEIVE ANY OF THESE THINGS, DID YOU?

A. NO, EXCEPT WE HAD WRITTEN REPORTS ALONG THE WAY OF THE POLICY FORMATION.

Q. AND WHEN IT WAS SUBMITTED TO THE BOARD OF TRUSTEES, SIR, DO YOU SIT ON THAT BOARD?

A. NO, I SIT IN THE ROOM WHEN THE BOARD IS MEETING.

Q. YOU DON'T SIT ON THE BOARD?

A. I'M NOT A MEMBER OF THE BOARD OF TRUSTEES.

Q. AND THE BOARD OF TRUSTEES CONSIDERED IT UPON THE PRESENTATION OF DR. DEL BENE, DIDN'T THEY?

A. THAT'S CORRECT.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CRYSTAL FERGUSON

[FERGUSON 181]

(TESTIMONY OF CRYSTAL FERGUSON, 11-25-96.)

MR. WHERRY: YOUR HONOR, AT THIS POINT I WOULD CALL CRYSTAL FERGUSON

- - -

CRYSTAL FERGUSON, PLF. WITNESS, SWORN

DIRECT EXAMINATION

BY MR. WHERRY:

Q. WHERE DO YOU LIVE, MS. FERGUSON?

A. 1905 DELTA STREET, NORTH CHARLESTON.

Q. LET ME GET YOU SOME WATER HERE. HOW OLD ARE YOU?

A. THIRTY-FIVE.

Q. WHAT IS YOUR DATE OF BIRTH?

A. JULY 13, 1961.

Q. MS. FERGUSON, IN EARLY OR MID 1991, WERE YOU PREGNANT?

A. YES, SIR.

Q. WHERE DID YOU LIVE THEN?

A. 1913 DISCO STREET.

Q. AND WHAT CITY IS THAT IN?

A. NORTH CHARLESTON.

Q. WHERE WERE YOU RECEIVING YOUR PRENATAL CARE?

A. STARTED OFF AT NORTH AREA HEALTH DEPARTMENT AND THEN I WAS TRANSFERRED TO MEDICAL UNIVERSITY.
Q. WHY WERE YOU TRANSFERRED TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

[FERGUSON 182]

A. NORMAL PROCEDURES I WAS IN EVERY TWO WEEKS AND THEN I WAS HIGH RISK. I CONFESSED THAT I WAS USING AND I NEEDED HELP.
Q. WHO DID YOU CONFESS TO MS. FERGUSON?
A. THE NORTH AREA SOCIAL WORKER.
Q. THAT YOU WERE USING WHAT?
A. COCAINE.
Q. BECAUSE YOU TOLD THEM THAT, IS THAT YOUR UNDERSTANDING OF WHY THEY TRANSFERRED YOU TO MUSC?
A. ONE OF THE REASONS. BECAUSE IT'S THE NORMAL PROCEDURE ANYHOW WHEN YOU GET DOWN TO YOUR LAST TWO MONTHS TO BE TRANSFERRED.
Q. DID YOU CONTINUE GETTING YOUR PRENATAL CARE AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. YES, SIR. UP UNTIL ABOUT SIX WEEK BEFORE I HAD THE BABY I WENT ON A VISIT AND MY PLACENTA WAS SEPARATING AND THEY KEPT ME OVERNIGHT.
Q. DURING THE TIME WHEN YOU WERE RECEIVING YOUR PRENATAL CARE FROM THE MEDICAL UNIVERSITY, DID YOU RECEIVE ANY

COUNSELING OR ANY INFORMATION ABOUT SUBSTANCE ABUSE AND PREGNANCY?
A. YES.
Q. FROM WHOM?
A. I'M NOT SURE OF THE NAME.
Q. WHAT WAS YOUR POSITION WITH RESPECT TO GETTING SUBSTANCE ABUSE TREATMENT?

[FERGUSON 183]

A. THREATS. I HAD NO PROBLEM WITH GETTING TREATMENT, MY PROBLEM WAS I COULDN'T GO INPATIENT BECAUSE I HAD TWO OTHER CHILDREN. AND MY HOME ENVIRONMENT, I HAD A LOT OF PROBLEMS. AND I KEPT TELLING THEM THAT I DIDN'T MIND GETTING TREATMENT, BUT I COULD NOT GO INPATIENT, IT HAD TO BE OUTPATIENT BECAUSE I DIDN'T HAVE ANYONE TO TAKE CARE OF MY TWO SONS AT HOME.
Q. WAS THERE ANY REFERRALS MADE FOR YOU BY MUSC OR ANY OF THE PEOPLE THERE TO AN OUTPATIENT TREATMENT CENTER?
A. AT THE TIME I WAS TOLD THEY HAD NO OUTPATIENT, I NEEDED TO GO INPATIENT IMMEDIATELY. I WAS GIVEN I THINK TWO OR THREE HOURS TO GO HOME AND GET SOME CLOTHES TOGETHER. AND I WAS SUPPOSED TO CALL A CAB AND GO BACK TO THE HOSPITAL WHERE THE REFERRAL WAS MADE.
Q. MS. FERGUSON, BECAUSE OF WHAT WE HEARD SO FAR, LET ME ASK

YOU A GENERIC QUESTION. AT ANY TIME IN ANY OF YOUR DEALINGS WITH MUSC, DID YOU HAVE ANY SPECIFIC RECOLLECTION OF EVER HAVING ANY DEALINGS WITH SHIRLEY BROWN?

A. I'M NOT SURE.

Q. OKAY. NOW, THE PEOPLE WHOEVER TOLD YOU YOU HAD TO GO HOME, AND HERE WAS TWO OR THREE HOURS AND HERE IS THE INPATIENT TREATMENT, WHAT DID YOU SAY TO THEM?

A. I TOLD THEM THAT I AGREED THAT I NEEDED TO GET INTO SOME TYPE OF TREATMENT, BUT I DISAGREED THAT I HAD TO DO IT WITH SUCH A HURRY BECAUSE I DID NOT PREPARE MYSELF TO GO INPATIENT AND I HAD TWO OTHER CHILDREN. AND I WAS GOING THROUGH A LOT

[FERGUSON 184]

OF PERSONAL CHANGES AT HOME. AND -

Q. WHAT KIND OF PERSONAL CHANGES?

A. MY HUSBAND WAS A USER AND HE WAS STEALING FROM ME.

Q. HE WAS STEALING FROM YOU?

A. YES. DURING THE TIME I WAS IN THE HOSPITAL FOR ONE DAY, I FOUND OUT THAT THEY DID APPROVE ME FOR SOME STAMPS AND I WAS GETTING UNEMPLOYMENT BECAUSE I WAS TEMPORARILY ON SICK LEAVE. I JUST STOPPED WORKING AND THEN MY BENEFIT OR UNEMPLOYMENT HAD STARTED AND HE HAD CASHED IT IN AND I WAS UPSET BECAUSE I

REALLY NEEDED THE BENEFITS TO TAKE CARE OF MY CHILDREN.
Q. DID YOU GO IN TO INPATIENT TREATMENT?
A. NO.
Q. AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. NO, I DIDN'T GO AT THAT TIME BECAUSE OF THE INCIDENT I WAS TOO HISTORICAL (SIC).
Q. DID THERE COME A POINT IN TIME, MS. FERGUSON, AS TO - THAT QUESTION WAS NOT COMING OUT WELL.
A. UMM-HMM.
Q. WHEN WAS YOUR CHILD BORN?
A. AUGUST THE 4TH, 1991.
Q. WHAT WAS YOUR CHILD'S NAME?
A. VIRGINIA ALETHA FERGUSON.
Q. AFTER YOUR CHILD WAS BORN - WELL, LET ME WITHDRAW THAT. WAS YOUR CHILD BORN AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

[FERGUSON 185]

A. YES, SIR.
Q. AFTER YOUR CHILD WAS BORN, FROM THE DELIVERY ROOM, WHERE DID YOU GO?
A. FROM THE DELIVERY?
Q. AFTER THE BABY WAS BORN?
A. TO THE ROOM. FROM THE DELIVERY ROOM I WAS PLACED IN THE ROOM.
Q. AT THAT TIME AFTER THE BABY WAS BORN, DID YOU HAVE ANY

CONVERSATION WITH ANY OF THE STAFF AT MUSC CONCERNING SUBSTANCE ABUSE AND YOUR BABY?

A. YES, SIR.

Q. WOULD YOU TELL THE JURY, PLEASE, GENERALLY WHAT THOSE CONVERSATIONS WERE.

A. WELL THE CONVERSATION, IT WAS VERY UNDERSTOOD THAT EVEN THOUGH I SHOULD HAVE BEEN ALREADY IN SUBSTANCE ABUSE PROGRAM BEFORE I HAD THE BABY, BUT AFTER I DIDN'T GET INTO IT IT WAS MANDATORY THAT I HAD TO GET INTO ONE. BUT -

Q. YOU SAID IT WAS MANDATORY?

A. IT WAS MANDATORY.

Q. WHO TOLD YOU IT WAS MANDATORY?

A. THAT'S WHAT THE NURSES AND STUFF WERE TELLING ME.

Q. MANDATORY OR WHAT?

A. THAT I GET INTO THE SUBSTANCE ABUSE. THEY WANTED TO TAKE MY BABY AWAY FROM ME AND UNTIL I SUCCESSFULLY COMPLETED IT. AND I HAD JUST LOST MY MOTHER THE DAY AFTER I HAD MY BABY.

[FERGUSON 186]

AND I WAS ARGUING WITH THEM. I HAD NO PROBLEM AS LONG AS IT WAS OUTPATIENT, BUT I DISAGREED WITH THEM FOR AS FAR AS THEM TAKING MY BABY AWAY FROM ME. AND I DIDN'T WANT TO GIVE MY BABY TO NOBODY. I WANTED TO GET TREATMENT, BUT I WANTED TO KEEP MY BABY. AND HE CAME -

Q. LET ME SEE IF I HAVE THIS RIGHT. YOUR BABY WAS BORN?
A. UH-HUH.
Q. THE DAY AFTER THAT YOUR MOTHER DIED?
A. MY MOTHER DIED 30 HOURS AFTER MY BABY WAS BORN.
Q. AND THE PEOPLE AT MUSC WANTED YOU TO IMMEDIATELY CHECK INTO AN INPATIENT PROGRAM?
A. YES.
Q. DID YOU DO THAT?
A. NO, SIR.
Q. DID YOU GO HOME?
A. YES, SIR.
Q. WHEN YOU WENT HOME, WHO, IF ANYONE, WAS THERE?
A. WELL I DIDN'T GO DIRECTLY TO MY HOUSE, I HAD TO GO AND STAY WITH MY GRANDMOTHER-IN-LAW, WHO WAS OVER ME AND MY CHILDREN, SO I WAS ABLE TO KEEP MY THREE KIDS.
Q. DID YOU HAVE AN APPOINTMENT TO GO INTO THE INPATIENT TREATMENT PROGRAM AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. WELL, AFTER I HAD THE BABY, IT CHANGED. I TALK TO SOMEONE ELSE AND I FOUND OUT THERE WAS A PROGRAM THAT I COULD GO IN THAT WAS OUTPATIENT. AND THE DATE THAT I WAS ARRESTED

[FERGUSON 187]

WAS THE DAY THAT I WAS SUPPOSED TO START OUTPATIENT.

Q. LET ME STOP YOU AND GO BACK AND TAKE THIS STEP BY STEP.
A. YES.
Q. YOU SAY THAT YOU FOUND AN OUTPATIENT PROGRAM?
A. YES.
Q. WHERE WAS THE OUTPATIENT PROGRAM?
A. THE CHARLESTON COUNTY SUBSTANCE ABUSE.
Q. AND DID YOU MAKE ARRANGEMENTS TO GO TO THE CHARLESTON COUNTY SUBSTANCE ABUSE PROGRAM?
A. I MADE ARRANGEMENTS THAT I WOULD BE THERE, BUT I WENT TO THE POLICE STATION FIRST AND I DIDN'T MAKE IT THERE THAT DAY. I WENT TO JAIL.
Q. WHAT WAS IT THAT YOU EXPECTED TO HAPPEN AT CHARLESTON COUNTY SUBSTANCE ABUSE?
A. I EXPECTED THEM TO WORK WITH ME.
Q. TO WORK WITH YOU TO DO WHAT?
A. TO GET OFF DRUGS. TO TREATMENT FOR MY ADDICTION.
Q. WERE YOU VOLUNTARILY GOING TO THAT PROGRAM?
A. YES.
Q. ON THE DAY THAT YOU HAD AN APPOINTMENT TO GO?
A. YES, SIR.
Q. DID YOU GO?
A. I DIDN'T GET A CHANCE TO.
Q. WHY?
A. BECAUSE I WENT TO THE CHARLESTON COUNTY POLICE

DEPARTMENT.
Q. WHY DID YOU GO THERE?
A. BECAUSE THEY WERE SUPPOSED TO TAKE ME STRAIGHT FROM THE HOSPITAL TO THE JAILHOUSE. BUT DUE TO FACT THAT MY MOTHER PASSED AWAY AND I WAS HISTORICAL (SIC) ABOUT THEM TAKING MY BABY, AND I HAD TO GET PREPARED FOR THE FUNERAL, AND SOME OF THE STAFF WAS UNDERSTANDING AND THEY WERE TALKING. SO I HAD SOME PEOPLE THAT WAS AGAINST ME AND SOME OF THEM THAT WAS FOR ME. AND THEY CAME TO THE AGREEMENT THAT THEY COULDN'T TAKE MY BABY, BUT I HAD TO STAY WITH MY GRANDMOTHER-IN-LAW AND LET HER BE OVER ME AND MY CHILDREN AND MONITOR ME SO I WOULDN'T DO ANYTHING TO HURT MY CHILDREN. AND I AGREED TO THAT.
AND THEN THE NEXT DAY BECAUSE I WAS IN THE HOSPITAL FOR THREE DAYS, I HAD A CESAREAN, WE BURIED MY MOTHER. AND THEN THE POLICEMAN CAME TO ARREST ME TWO DAYS AFTER WE BURIED MY MOTHER. BUT I WAS STILL RECOVERING FROM THE CESAREAN BECAUSE IT WAS MY FIRST CESAREAN AND I WAS STILL IN BED. SO INSTEAD OF ARRESTING ME AT MY GRANDMOTHER-IN-LAW WE MADE AN APPOINTMENT FOR ME TO COME IN WHEN I WAS FEELING BETTER.
Q. MADE AN APPOINTMENT FOR YOU TO COME IN WHERE?
A. COME TO THE POLICE STATION.

Q. AND YOU GOT BETTER, DID YOU GO TO THE POLICE STATION?
A. YES. THREE WEEKS LATER AFTER I HAD MY DAUGHTER, THE DAY MY DAUGHTER TURNED THREE WEEKS AND I WAS FEELING BETTER, I HAD AN APPOINTMENT TO GO TO SUBSTANCE ABUSE. AND I TOLD THEM ON

[FERGUSON 189]

THE DAY OF THE APPOINTMENT FOR THE SUBSTANCE ABUSE THAT I WAS GOING TO COME IN AND SEE THEM. MY APPOINTMENT FOR THE SUBSTANCE ABUSE TO START WAS AT TEN O'CLOCK. I WENT TO SEE THEM AT NINE O'CLOCK.
Q. WENT TO SEE WHO AT NINE?
A. THE POLICE DEPARTMENT DETECTIVE.
Q. YES, MA'AM. DO YOU REMEMBER THAT DETECTIVE'S NAME?
A. NO, I DON'T.
Q. WAS IT A MAN OR WOMEN?
A. IT WAS A MAN.
Q. AND WHEN YOU WENT TO SEE THE DETECTIVE, WHAT HAPPENED?
A. HE READ ME MY RIGHT AND PUT ME IN THE HOLDING CELL.
Q. WHERE DID YOU GO FROM THE HOLDING CELL?
A. TO A BOND HEARING.
Q. HOW MUCH BAIL WAS SET?
A. TWENTY-FIVE HUNDRED DOLLARS.
Q. DID YOU HAVE 2500 DOLLARS?
A. NO, I DIDN'T. MY GRANDMOTHER-IN-LAW GOT A BAILS BONDMAN AND PAID 250 DOLLARS TO GET ME OUT.

Q. HOW LONG WERE YOU IN JAIL BEFORE YOUR GRANDMOTHER GOT THE 250 DOLLARS?
A. ELEVEN HOURS.
Q. DESCRIBE THE JAIL - WELL, FIRST OF ALL WHEN YOU WERE TAKEN FROM THIS HOLDING CELL, WERE YOU TAKEN TO THE BOND HEARING?

[FERGUSON 190]

A. YES, SIR.
Q. WERE YOU HANDCUFFED?
A. HANDCUFFED, SHACKLED, THE WORKS.
Q. AGAIN, ALTHOUGH WE HAVE ALL HEARD IT BEFORE, MS. FERGUSON, DESCRIBE THE HANDCUFFED AND SHACKLES.
A. HANDCUFF BY TWO HAND. THE TWO SHACKLED TO THE FOOT.
Q. I DON'T MEAN TO MINIMIZE WHAT YOU WENT THROUGH, BUT WERE YOU DRESSED WHEN YOU WERE HANDCUFFED AND SHACKLED?
A. YES, SIR.
Q. WHEN YOU WERE TAKEN TO THE JAIL, YOU SAID THAT YOU WERE IN THERE ELEVEN HOURS?
A. YES, SIR.
Q. DESCRIBE THE CELL THAT YOU WERE HELD IN?
A. IT WAS LOUD. IT WAS SMALL. IT WAS - IT WAS MY FIRST EXPERIENCE WITH BEING IN JAIL AND IT WAS VERY FILTHY BECAUSE I HAD CESAREAN AND I DIDN'T HAVE ANY CHANGING SANITARY. I WAS

HYSTERICAL BECAUSE I NEVER BEEN IN JAIL IN MY LIFE AND I COULDN'T UNDERSTAND WHY I WAS BEING TREATED LIKE A MASS MURDERER. THAT'S THE WAY I FELT. AND THE NOISE, YOU COULD BARELY HEAR YOURSELF TALK.

Q. JUST BY THE WAY, WERE YOU WERE DISCHARGED FROM THE HOSPITAL, WERE YOU - WHEN YOU LEFT THE HOSPITAL TO GO TO YOUR GRANDMOTHER-IN-LAW'S HOUSE, WERE YOU GIVEN ANY PERSONAL MEDICAL SUPPLIES WHEN YOU LEFT THE HOSPITAL?

A. YES, SIR.

[FERGUSON 191]

Q. AND WOULD YOU DESCRIBE WHAT YOU WERE GIVEN TO THE JURY?

A. I'M NOT SURE. EVERYTHING THAT I USED INSIDE THE HOSPITAL I KEPT THAT. PRETTY WELL EVERYTHING THAT I NEEDED STARTED ME OFF.

Q. OKAY. AFTER YOUR GRANDMOTHER-IN-LAW POSTED YOUR BAIL, WHERE DID YOU GO?

A. BACK TO HER HOUSE.

Q. AND SUBSEQUENTLY AFTER THAT, DID YOU GET INTO SUBSTANCE ABUSE TREATMENT?

A. YES, SIR, IMMEDIATELY.

Q. MS. FERGUSON, JUST FOR THE PURPOSE OF THIS CASE, WHAT POLICE DEPARTMENT WAS IT THAT YOU WENT TO?

A. CHARLESTON COUNTY DEPARTMENT DOWNTOWN.
Q. IS THAT WITHIN THE CITY OF CHARLESTON?
A. YES, SIR.
Q. NOW - I'M SORRY. I LOST MY TRAIN OF THOUGHT. I THOUGHT
- NEXT TO LAST QUESTION OF YOU WAS, DID YOU EVENTUALLY GET
INTO SUBSTANCE ABUSE TREATMENT?
A. YES, SIR.
Q. WHERE?
A. CHARLESTON COUNTY SUBSTANCE ABUSE.
Q. HOW LONG DID YOU STAY IN THAT?
A. TWO AND A HALF YEARS.
Q. WAS IT SUCCESSFUL?
A. NO, SIR. I NEVER - I STOPPED MYSELF BUT I

[FERGUSON 192]

Q. WHY?
A. I DIDN'T GET A PIECE OF PAPER SAYING THAT I SUCCESSFULLY
COMPLETE IT.
Q. DID YOU STOP USING COCAINE?
A. YES, SIR. I HAD A RELAPSE FROM TIME TO TIME BUT I DO MY
PART AS MUCH AS I CAN, BUT I STILL HAVE TO GO TO SUPPORT
GROUP.
Q. MS. FERGUSON, LET ME UNDERSTAND, WHEN YOU SAY THAT YOU
RELAPSED, I TAKE IT THAT'S A NICE WAY OF SAYING THAT YOU USED
COCAINE AGAIN?
A. YES, SIR.

Q. WHY WOULD YOU DO THAT? EXPLAIN TO THE JURY WHAT IT IS THAT MAKES YOU USE DRUGS AGAIN?
A. I TRY NOT TO USE IT, BUT I FIND MYSELF USING IT. IF I'M AROUND THE CROWD, I FIND - IF UNDER A LOT OF PRESSURE AND - I MEAN, I GOT A LOT OF PERSONAL PROBLEMS. I'M NOT MAKING UP EXCUSES, BUT I'M A DRUG ADDICT, AN ALCOHOLIC, AND IT'S HARD FOR ME NOT TO USE SOMETIME IF I'M IN THAT ATMOSPHERE. AND THE TEMPTATION SOMETIMES JUST COME FROM PEER PRESSURE, YOU KNOW. SOMETIME I TAKE A DRINK. IT'S NO EXCUSE FOR IT. IT'S JUST AN ADDICTION TO SOMETHING THAT HAPPENED.
Q. MS. FERGUSON, I'M SURE THAT YOU HAVEN'T KEPT COUNT, BUT APPROXIMATELY HOW MANY TIMES HAVE YOU RELAPSED SINCE - SINCE COMPLETING YOUR TWO AND A HALF YEARS IN CHARLESTON COUNTY SUBSTANCE ABUSE PROGRAM?

[FERGUSON 193]

A. I CAN'T COUNT.
Q. OKAY. GOING THROUGH THAT PROGRAM. WAS THERE ANY CHILD CARE INVOLVED IN THAT PROGRAM?
A. NO, SIR.
Q. WERE THE PARTICIPANTS ALL FEMALE OR ALL MALE OR A MIXTURE?
A. IT WAS A FEMALE THAT WAS COUNSELING ME.

Q. BUT THE PEOPLE WHO WERE TAKING IT; THE PEOPLE WHO WERE TAKING THE PROGRAM?
A. UMM-HMM.
Q. THE PATIENTS LIKE YOU?
A. YES.
Q. WERE THEY ALL FEMALE, ALL MALE, OR WAS IT A MIXTURE?
A. FEMALE AND MALE. BOTH.
Q. THE ARREST, FERGUSON, DID YOU EVER GO TO TRIAL FOR THAT? DID YOU EVER GO TO A COURTROOM LIKE THIS FOR A JURY?
A. I WENT TO A PRETRIAL, AS I RECALL. I HAD AN ATTORNEY AND WHAT IT WAS 50 DOLLARS I HAD TO PAY FOR FIRST OFFENSE. AND I RECEIVE MY PAPERS FROM DSS STATING THAT I WAS - MY KID WERE NO LONGER IN DANGER OF ME AND THAT I COULD YOU KNOW GET ON WITH MY LIFE AND GO BACK WITH A PLACE OF MY OWN. BUT I NEVER WENT TO COURT, I JUST HAD TO GO SEE MY ATTORNEY A COUPLE OF TIMES. I WENT TO THE FIRST OFFENSE AND I HAD TO STAY IN SUBSTANCE ABUSE UNTIL THAT WAS CLEARED UP.
Q. WERE THE CHARGES AGAINST YOU EVENTUALLY DISMISSED?

[FERGUSON 194]

A. I NEVER RECEIVED A CHARGE THAT THEY WERE DISMISSED. I WENT TO TALK WITH AN ATTORNEY ONE TIME AND HE WAS TALKING THAT

EVEN AFTER IT WAS DISMISSED THE SOLICITOR MIGHT PICK IT UP.
SO I REALLY DON'T KNOW WHAT THE OUTCOME WAS. I ONLY KNOW THAT I RECEIVED PAPERS CONCERNING MY CHILDREN. AND I TOOK THAT AS, YOU KNOW, EVERYTHING WAS OKAY. I NEVER GOT IN TROUBLE BEFORE AND I HAVE NO WAY OF KNOWING.
Q. MS. FERGUSON, AS YOU SIT HERE TODAY IN THE COURTROOM, WOULD YOU DESCRIBE TO THE JURY PLEASE HOW THIS EXPERIENCE HAS AFFECTED YOUR LIFE AND HOW IT AFFECTS YOUR LIFE NOW, HAVING BEEN ARRESTED AND HAVING BEEN THROUGH WHAT YOU HAVE BEEN THROUGH?
A. WELL, I HAVE LOW SELF-ESTEEM. AND AS FAR AS THE LAW AND THE HOSPITAL IS CONCERNED, I HAVE MY DOUBTS ABOUT HOW MUCH YOU CAN TRUST THEM, BECAUSE WHEN I WENT TO THEM, I DID WHAT I THOUGHT THAT WAS RIGHT GETTING PRENATAL CARE. REGARDLESS OF DRUG OR ALCOHOL OR WHATEVER, IF YOU'RE PREGNANT, YOU HAVE THE RIGHT TO GET PRENATAL CARE. AND I JUST FEEL LIKE I DIDN'T GET ENOUGH HELP, THAT I WAS ASKING FOR IT BEFORE I WAS THROWN IN JAIL.
Q. WELL, LET'S TALK ABOUT THAT. THEY OFFERED YOU INPATIENT TREATMENT, DIDN'T THEY?
A. YES, SIR.
Q. WHAT WAS WRONG WITH THAT?

A. I HAD TWO KIDS AT HOME. SIX WEEKS IS A LONG TIME IF YOU

[FERGUSON 195]

DON'T HAVE SOMEONE TO CARE FOR YOUR CHILDREN.
Q. HOW ABOUT YOUR HUSBAND?
A. MY HUSBAND WAS A DRUG ADDICT AND ALCOHOLIC, HE WAS NOT RESPONSIBLE. HE WAS DANGERING MY CHILDREN LIFE. HE WOULD LEAVE THEM IN THE HOUSE BY THEIRSELF.
Q. DID YOU TELL - DID YOU TELL THE PEOPLE AT MUSC ABOUT THAT?
A. YES.
Q. WAS YOUR HUSBAND EVER ARRESTED AND CHARGED?
A. NO.
Q. ARE YOU STILL LIVING WITH YOUR HUSBAND?
A. NO, SIR.
MR. WHERRY: YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF MS. FERGUSON.
THE COURT: CROSS-EXAMINATION.

<u>CROSS-EXAMINATION</u>

BY MS. SHOWERS:
Q. MS. FERGUSON, WAS YOUR HUSBAND EVER TREATED AS AN OBSTETRICAL PATIENT AT MUSC?
A. NO, SIR. I MEAN, NO, MA'AM.
MS. SHOWERS: THIS IS CRYSTAL FERGUSON'S ORIGINAL RECORDS.
MR. WHERRY: YOUR HONOR, WE HAVE NO OBJECTION TO IT

BEING USED SUBJECT TO REDACTION, THE NORMAL WAY WE'RE HANDLING THESE

[FERGUSON 196]

THE COURT: OKAY.
Q. (BY MS. SHOWERS, CONTINUING) MS. FERGUSON, YOU HAVE THREE CHILDREN; IS THAT RIGHT?
A. YES, MA'AM.
Q. AND YOU CAME TO MUSC FOR THE FIRST TIME WITH YOUR THIRD PREGNANCY ON JUNE 19, 1991; IS THAT RIGHT?
A. YES, SIR.
Q. AND AT THAT TIME YOU WERE HAVING PRE-TERM LABOR OR EARLY LABOR; IS THAT RIGHT?
A. YES, MA'AM.
Q. AND THAT'S BECAUSE YOU WERE USING COCAINE; ISN'T THAT TRUE?
THE WITNESS: I'M NOT SURE.
MR. WHERRY: IT CALLS FOR A CONCLUSION OF A MEDICAL NATURE. SHE KNOWS WHAT SHE HAS, SHE DOESN'T KNOW WHY. SHE ISN'T A DOCTOR.
THE COURT: WELL I DON'T KNOW WHETHER SHE DOES OR NOT. LET'S SEE. OBJECTION OVERRULED.
Q. (BY MS. SHOWERS, CONTINUING) GO AHEAD.
A. NO, I ASSUMED THAT I WAS GOING THERE BECAUSE IT WAS ALMOST THAT TIME FOR ME TO GO THERE. AND I ADMITTED TO THE

LADY THAT I WAS USING, AND SHE SAID THAT WAS THE PROCEDURE.
BUT I DIDN'T KNOW THEY WAS HAVING TROUBLE WITH THE PREGNANCY
WHEN I WAS GOING TO THE NORTH AREA HEALTH DEPARTMENT BECAUSE
EVERYTHING SEEMED TO BE FINE. I WENT TO MY NORMAL VISIT

[FERGUSON 197]

WHENEVER I WAS SCHEDULED TO COME IN. AND THEY WERE TELLING ME
EVERYTHING WAS FINE.
Q. AND YOU WERE 32 WEEKS PREGNANT; IS THAT RIGHT?
A. YES, MA'AM.
AND W787HEN YOU CAME IN, YOU WERE GIVEN A CONSENT FORM FOR
TREATMENT AT AMBULATORY CARE; IS THAT RIGHT?
A. YES, MA'AM.
Q. AND THAT IS DATED JUNE 19, 1991?
A. YES, MA'AM.
Q. AND THAT'S YOUR SIGNATURE THERE AT THE BOTTOM?
A. YES, MA'AM.
MS. SHOWERS: 1-A.
Q. (BY MS. SHOWERS, CONTINUING) AND AFTER YOU CAME TO MUSC
- EXCUSE ME, ON THAT DAY, YOU FOUND OUT THAT YOU HAD TESTED
POSITIVE FOR COCAINE, TRUE?
A. YES, MA'AM.
Q. AND A NURSE CAME TO SEE YOU TO TALK ABOUT THE HARMFUL
EFFECTS OF COCAINE ON YOUR BABY; ISN'T THAT TRUE?
A. YES, MA'AM.

Q. AND SHE SHOWED YOU A VIDEO ABOUT THE HARMFUL EFFECTS OF ILLEGAL DRUGS ON YOUR UNBORN CHILD, ISN'T THAT ALSO TRUE?
A. YES, MA'AM.
Q. SHE ALSO GAVE YOU A LETTER. IS THAT YOUR SIGNATURE THERE ON THE BOTTOM?
A. YES, MA'AM.

[FERGUSON 198]

MS. SHOWERS: 1-B.
Q. (BY MS. SHOWERS, CONTINUING) AND THIS LETTER IS FROM THE SOLICITOR, NINTH JUDICIAL CIRCUIT, CHARLIE CONDON; IS THAT RIGHT?
A. YES, MA'AM.
Q. AND THAT LETTER WARNED YOU THAT YOU NEEDED TO GO GET SUBSTANCE ABUSE TREATMENT AND PRENATAL CARE TREATMENT IN AN EFFORT TO REHABILITATE YOURSELF AND THE GOOD OF YOURSELF AND YOUR BABY; ISN'T THAT TRUE?
A. YES, MA'AM.
Q. AND AFTER TALKING TO ONE OF THE NURSES AT MUSC, YOU TOLD THAT NURSE THAT YOU WANTED TO GO TO INPATIENT SUBSTANCE ABUSE TREATMENT AT THE MUSC PSYCHIATRIC INSTITUTE; ISN'T THAT TRUE?
A. NO, MA'AM.
Q. THAT IS NOT TRUE?
A. NO, MA'AM.
Q. SO IF THERE IS SOMETHING IN MEDICAL RECORD THAT SAYS THAT, THAT IS NOT TRUE?

A. THAT'S NOT TRUE.
Q. AND YOU ALSO TOLD THAT SAME NURSE THAT YOU HAD YOUR SISTER AT HOME TAKING CARE OF YOUR CHILDREN WHILE YOU WERE IN THE HOSPITAL AND SHE COULD CONTINUE TO TAKE CARE OF YOUR CHILDREN WHILE YOU WERE AT THE PSYCH UNIT?
A. NO, MA'AM. I DON'T RECALL TELLING HER THAT. I RECALL US SPEAKING ABOUT DID I HAVE ANYBODY THAT COULD TAKE CARE OF MY

[FERGUSON 199]

CHILDREN. AND I TOLD HER THAT I HAD A SISTER. I HAD A DYING MOTHER AT THAT TIME AND MY SISTER WAS CAUGHT IN THE MIDDLE OF TRYING TO HELP ME AND HELPING MY MOTHER. SHE WAS BACK AND FORTH TO THE HOSPITAL ALL OF THE TIME.
Q. YOU WERE GIVEN AN APPOINTMENT TO GO TO THE MUSC PSYCHIATRIC INSTITUTE AFTER YOU LEFT MUSC; ISN'T THAT TRUE?
A. YES, MA'AM.
Q. BUT YOU DIDN'T GO?
A. NO, MA'AM. I DIDN'T HAVE TIME.
Q. DID YOU EVER CALL ANYONE AT MUSC TO SAY I NEED TO GO TO OUTPATIENT, MY CIRCUMSTANCES HAVE CHANGED?
A. I RECALL CALLING AND TALKING TO SOMEONE. THAT WAS A LONG TIME AGO. I WAS A VERY SICK PERSON AT THAT TIME.
Q. YOU NEVER WENT TO SUBSTANCE ABUSE TREATMENT TO GET

OUTPATIENT ON YOUR OWN, DID YOU?
A. NOT BEFORE I GOT - BEFORE I HAD THE BABY. AFTER I HAD THE BABY, BUT I WANTED TO GO BEFORE I HAD THE BABY.
Q. BETWEEN JUNE 19TH AND AUGUST 4TH WHEN YOU NEXT CAME BACK TO MUSC, DID YOU EVER GO GET SUBSTANCE ABUSE TREATMENT?
A. NO, MA'AM.
Q. AND YOU DIDN'T CALL ANYONE AT MUSC TO TRY TO HELP YOU GET SUBSTANCE ABUSE TREATMENT?
A. I CALLED SOMEONE CONCERNING THAT.
Q. WHO DID YOU CALL?
A. I'M NOT SURE THE PERSON'S NAME.

[FERGUSON 200]

Q. AND YOU CONTINUED TO USE DRUGS DURING THAT THE FOLLOWING TWO MONTHS; ISN'T THAT TRUE?
A. I TRIED NOT TO, BUT A COUPLE OF TIMES I DID.
Q. OKAY. AND THEN YOU CAME INTO MUSC AND YOU WERE ADMITTED FOR AN EMERGENCY C SECTION BECAUSE YOUR PLACENTA WAS SEPARATING FROM THE UTERINE WALL; ISN'T THAT TRUE?
MR. WHERRY: OBJECTION, YOUR HONOR. SAME BASIS.
THE WITNESS: I HONESTLY DON'T KNOW WHY THEY GAVE ME A CESAREAN.
THE COURT: I SUSTAIN THE OBJECTION.
MR. WHERRY: THANK YOU.

THE COURT: LADIES AND GENTLEMEN, THE ONLY WAY THAT SHE COULD HAVE ANY IDEA WHAT THE CAUSES OF HER RECEIVING CERTAIN TREATMENT IS SOMEONE TOLD HER. AND THAT'S HEARSAY. AND SO IF IT'S IMPORTANT TO PROVE TO YOU WHAT HER MEDICAL CONDITION WAS, THEN THE DOCTOR THAT TREATED HER, OR THE DOCTORS THAT TREATED HER SHOULD BE BROUGHT IN HERE AND TESTIFY WHERE THEY CAN BE CROSS-EXAMINED. IT'S IMPROPER TO BRING THAT TESTIMONY IN HERE BY WAY OF HEARSAY EVIDENCE. SO, I HAVE SUSTAINED THE OBJECTION. DISREGARD THE TESTIMONY. DISREGARD ANY INFERENCE THAT MAY HAVE BEEN DRAWN FROM THE QUESTION AND ANSWER.

YOU MAY PROCEED.

MS. SHOWERS: THANK YOU VERY MUCH.

Q. (BY MS. SHOWERS, CONTINUING) AT THE TIME OF DELIVERY,

[FERGUSON 201]

YOU TESTED POSITIVE FOR COCAINE, DIDN'T YOU?

A. YES, MA'AM.

Q. AND SO DID YOUR BABY?

A. YES, MA'AM.

Q. AND BEFORE YOU EVER CAME TO THE MEDICAL UNIVERSITY, YOU SAW THE PUBLIC SERVICE ANNOUNCEMENT THAT SOLICITOR CONDON HAD

OUT ON THE TELEVISION WARNING WOMEN THAT IF THEY USE DRUGS THEY MAY FACE ARREST?
A. YES, MA'AM.
Q. AND YOU KNEW IF YOU TESTED POSITIVE FOR DRUGS DURING YOUR PREGNANCY THAT YOU COULD GO TO JAIL?
A. YES, MA'AM.
Q. AND YOU WERE AWARE THAT THERE WERE OPPORTUNITIES FOR YOU TO ATTEND SUBSTANCE ABUSE TREATMENT INSTEAD OF GOING TO JAIL AND BEING PROSECUTED?
A., NO, MA'AM.
Q. YOU WERE NOT AWARE OF THAT?
A. NOT OUTPATIENT.
Q. WELL, YOU WERE AWARE THAT THERE WAS SUBSTANCE ABUSE TREATMENT AVAILABLE THAT YOU COULD HAVE GONE TO IN LIEU OF BEING PROSECUTED, TRUE?
A. NO.
Q. YOU DON'T REMEMBER TELLING ME THAT IN YOUR DEPOSITION?
A. AT THE TIME, AS I THINK ABOUT IT, LIKE I SAY THAT WAS A LONG TIME AGO AND I WAS VERY SICK. IF I HAD TO DO IT ALL OVER

[FERGUSON 202]

AGAIN, I WOULDN'T GO TO JAIL I WOULD HAVE WENT OUTPATIENT. BUT I STILL SAY THAT I COULDN'T GO INPATIENT BECAUSE OF THE OTHER TWO KIDS.
Q. SO YOU WERE AWARE THERE WAS SUBSTANCE ABUSE TREATMENT AVAILABLE FOR YOU?

A. YES, BUT NOT OUTPATIENT.
Q. AND WHEN I TOOK YOUR DEPOSITION, DO YOU RECALL TELLING ME THAT THE SUBSTANCE ABUSE TREATMENT THAT YOU GOT AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION WAS HELPFUL AND EFFECTIVE?
A. YES, SIR. YES, MA'AM.
Q. AND, MS. FERGUSON, YOU'RE CURRENTLY PREGNANT NOW; ISN'T THAT TRUE?
A. YES, I AM.
Q. ARE YOU USING COCAINE DURING THIS PREGNANCY?
A. NO, MA'AM.
MS. SHOWERS: ONE MOMENT, YOUR HONOR.
Q. (BY MS. SHOWERS, CONTINUING) JUST A COUPLE MORE QUESTIONS, MS. FERGUSON. I'M GOING TO ASK YOU IF THAT IS YOUR SIGNATURE ON THE BOTTOM OF THE PAGE?
A. YES, MA'AM.
Q. I'LL SHOW THEM ALL TO YOU, MS. FERGUSON. IS THAT YOUR SIGNATURE?
MR. WHERRY: YOUR HONOR, MAY I BE HEARD ON THESE DOCUMENTS UNDER 270(D)(D).
MS. SHOWERS: 290.

* * *

[FERGUSON 205]

MS. SHOWERS: AT THE TIME.
THE COURT: IS THERE ANY OBJECTION TO THIS?
MS. PALTROW: UNDER THE CFR SECTION 2.61.

THE COURT: UMM-HMM.
- MS. PALTROW: AND 2.64, ANY PART OF ANY SUBSTANCE ABUSE RECORD MUST BE ORDERED BY THIS COURT TO BE ALLOWED IN. WE JUST WANT TO MAKE SURE THAT THEY'RE DONE ACCORDING TO THAT.
THE COURT: LET'S MARK THESE FOR IDENTIFICATION. THESE PURPORT TO BE SOME CONSENTS FOR THE RELEASE OF INFORMATION. I DON'T KNOW WHY THE CONSENT WOULD HAVE ANY RELEVANCE, UNLESS THE INFORMATION FOLLOWS.
MS. SHOWERS: WE WANT TO MOVE IT INTO EVIDENCE.
THE COURT: WHEN YOU MOVE IT IN, I'LL LOOK AT IT AND SEE WHETHER OR NOT I CAN MAKE A FINDING OF FACT. BUT IN THE MEANTIME MARK IT FOR IDENTIFICATION AND STATE THE NUMBER FOR THE RECORD.
DEPUTY CLERK: OKAY.
THE COURT: LET'S PROCEED WITH EXAMINATION OF THIS WITNESS.
DEPUTY CLERK: THAT'S DEFENDANTS' EXHIBIT NUMBERS 1-C, 1-D,1-E AND 1-F FOR IDENTIFICATION.
MS. SHOWERS: YOUR HONOR, THEN I'M MOVING INTO EVIDENCE THE SUBSTANCE ABUSE RECORD MARKED AS DEFENDANTS' EXHIBIT 5.
I DON'T HAVE ANY OTHER QUESTIONS.

* * *

[FERGUSON 207]

MY - MY MENTAL CONDITION WASN'T WELL AT ALL.
Q. WAS YOUR PHYSICAL CONDITION - WHEN YOU WENT TO THE HOSPITAL, WHAT WAS YOUR PHYSICAL CONDITION?
A. I GUESS MY PHYSICAL CONDITION WAS AS WELL TO BE EXPECTED.
Q. DID YOU READ THAT CONSENT BEFORE YOU SIGNED IT?
A. NO.
Q. WHAT DID YOU THINK YOU WERE CONSENTING TO?
A. I THOUGHT IT WAS SOMETHING MORE LIKE TO HELP ME.
Q. WHEN YOU TOLD THE PEOPLE AT MUSC THAT YOU WERE USING COCAINE WHEN YOU WERE PREGNANT, WHY DID YOU DO THAT?
A. BECAUSE I DIDN'T KNOW HOW MUCH WAS TOO MUCH OR TOO LITTLE. I HAVE BEEN AROUND SEVERAL PEOPLE THAT HAD BABIES THAT NOTHING WAS WRONG WITH THEM. I PRAYED A LOT. I PRAYED THAT MY BABY WAS GOING TO BE ONE OF THOSE BABIES THAT WAS ONE OF THE LUCKY ONES, BUT I COULDN'T BE POSITIVE OF THAT. AND I KNEW THAT I WAS WRONG, BUT I KNEW THAT I NEEDED HELP.
Q. WHAT DID YOU EXPECT THE HOSPITAL TO DO FOR YOU?
A. HELP ME.
MR. WHERRY: I HAVE NO FURTHER QUESTIONS ON

REDIRECT.

RECROSS-EXAMINATION

BY MS. SHOWERS:

Q. MS. FERGUSON, THEY DID GIVE YOU AN APPOINTMENT TO GO TO SUBSTANCE ABUSE TREATMENT, DID THEY NOT?

[FERGUSON 208]

A. YES, MA'AM.

MS. SHOWERS: THANK YOU. NOTHING FURTHER.

THE COURT: THANK YOU. YOU'RE EXCUSED.

(TESTIMONY OF MS. FERGUSON COMPLETED.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF DEBORAH FRANK

[FRANK 944]

CAN PICK IT BACK UP VERY EASILY.
AND SO JUST DON'T WORRY ABOUT IT DURING THE HOLIDAYS. HAVE A GOOD TIME AND BE CAREFUL AND BE SAFE AND WE'LL SEE YOU BACK ON THE 6TH AT TEN O'CLOCK.
MR. WHERRY: I REALIZE WHEN I SAID TEN MINUTES, IT'S NOW TWENTY. WE CALLED IMMEDIATELY. IT'S A THREE - OR FOUR-MINUTE WALK.
THE COURT: SHE CAN'T GET IN THE BUILDING.
MR. WHERRY: THAT MAY BE THE PROBLEM, ALTHOUGH WE HAVE SOMEONE DOWNSTAIRS TO FACILIATE THAT. AND I THINK WE JUST GOT LUCKY. HERE COMES DR. FRANK.

- - -

DEBORAH FRANK, PLF. WITNESS, AFFIRMED.

DIRECT EXAMINATION

BY MS. PALTROW:

Q. GOOD AFTERNOON, DR. FRANK. WITH THE COURT'S AND JURY'S INDULGENGE WE STILL HAVE A FEW MINUTES TO ASK A FEW QUESTIONS.

TELL ME ABOUT YOUR EDUCATIONAL BACKGROUND?
A. I GRADUATED FROM RADCLIFFE COLLEGE AND HARVARD MEDICAL SCHOOL. TRAINED AT CHILDREN'S ORTHOPEDIC HOSPITAL IN SEATTLE AND DID A FELLOWSHIP WITH DR. BRAZELTON AT CHILDREN'S HOSPITAL AT BOSTON.
Q. AND CAN YOU TELL ME WHERE YOU'RE CURRENTLY WORKING?
A. BOSTON MEDICAL CENTER, WHICH USED TO BE CALLED BOSTON

[FRANK 945]

CITY.
Q. WHAT D0 YOU DO THERE?
A. I AM ASSOCIATE PROFESSOR OF PEDIATRICS AT THE SCHOOL OF MEDICINE. AND I RUN A LARGE RESEARCH PROJECT FUNDED BY THE NATIONAL CENTER OF DRUG ABUSE FOLLOWING CHILDREN WHO ARE PRENATELY EXPOSED AND CHILDREN WHO WERENT. AND ALSO RUN A PROGRAM FOR MALNOURISHED KIDS.
Q. ARE THOSE TWO OF YOUR AREAS OF EXPERTISE?
A. THEY ARE.
Q. AND CAN YOU TELL ME WHAT OTHER RESEARCH YOU MAY HAVE DONE IN THE FIELD OF SUBSTANCE-EXPOSED INFANTS?
A. I WAS PART OF A STUDY DIRECTED BY DOCTOR ZUCKERMAN, WHEN I FIRST CAME TO THE HOSPITAL, STUDYING BIRTH OUTCOMES OF

CHILDREN EXPOSED TO COCAINE AND MARIJUANA AND OTHER SUBSTANCES PRENATALLY. I HAVE ALSO WRITTEN A PAPER ABOUT INTENTIONS TO BREAST FEED. I HAVE WRITTEN A PAPER ABOUT ABOUT BODY COMPOSTION FOLLOWING DRUG EXPOSURE. AND THEN I'M NOW DOING A STUDY OF WHERE THE OTHER ONE LEFT OFF, ALTHOUGH IT'S A NEW GROUP OF KIDS, WHERE WE RECRUIT THEM AT BIRTH AND THEN FOLLOW THEM. SO WE'RE FOLLOWING THEM NOW UP TO AGE 6.

Q. CAN YOU TELL ME, HAVE YOU PUBLISHED ANY RESEARCH ARTICLES ON THE SUBJECT OF COCAINE AND OTHER DRUG-EXPOSED INFANTS?

A. I JUST CAN'T GIVE YOU A LIST. I HAVE ALSO DONE A OF REVIEW ARTICLES THAT AREN'T JUST BASED ON OUR RESEARCH, BUT PULL TOGETHER THE RESEARCH OF A LOT OF OTHER PEOPLE AND TRYING

* * *

[FRANK 952]

MANY TIMES HE BANGS AND HOW MANY TIMES HE SMILES AND HOW MANY TIMES HE PRETENDS HE IS COOKING DINNER. IT'S VERY TEDIOUS, BUT THAT'S WHAT CODING IS. DOCUMENTING BEHAVIOR MINUTE TO MINUTE.

Q. DO YOU HAVE AN OPINION ABOUT WHETHER ONE HIT OR ONE LINE OF COCAINE IS LIKELY TO CAUSE DEATH OR DAMAGE TO A PARTICULAR

PREGNANCY?
A. I WOULD THINK THAT ONE LINE WOULD BE VERY UNLIKELY. THAT A MASSIVE DOSE IN GRAMS COULD BE DANGEROUS AND - BUT, AGAIN, MOST OF OUR DATA SHOWS THAT IT'S THE VERY HIGHEST DOSES WHERE THE DANGER IS.
Q. AND IN TERMS OF - DO YOU HAVE AN OPINION ABOUT THE RELATIVE RISK OF ONE LINE OF COKE, USING COCAINE ONCE, VERSUS OTHER SUBSTANCES?
A. WELL, MY OPINION IS THAT - ALL SUBSTANCES IT DEPENDS ON DOSE. THAT HALF A GLASS OF CHAMPAGNE WILL PROBABLY NOT DO THE MOTHER OR BABY MUCH HARM. THAT A FIFTH OF WHISKEY COULD EASILY KILL BOTH OF THEM. THAT ONE LINE OF COCAINE IS NOT A GOOD IDEA, BUT I WOULD BE REALLY WORRIED IF WE STARTED TALKING GRAMS. SAME WITH OPIATES, DEPENDING ON THE TOLERANCE OF THE LADY, HOW USED SHE IS TO OPIATES. IT - YOU KNOW, A SMALL DOSE WILL NOT DO PERMANENT DAMAGE. A LARGE ONE COULD PUT HER IN A COMA AND KILL THE BABY, TOO, SURE.
Q. THAT WOULD BE FOR HEROIN?
A. YES, HEROIN IS AN OPIATE. I'M SORRY.

* * *

[FRANK 956]

A. MY OPINION IS THAT THERE WAS, AGAIN THERE WERE A LOT OF

SERIOUS WHAT WE CALL METHODOLOGICAL ISSUES IN THE EARLY RESEARCH, WHICH IS OFTEN WHAT HAPPENS AND THAT THEY RAISE QUESTIONS, BUT IT CERTAINLY DIDN'T GIVE ANY DEFINITIVE ANSWERS. AND THE ISSUES ARE THE ONES WE HAVE TALKED ABOUT. NO CONTROLS, THE PEOPLE WHO ARE ASSESSING THE KIDS KNEW THE HISTORY AND SO HAD EXPECTATIONS, DIDN'T ACCOUNT FOR OTHER EXPOSURES AND OTHER PROBLEMS. THE WHOLE - THE DOCTOR CHASNOFF'S GROUP, FOR EXAMPLE, IS A VERY UNUSUAL, SELECT GROUP BAD ENOUGH TO GET INTO DRUG TREATMENT. YOU KNOW. AND SO THAT THE EARLY RESEARCH WAS VERY PRELIMINARY AND IT SORT OF RAISED THE QUESTIONS THAT THE WHOLE NEXT GENERATION OF RESEARCHERS, OF WHICH I'M ONE, HAVE SET OUT TO ANSWER. BUT IT DIDN'T GIVE THE ANSWERS.

MS. PALTROW: NO FURTHER QUESTIONS.

CROSS-EXAMINATION

BY MS. SHOWERS:

Q. DR. FRANK, IF I UNDERSTAND YOUR TESTIMONY, IT'S ALL RIGHT FOR WOMEN TO USE COCAINE DURING THEIR PREGNANCY?

A. I THINK YOU MISINTERPRET ME.

Q. SO YOU WOULD AGREE WITH ME THAT COCAINE USE DURING PREGNANCY SHOULD BE DISCOURAGED?

A. I AGREE.

Q. AND THE USE OF COCAINE PRENATALLY INCREASES THE RISK OF ADVERSE OUTCOMES FOR THE CHILD, CORRECT?

[FRANK 957]

A. IT'S ONE OF MANY SUBSTANCES THAT INCREASES THE RISK OF ADVERSE OUTCOMES.
Q. AND YOU TALKED ABOUT DOING RESEARCH ON ANIMALS AND TRANSLATING THAT TO HUMANS. DO YOU ADVOCATE USING HUMANS TO TEST THE EFFECTS OF COCAINE?
A. THAT'S - YOU DON'T - OBVIOUSLY YOU DON'T TEST POTENTIALLY DANGEROUS DRUGS ON HUMANS. PEOPLE TEST THEM ON THEMSELVES, UNFORTUNATELY. I'M NOT TRYING TO DISCREDIT ANIMAL RESEARCH, I'M SIMPLY SAYING THAT EXTRAPOLATION FROM THEIR DATA TO HUMANS HAS TO BE DONE VERY CAUTIOUSLY.
Q. SO THE ANSWER TO MY QUESTION IS: NO, YOU DON'T ADVOCATE TESTING COCAINE ON HUMANS, CORRECT?
A. DO I ADVOCATE RANDOMLY ASSIGNING HUMANS TO GIVE THEM COCAINE, FOR HEAVEN SAKES, NO.
Q. YOU AGREE WITH ME IN 1988 AND 1989 THERE WERE REPORTS IN THE LITERATURE THAT THE USE OF COCAINE DURING PREGNANCY WAS EXPECTED TO BE A PROBLEM OF ENORMOUS PROPORTIONS, CORRECT?
A. BUT - IF THOSE REPORTS WERE READ CRITICALLY -

Q. JUST YES OR NO, DOCTOR. YOU CAN EXPLAIN IT. YES OR NO?
A. THERE WERE - YES, THERE WERE ALL KINDS OF DIRE PREDICTIONS IN THE LITERATURE.
MS. PALTROW: I WOULD LIKE TO LET THE WITNESS ANSWER THE QUESTION.
MS. SHOWERS: SHE ANSWERED IT.
THE COURT: WELL DIDN'T SHE ANSWER THAT ON DIRECT

[FRANK 958]

EXAMINATION? DIDN'T SHE EXPLAIN THAT ON DIRECT EXAMINATION?
MS. PALTROW: I DON'T KNOW WHAT SHE IS GOING TO EXPLAIN.
THE COURT: HAVE YOU ALREADY EXPLAINED THAT?
THE WITNESS: I EXPLAINED WHY I THOUGHT THAT THE LITERATURE WAS FLAWED, YOUR HONOR. AND YOU HAD TO BE VERY CAUTIOUS ABOUT INTERPRETATIONS. AND THE DIRE PREDICTIONS THAT WERE MADE WERE BASED ON UNSOUND SCIENCE, I GUESS WOULD BE THE BEST WAY TO PUT IT.
Q. (BY MS. SHOWERS, CONTINUING) SO, DR. FRANK, DO I UNDERSTAND YOU TO SAY THAT YOU DON'T RESPECT DOCTOR IRA CHASNOFF'S WORK?
A. I THINK BECAUSE HE WAS THE FIRST PERSON TO NOTICE

SOMETHING - YES, OF COURSE I RESPECT DR. CHASNOFF. BUT WE DISAGREE ABOUT SOME THINGS.
Q. YOU DISAGREE WITH DR. CHASNOFF?
A. ABOUT SOME THINGS WE DO.
Q. THE PLAINTIFFS' OWN EXPERT, DR. CHASNOFF, CORRECT?
MS. PALTROW: OBJECTION, YOUR HONOR, THIS IS ARGUMENTATIVE AND MISLEADING.
MS. SHOWERS: WITHDRAWN, YOUR HONOR.
Q. (BY MS. SHOWERS, CONTINUING) YOU AGREE WITH ME, DR. FRANK, THAT IN 1988 AND 1989 THERE WAS A MEDICAL REASON TO TEST PREGNANT WOMEN FOR COCAINE USE?
A. I GUESS THE QUESTION IS, WHAT YOU DO YOU MEAN BY MEDICAL

[FRANK 959]

REASON? I DON'T THINK I GET IT.
Q. WE TALKED ABOUT IT IN YOUR DEPOSITION. WOULD YOU LIKE TO REFRESH YOUR RECOLLECTION?
A. SURE. I HAVE NEVER EVEN SEEN MY DEPOSITION.
MR. WHERRY: AND READING AND SIGNING WAS NOT WAIVED, I WAS THERE.
A. WHERE DID WE TALK ABOUT THIS NOW. I GUESS I'M TRYING TO FIGURE OUT BY MEDICAL, BUT I PROBABLY UNDERSTOOD IT WHEN YOU ASKED ME BEFORE. WHERE ARE WE?
Q. ON PAGE 35.
A. OKAY.

Q. LINE 24. BUT MY QUESTION IS SIMPLY, WAS THERE ANY MEDICAL EVIDENCE TO SUPPORT THE TESTING OF PREGNANT WOMEN BACK IN THE LATE '80'S?

A. AND I SAID THAT IN FACT THE PEOPLE, THERE WAS GREAT INTEREST IN DETERMINING THE PREVALENCE OF USE, YES. I THINK THAT'S - THERE WAS EPIDEMIOLOGIC.

Q. SO THERE WAS A REASON TO TEST PREGNANT WOMEN FOR COCAINE USE DURING THEIR PREGNANCY?

A. YEAH. I MEAN, I THINK THAT'S RIGHT.

Q. AND AT YOUR HOSPITAL IN FACT YOU TESTED BABIES IF THEY APPEARED JITTERY; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. IF THE - IF THERE WAS A MATERNAL HISTORY OF SUBSTANCE ABUSE?

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF JOSEPH GOOD

[GOOD 172]

(TESTIMONY EXCERPT OF JOSEPH GOOD 12-16-96.)

- JOSEPH C. GOOD, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HOOD:

Q. GOOD AFTERNOON. MR. GOOD, I WANT THE JURY TO KNOW WHO YOU ARE FIRST. JUST A LITTLE BIT ABOUT YOU.

YOU WERE BORN AND RAISED WHERE?

A. I WAS BORN AND RAISED IN COLUMBIA, SOUTH CAROLINA.

Q. ALL RIGHT, SIR. AND YOUR EDUCATIONAL BACKGROUND.

A. I WENT TO PUBLIC SCHOOLS AND WENT TO WOFFORD COLLEGE IN SPARTANBURG AND THEN WENT TO USC LAW SCHOOL. AND GOT OUT OF LAW SCHOOL AND WENT IN THE ARMY AND SERVED AS A QUARTERMASTER. AND GOT OUT IN 1970 AND WORKED FOR THE ATTORNEY GENERAL DAN MCCLOUD IN THE STATE ATTORNEY GENERAL'S OFFICE FOR TWO YEARS. AND I LEFT THERE AND WENT WITH SOUTH

CAROLINA ELECTRIC AND GAS COMPANY AS AN ATTORNEY FOR THEM FOR 13 YEARS. COMING TO THE MEDICAL UNIVERSITY AS THEIR ATTORNEY IN 1987 AROUND SEPTEMBER.

Q. AND YOUR TITLE IS WHAT AT THE MEDICAL UNIVERSITY, MR. GOOD?

A. GENERAL COUNSEL.

Q. AND YOU HAVE HELD THAT TITLE FOR HOW LONG?

A. ABOUT TEN YEARS NOW, SIR.

Q. AND YOU'RE A LICENSED PRACTICING ATTORNEY BY THE STATE OF

[GOOD 173]

SOUTH CAROLINA?

A. YES, SIR, I AM.

Q. BUT YOU'RE A FULL-TIME EMPLOYEE; IS THAT CORRECT?

A. YES, SIR, IM A SALARIED EMPLOYEE.

Q. ALL RIGHT. MR. GOOD, THE REASON WE HAVE ASKED YOU TO TESTIFY, I WANT YOU TO EXPLAIN TO THE JURY THE METHOD AND MODE BY WHICH PROTOCOLS AND POLICIES GO THROUGH THE PROCESS OF BECOMING FORMULATED AND ULTIMATELY APPROVED BY THE BOARD THAT RUNS THE MEDICAL UNIVERSITY?

A. YES, SIR. AS Y'ALL KNOW THE MEDICAL UNIVERSITY IS A LARGE PLACE AND GETTING LARGER EVERY DAY. WE HAVE SIX COLLEGES AND WE OPERATE THREE HOSPITALS. ALL OF THE LEGAL AUTHORITY FOR OPERATING THE UNIVERSITY IS IN OUR BOARD OF

TRUSTEES, MANY OF WHICH ARE HERE TODAY, AND YOU WILL MEET SOME OF THEM LATER.

TRUSTEES DELEGATE TO DIFFERENT COLLEGES AND DIFFERENT HOSPITALS THE RESPONSIBILITY TO DEVELOP RULES AND REGULATIONS FOR RUNNING THOSE HOSPITALS. AND WE HAVE TO LEAVE IT TO THE PHYSICIANS WHO KIND OF KNOW BETTER THAN WE DO. IN THIS PARTICULAR INSTANCE THE DEPARTMENT OF PEDIATRICS SAW THAT WE HAD A PROBLEM AND THEY STARTED WORKING ON IT. AND THEY DEVELOPED A POLICY THAT WE HAVE BEEN DISCUSSING IN THIS CASE.

AFTER IT WAS REVIEWED BY THE DEPARTMENT OF PEDIATRICS, IT WENT TO THE EXECUTIVE STAFF OF THE MEDICAL STAFF OF THE MEDICAL UNIVERSITY. THEY'RE THE PHYSICIANS THAT

[GOOD 174]

GOVERN THE DAY-TO-DAY RUNNING OF THE HOSPITAL. THEY REVIEWED THE POLICY. THEY I THINK REFINED IT. AND THEN THEY VOTED IN A FORMAL SESSION TO ACCEPT THE POLICY. AND I BELIEVE IT WAS IN NOVEMBER OF 1989 WHEN THEY ADOPTED THE POLICY AS THE OFFICIAL HOSPITAL POLICY.

THEY THEN, IN THE EXECUTIVE COMMITTEE MINUTES, IN THEIR MINUTES, AS THEY NORMALLY DO, SEND IT UP TO THE

GOVERNING BOARD, THE BOARD OF TRUSTEES OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. AS IS NORMAL, THEY HAVE TO PUT IT TO A COMMITTEE FOR THEIR REVIEW. IN THIS CASE IT WOULD HAVE BEEN THE HOSPITAL AND PATIENT CARE COMMITTEE WHO THOROUGHLY REVIEWED WHAT THEIR MEDICAL STAFF HAD DONE, APPROVED THE POLICY AND PRESENTED IT TO THE FULL BOARD IN FEBRUARY OF 1990 FOR FORMATION. AND THE FULL BOARD ACKNOWLEDGED IT. AND I THINK SOMEWHERE IN THERE DR. DEL BENE, WHO YOU HAVE HEARD FROM, EXPLAINED IT TO THE BOARD AND TO THE PATIENT - I MEAN HOSPITAL AND PATIENT CARE COMMITTEE.

Q. NOW IN THAT APPROVAL PROCESS THAT YOU HAVE JUST OUTLINED, WAS ANYTHING DONE THAT WAS A DEVIATION OR DIFFERENT FROM THE NORMAL METHOD OF COMING UP WITH THE HOSPITAL PROTOCOL OR POLICY

A. NO, SIR.

Q. WAS THERE ANYTHING THAT WAS DONE IN THE FORMULATION OR THE IMPLEMENTATION OF THIS POLICY WHICH WAS DONE IN A WAY TO DISCRIMINATE?

[GOOD 175]

A. NO, SIR.

Q. WAS THIS POLICY FORMULATED AND IMPLEMENTED BY THE MEDICAL

UNIVERSITY AT THE INSISTENCE OF SHIRLEY BROWN?
A. NO, SIR. SHIRLEY IS A NURSE, AND I DON'T MEAN TO BELITTLE HER, BUT SHE DOESN'T HAVE THE DECISION-MAKING POWER FOR THE UNIVERSITY.
Q. ALL RIGHT, SIR. EXPLAIN WHO ACTUALLY GOVERNS - WE UNDERSTAND THAT THE MEDICAL UNIVERSITY HAS SOMETHING LIKE EIGHT THOUSAND EMPLOYEES - WHO GOVERNS THE MEDICAL UNIVERSITY?
A. BY LAW IT IS THE MEMBERS OF THE BOARD OF TRUSTEES.
Q. OKAY.
A. THEY HAVE ALL OF THE LEGAL POWER.
Q. OKAY. AND THEY ARE NAMED IN THIS LAWSUIT; IS THAT CORRECT?
A. YES, SIR.
Q. NOW THERE HAVE BEEN SOME CHANGES SINCE THE LAWSUIT WAS BROUGHT IN THE BOARD OF TRUSTEES. THERE ARE SOME NEW MEMBERS; IS THAT RIGHT?
A. THEY ARE. THEIR TERMS GO OFF AND WE HAVE ONE LAY PERSON AND ONE MEDICAL PERSON FROM EACH DISTRICT, AND IT DOES CHANGE FROM TIME TO TIME.
Q. OKAY. A LETTER WAS PUT INTO EVIDENCE, PLAINTIFF'S EXHIBIT 28, THAT WAS WRITTEN BY YOU. I WANT TO SHOW YOU THE LETTER AND ASK YOU A QUESTION. WAS THIS POLICY SOMETHING THAT.

[GOOD 176]

SOLICITOR CONDON WAS INSISTING ON THE MEDICAL UNIVERSITY DOING?

A. NO, SIR, IT WASN'T. YOU KNOW, MAYBE I OUGHT TO EXPLAIN THE RELATIONSHIP. WE'RE A STATE AGENCY, THE MEDICAL UNIVERSITY. AND I, FROM TIME TO TIME, ON A WEEKLY BASIS IN CALLING THE ATTORNEY GENERAL'S OFFICE, I CALL THE LOCAL SOLICITOR'S OFFICE, I CALL LAW ENFORCEMENT, I CALL DSS AND WORK VERY CLOSELY WITH THEM. I THINK OUR PEDIATRICIANS RECOGNIZED THAT WE HAD A PROBLEM. YOU KNOW EVERYBODY THINKS THAT IT CAN'T HAPPEN IN SOUTH CAROLINA, BUT THEY HAD INFORMED ME THAT WE REALLY DID HAVE A PROBLEM.

I THINK IN ANOTHER CORRESPONDENCE I CONTACTED THE STATE ATTORNEY GENERAL'S OFFICE AND SAID, LOOK, I HAVE BEEN READING IN THE NEWS WHAT YOU HAVE BEEN DOING IN GREENVILLE, ARE YOU GOING TO DO THAT IN CHARLESTON? I CONTACTED THE SOLICITOR'S OFFICE AND SAID, YOU KNOW, WHAT ARE Y'ALL GOING TO DO, SHOULD WE GET TOGETHER.

IT APPEARED TO ME, AND WE'VE GOT LAWYERS REPRESENTING THE HOSPITAL, WE'VE GOT LAWYERS REPRESENTING

MOTHERS, BUT WE AIN'T GOT ANY LAWYERS REPRESENTING THE UNBORN CHILD AND SOMEHOW IN MY MIND THESE CHILDREN WERE FALLING THROUGH THE CRACKS. AND EVERYBODY WAS DOING THEIR OWN THING AND IT WASN'T A COORDINATION. AND SO AS I RECALL I CONTACTED OUR LOCAL SOLICITOR AND SAID WHAT ARE Y'ALL DOING AND WHAT CAN WE DO AND SHOULD WE GET TOGETHER AND MEET AND TALK ABOUT

[GOOD 177]

THIS.

Q. ALL RIGHT, SIR. AND IN FURTHERANCE OF WHAT YOU JUST SAID, THE ONLY COPY I HAVE IS HIGHLIGHTED. I WILL SUBMIT AN UNHIGHLIGHTED ONE. LET ME HAND YOU THIS. IS THIS THE LETTER?

A. YES, SIR. AUGUST 23, 1989, TO HONORABLE CHARLES CONDON, SOLICITOR.

Q. ALL RIGHT. READ TO THE JURY THE FIRST SENTENCE OF WHAT YOU SAID IN THAT LETTER, PLEASE.

A. DEAR CHARLES, I READ WITH GREAT INTEREST IN SUNDAY'S NEWSPAPER ACCOUNTS OF OUR GOOD FRIEND AND SOLICITOR FOR THE 13TH JUDICIAL CIRCUIT PROSECUTING MOTHERS WHO GAVE BIRTH TO CHILDREN WHO TESTED POSITIVE FOR DRUGS.

Q. OKAY. THAT'S UP IN WHAT COMMUNITY?

A. GREENVILLE.

MR. HOOD: PUT THIS LETTER INTO EVIDENCE.
MR. WHERRY: NO OBJECTION.
MR. HOOD: IT'S ALREADY IN EVIDENCE.
MR. HOOD: IT'S DEFENDANTS' 170.
Q. (BY MR. HOOD, CONTINUING) ALL RIGHT, SIR. READ THE LAST SENTENCE OF THAT LETTER, WHICH IS NOW EXHIBIT 170.
A. PLEASE ADVISE US IF YOUR OFFICE IS ANTICIPATING FUTURE CRIMINAL ACTION AND WHAT, IF ANYTHING, OUR MEDICAL CENTER NEEDS TO DO TO ASSIST YOU IN THIS MATTER.
Q. ALL RIGHT, SIR. NOW, WHEN THE PEDIATRIC DOCTORS CAME TO YOU AND ASKED ABOUT THIS PROBLEM AND WHAT TO DO, EXPLAIN TO

[GOOD 178]

THE JURY WHAT YOU AS THE ATTORNEY FOR THEM AND THE OTHER DOCTORS AT THE MEDICAL UNIVERSITY UNDERTOOK TO DO?
A. I THINK THEIR CONCERN, THEY CAME TO ME AND TOLD ME WHAT THEY HAD FOUND AND WHAT THEY WERE EXPERIENCING. WHAT WE WANTED TO DO WAS DEVISE A POLICY, OR WHAT THEY WANTED TO DO WAS DEVISE A POLICY.
MR. WHERRY: OBJECTION, YOUR HONOR, THAT'S HEARSAY WHAT THEY WANTED TO DO.
THE COURT: GO AHEAD.

A. I'LL REPHRASE WHAT I WANTED TO DO AND WHAT I ADVISED THE PHYSICIANS TO DO.
Q. ALL RIGHT, SIR.
A. IS TO DEVELOP A POLICY TO GIVE THESE BABIES A CHANCE.
AND I SUGGESTED TO THEM THE CARROT-AND-STICK METHOD. THAT IF VOLUNTARY TREATMENT WAS NOT GOING TO WORK, THAT WHAT WE OUGHT TO DO IS GIVE THEM SOME REWARD SEEKING TREATMENT AND SOME PUNISHMENT IF THEY DIDN'T. AND THAT'S WHAT I MEANT BY THE CARROT AND STICK.
I WANTED A POLICY AND WAS VERY SENSITIVE TO THIS, THAT DOCTORS WOULD HAVE TO TELL ME, I'M A LAY PERSON, OF WHO SHOULD BE TESTED. AND I WAS INSISTENT THAT POLICY BE NONDISCRIMINATORY AND APPLIED THROUGHOUT THE UNIVERSITY AND HOPEFULLY AT THE OTHER AREA HOSPITALS. WE HAD NO LEGAL CONTROL TO MAKE OTHER HOSPITALS LIKE ROPER AND SAINT FRANCIS DO ANYTHING, BUT WE WERE THE STATE MEDICAL UNIVERSITY AND I

[GOOD 179]

FELT LIKE WE OUGHT TO TAKE THE LEAD IN THIS THING.
Q. OKAY. AND SO THEN WHEN YOU WROTE YOUR LETTER, PLAINTIFF'S EXHIBIT 28 ON DECEMBER THE 19, 1989, AND THEN THE

THIRD PARAGRAPH REFERRED TO A MEETING. IS THIS SOMETHING THAT WAS ORGANIZED BY YOU, MR. GOOD?

A. I PROBABLY HAD SUGGESTED THAT, TO BE TRUTHFUL WITH YOU THAT WE ALL COME TOMORROW. AND I THINK WE CAME TOGETHER AT THE MEDICAL UNIVERSITY BECAUSE IT WAS A CENTRAL PLACE. AND I REMEMBER GOING DOWN AND MEETING IN A BIG ROOM WITH REPRESENTATIVES FROM CHARLESTON SUBSTANCE ABUSE, SOME SOCIAL WORKERS, I THINK NURSE BROWN WAS THERE, AND THE SOLICITOR'S OFFICE WAS REPRESENTED AND LAW ENFORCEMENT WAS REPRESENTED, TO MAINLY SAY LET'S TALK ABOUT WHAT EACH OTHER IS DOING AND WHY THIS THING ISN'T WORKING OR HOW WE CAN MAKE IT WORK BETTER.

Q. REFERRING TO THE SECOND PAGE OF THAT LETTER WHERE YOU SAY THIS IS NOT A PERFECT PROGRAM, AND YOU GO THROUGH YOUR THOUGHTS ABOUT IT AT THAT TIME, DECEMBER OF '89, WAS THE POLICY EVOLVING AT THIS POINT?

A. IT WAS BRAND NEW. WE WERE BRAINSTORMING TO SEE WHAT WOULD BE THE BEST METHOD. I'M NOT A CRIMINAL LAWYER. OF COURSE, MY BOSS IS IN THE BACK OF THE ROOM, WOULD TELL YOU I'M NOT MUCH OF A LAWYER AT ANYTHING. I'M CERTAINLY NOT A CRIMINAL LAWYER. I WAS BEING A DEVIL'S ADVOCATE AND I WAS

INQUISITIVE BY NATURE, WHAT ABOUT THIS WHAT ABOUT THAT, WHAT - HOW DOES CRIMINAL LAW WORK ON THIS OR THAT, AND WE WERE

[GOOD 180]

WRITING BACK AND BANTERING THE IDEA AROUND, YOU KNOW, TO COME UP WITH THE VERY BEST.

Q. AND WITH REGARD TO THE ADEQUACY OF THE PATIENT'S CONSENT TO HAVE A DRUG SCREEN DONE, THE INFORMED CONSENT OF THE PATIENTS, THE PATIENT WHO TESTED POSITIVE, GOING THROUGH THIS PROGRAM, SHOWN THE VIDEOTAPE AND COUNSELING AND SO FORTH, REFERRED TO DSS FOR COUNSELING, DID YOU CONSIDER THE WAY IT WAS SET UP TO BE ADEQUATE?

A. I DID.

Q. AND ARE YOU FAMILIAR -

MR. WHERRY: OBJECTION, YOUR HONOR. THAT'S AN EXPERT OPINION ON THE LAW.

THE COURT: WHAT WAS THE QUESTION AGAIN?

MR. HOOD: DID YOU CONSIDER IT TO BE ADEQUATE?

THE COURT: WHAT TO BE ADEQUATE?

MR. HOOD: THE WAY THE POLICY WAS SET UP FROM THE STANDPOINT OF INFORMED CONSENT TO THE PATIENT WITH REGARD TO THE GIVING OF THE INFORMED CONSENT TO HAVE THE DRUG TEST

GIVEN, URINE DRUG SCREEN OBTAINED AND SO FORTH.

THE COURT: ALL RIGHT, SIR. I'LL BE GLAD TO HEAR YOU

MR. WHERRY: I THINK THAT THAT IS AN OPINION ON THE LAW. INFORMED CONSENT IS SOMETHING THAT YOU WILL CHARGE THE JURY ABOUT AND WHAT IT MEANS AND WHAT IS NECESSARY AND WHAT IS ADEQUATE. TO HAVE THIS WITNESS GIVE AN OPINION THAT HE THINKS

* * *

[GOOD 185]

SO MUCH, I'M REMINDED OF CARNAC. REMEMBER JOHNNY CARSON, HE DIDN'T HAVE TO KNOW THE QUESTION, HE COULD GIVE YOU THE ANSWER. I THINK HE CAN PROBABLY DO THAT.

GO AHEAD.

MR. HOOD: YES, SIR.

Q. (BY MR. HOOD, CONTINUING) THE SOLICITOR, AS YOU MENTIONED IN YOUR LETTER, WAS BROUGHT IN AT THIS MEETING. WHY?

A. MR. HOOD, AS I STATED BEFORE, I'M NOT A CRIMINAL LAWYER. THE SOLICITOR IS A PEOPLES' LAWYER. HE IS A CRIMINAL LAWYER. I BROUGHT HIM IN TO ADVISE ALL OF US ON WHAT THE LAW WAS AND MAKE SURE THE POLICY WAS ACCEPTABLE. APPROPRIATE.

Q. AND DID YOU - AND DID THE MEDICAL UNIVERSITY FOLLOW WHAT THE SOLICITOR RECOMMENDED?
A. WE DID, SIR.
Q. AND DID THE SOLICITOR RECOMMEND REPORTING TO LAW ENFORCEMENT?
MR. WHERRY: OBJECTION, HEARSAY.
THE COURT: WELL, IT'S LEADING. YOU SAID DID THE SOLICITOR RECOMMEND WHAT. YOU CAN ASK HIM WHAT, IF ANYTHING, DID THE SOLICITOR RECOMMEND.
MR. HOOD: THANK YOU. WOULD YOU ANSWER THE JUDGE'S QUESTION.
MR. WHERRY: AND I OBJECT TO YOUR QUESTION RESPECTFULLY, ON THE GROUNDS OF HEARSAY. THE STATEMENT MADE

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[GOOD 187]

I'LL LET HIM ANSWER THE QUESTION.
A. WHAT THE SOLICITOR DID WAS ADVISE ALL OF US AND HAVE INPUT INTO DEVELOPING AND INFORMING US WHAT THE PRESENT LAW REQUIRED AS FAR AS REPORTING WENT AND WHEN WE WOULD BE LEGALLY OBLIGATED TO REPORT A VIOLATION.
Q. AND DID THE MEDICAL UNIVERSITY FOLLOW THAT ADVICE?
A. WE DID, SIR.
Q. IN YOUR LETTER THAT WE REFERRED TO DECEMBER 19, '89, YOU

REFFRRED TO A PROFILE IN THE LAST PARAGRAPH OF THE SECOND PAGE. WHAT ARE YOU REFERRING TO WHEN YOU REFER TO A PROFILE?

A. WHAT I WANT -- NOT JUST WHAT I WANTED, BUT WHAT I ASKED OR SUGGESTED OR RECOMMENDED TO THEM, I WANTED A POLICY THAT WOULD BE FAIR. I WANTED A POLICY THAT WOULD BE UNIFORM. I WANTED TO KNOW HOW THEY WERE GOING TO SELECT WHO WOULD BE TESTED. AND I TURNED TO THE DOCTORS AND SAID YOU NEED TO COME UP WITH A RACE NEUTRAL, NONDISCRIMINATORY POLICY. WHATEVER YOU CALL IT, I DON'T KNOW MEDICINE, BUT YOU COME DOWN WITH THE ELEMENTS THAT ANYBODY WALKS IN HERE, BE THEY BLACK, WHITE, PURPLE, GREEN, RICH, POOR, THAT IF THEY HIT THE INDICATORS THAT YOU'RE GOING TO TEST THEM, AND THAT'S THE ONLY WAY TO DO IT, AND WE'RE GOING TO DO IT ACROSS THE BOARD. AND THEY WERE ALL IN FULL AGREEMENT.

Q. WAS THE POLICY FOLLOWED IN THAT WAY?

A. TO MY KNOWLEDGE IT WAS IN EVERY CASE.

Q. CONTINUE IN THAT SAME SENTENCE OF THE LAST PARAGRAPH YOU

[GOOD 188]

REFERRED TO, BLACK INDIGENT MOTHERS. WHAT ARE YOU REFERRING TO, THERE, MR. GOOD?

A. I WAS RAISED TO BELIEVE THAT NOT ONLY HAS IT GOT TO BE RIGHT, IT'S GOT TO LOOK RIGHT. WHAT I WAS CONCERNED ABOUT AT THAT TIME THE DEMOGRAPHICS OR THE NUMBER OF PEOPLE THAT WE SERVED AT OUR HOSPITAL, THERE WERE MORE AFRICAN-AMERICANS SERVED, I THINK WE DO THE MAJORITY OF THAT IN THIS AREA OF THE STATE, AND I WANTED TO MAKE DARN SURE THAT IF MORE BLACK WOMEN WERE CAUGHT IN THIS THING THAN WHITE, THAT THERE WAS A MEDICAL REASON FOR IT. THAT NO ONE COULD SAY, OH, THAT'S DISCRIMINATORY, YOU SET OUT TO GET SOMEBODY. AND THAT WAS MY CONCERN. I WAS SENSITIVE TO THAT.

Q. WAS THERE ANY REFUSAL OF TREATMENT TO THESE INDIVIDUALS UNDER THE POLICY?

A. NONE.

Q. AND WHEN THEY WERE REFERRED TO CHARLESTON COUNTY SUBSTANCE ABUSE, WHAT WAS THE REASON FOR THAT?

A. WELL, THAT WAS THE CARROT AND STICK. WHAT OUR CONCERN WAS, THIS WAS NOT SUPPOSED TO BE A PUNITIVE POLICY WHERE WE WENT OUT AND PUNISHED PEOPLE FOR DOING SOMETHING, EVEN THOUGH WE KNEW THE ACTIVITY WAS ILLEGAL. WHAT WE WERE TRYING TO DO IS GIVE THOSE BABIES A CHANCE TO BE BORN NORMAL.

AND WHAT WE WERE TELLING THE MAMAS IS THAT, LOOK,

WE'RE GOING TO TRY TO HELP YOU, BUT OUR MAIN CONCERN FRANKLY IS THAT UNBORN BABY. IF YOU WILL GO TO CHARLESTON SUBSTANCE

[GOOD 189]

ABUSE, YOU WILL LET THEM HELP YOU, YOU CAN'T KICK THIS ON YOUR OWN YOU NEED PROFESSIONAL HELP, IF YOU MAKE APPOINTMENTS THERE, IF YOU GO TO PRENATAL CARE AND GIVE THAT BABY A CHANCE TO BE BORN HEALTHY, WE'RE GOING TO FORGET ABOUT ALL OF THIS OTHER STUFF. THAT WAS THE CARROT. YOU KNOW, IF YOU GIVE YOUR BABY A CHANCE, LET'S WIPE THE SLATE CLEAN AND FORGET ABOUT IT. ON THE OTHER HAND IF YOU PERSIST IN DOING THAT, WE GOT TO TAKE SOME ACTION, WE GOT TO FORCE YOU INTO TREATMENT OR WE GOT TO, LORD FORBID, PUT YOU IN JAIL WHERE YOU CAN'T HAVE THOSE DRUGS UNTIL THAT BABY WAS BORN.

Q. HAD WOMEN BEEN ARRESTED AT THE MEDICAL UNIVERSITY BEFORE AT THIS POLICY?

A. I THINK PROBABLY THEY HAVE. THE PROBLEM DIDN'T COME UP OVERNIGHT.

Q. AND WAS THE ADOPTION OF THIS POLICY WITHIN THE ESTABLISHED NORMS OF THE MEDICAL UNIVERSITY?

A. IN MY OPINION, YES, SIR.

Q. THERE IS A REFERENCE TO THE POLICY TO CHAIN OF CUSTODY.

WHAT IS THAT ABOUT?
A. THAT'S FOR THE MEDICAL CHAIN OF CUSTODY.
Q. DOES THE MEDICAL UNIVERSITY TREAT PATIENTS WHO COME FROM COUNTY JAIL FROM PRISON WHO NEED MEDICAL ATTENTION?
A. YES, SIR. TREAT EVERYONE.
Q. AND ARE SOME OF THOSE, UNFORTUNATELY, PREGNANT WOMEN?
A. THEY ARE

[GOOD 190]

Q. IF A WOMAN GOES TO THE EMERGENCY ROOM OF THE MEDICAL UNIVERSITY AND HAS BEEN THE SUBJECT OF ABUSE IN THE FAMILY OR WHATEVER, DOES THE MEDICAL UNIVERSITY HAVE A WAY FOR THE EMERGENCY ROOM DOCTOR TO DEAL WITH THAT?
A. WE HAVE A POLICY AND WE'RE REQUIRED BY LAW TO REPORT THAT. SAME WITH GUNSHOTS, KNIFE WOUNDS.
Q. AND WAS THIS POLICY IN THE SAME VEIN?
A. YES, SIR.
Q. AND DID IT THEREBY MEET THE -
MR. WHERRY: OBJECTION, LEADING.
Q. (BY MR. HOOD, CONTINUING) DID THIS POLICY MEET THE NORMS AND STANDARDS OF THE MEDICAL UNIVERSITY?
MR. WHERRY: OBJECTION, LEADING.

THE COURT: IT IS LEADING. I'LL PERMIT IT.

MR. HOOD: JUST A MINUTE.

Q. (BY MR. HOOD, CONTINUING) THERE IS A PAMPHLET IN EVIDENCE ABOUT PATIENTS AND SO FORTH. IS THERE A CAVEAT WITH REGARD TO PATIENT'S RIGHTS WITH REGARD TO REQUIREMENTS WITH REGARD TO LAW?

MR. HOOD, I REALLY DON'T KNOW. IT'S BEEN AWHILE SINCE I LOOKED AT IT. I WOULD IMAGINE THAT IT'S STANDARD THAT WE DO TELL THEM THAT ALL OF THIS IS SUBJECT TO THE LAW.

Q: AND MY LAST QUESTION THERE WAS AN OBJECTION TO, WE NEVER GOT AN ANSWER.

DID THIS POLICY MEET THE STANDARD AND NORMS LIKE

[GOOD 191]

OTHER POLICIES? DID THE INTERAGENCY POLICY WITH COCAINE MOTHERS MEET THE NORMAL STANDARDS AND NORMS OF THE MEDICAL UNIVERSITY?

A. IN MY OPINION IT DID.

MR. HOOD: THANK YOU VERY MUCH.

THE COURT: AND THE QUESTION IS LEADING. BUT IT SAYS UNLESS NECESSARY. AND I DON'T KNOW HOW HE CAN ASK THAT QUESTION WITHOUT GOING THROUGH EVERY SINGLE STANDARD AND NORM,

WHICH TAKES SUCH A GREAT AMOUNT OF TIME, SO I'LL I PERMIT THE LEADING QUESTION.

CROSS-EXAMINATION.

CROSS-EXAMINATION

BY MR. WHERRY:

Q. MR. GOOD, YOU SAID THAT THE PEDIATRIC DEPARTMENT CAME TO YOU WITH THE PROBLEM ABOUT SUBSTANCE-ABUSING PREGNANT WOMEN; IS THAT RIGHT?

A. YES, SIR.

Q. ACTUALLY, MR. GOOD, THE FIRST TIME - THE FIRST TIME THAT THIS ISSUE CAME UP WAS YOU AND SHIRLEY BROWN WALKING INTO THE HOSPITAL TOGETHER ONE MORNING AND SHIRLEY TOLD YOU ABOUT A PROGRAM SHE HEARD ON THE RADIO DRIVING INTO WORK; ISN'T THAT RIGHT?

A. I VAGUELY REMEMBER TALKING -

Q. SO ACTUALLY IT WAS SHIRLEY BROWN WHO FIRST SUGGESTED THIS POLICY AND FIRST BROUGHT THIS PROBLEM TO YOU, ISN'T THAT

[GOOD 192]

RIGHT?

A. I DON'T THINK THAT'S CORRECT, SIR.

Q. SO WHAT YOU'RE SAYING IS THAT THE PEDIATRIC DEPARTMENT HAD CONTACTED YOU BEFORE SHIRLEY BROWN TALKED TO YOU THAT MORNING WALKING INTO WORK?

A. POSSIBLY. I HONESTLY DON'T REMEMBER, BUT I WOULD SAY PROBABLY, YES.

Q. WHO IN THE PEDIATRICS DEPARTMENT WAS IT THAT CAME TO YOU REPORTING - REPORTING THAT THE DEPARTMENT WAS CONCERNED?
A. I BELIEVE IT WAS DR. HORGER. I'M NOT SURE. BUT I THINK IT WAS.
Q. DID YOU EVER CONFIRM ANYTHING WITH DR. HORGER IN WRITING ABOUT THAT CONTACT?
A. I DON'T RECALL THAT I DID, SIR.
Q. IN FACT, WHAT YOU DID, WHETHER IT WAS DR. HORGER OR WHETHER IT WAS SHIRLEY BROWN YOU - WHO FIRST CONTACTED YOU, YOU WROTE A LETTER, WHICH IS IN EVIDENCE HERE, TO MR. CONDON INVITING MR. CONDON TO COOPERATE WITH THE HOSPITAL IN THE PROSECUTION OF SUBSTANCE-ABUSING PREGNANT WOMEN; ISN'T THAT FAIR?
A. NO, SIR. I INVITED HIM TO COME AND SHARE WITH US. I DID NOT THINK THAT ANYTHING WAS BEING DONE, THAT ALL OF THESE AGENCIES WERE GOING DIFFERENT WAYS AND THESE POOR BABIES WERE FALLING THROUGH THE CRACKS, I WANTED HIM TO COME SHARE WITH US WHAT HE WAS DOING AND WHAT HE PLANNED TO DO. JUST LIKE I

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[GOOD 194]

HIPPOCRATIC OATH TO DO NO HARM, FAIR?
A. YES.

Q. DID YOU VIEW YOURSELF, MR. GOOD, AS AN ARM OF THE PROSECUTOR'S OFFICE?
A. COUNSEL, THE ANSWER IS NO. WE REPORT KNIFE WOUNDS, GUNSHOT WOUNDS, WE REPORT ABORTIONS, STILL DEATHS AND SYPHILIS AND TUBERCULOSIS. ALL OF THESE THINGS ARE MANDATED BY LAW AS IS PART OF RUNNING THE HOSPITAL. THIS IS NO DIFFERENT.
Q. SO I TAKE IT, MR. GOOD, THE ANSWER TO MY QUESTION IS: NO. THE QUESTION WAS: DID YOU SEE YOURSELF AS AN ARM OF THE PROSECUTION. I TAKE IT YOUR ANSWER IS NO FOR WHATEVER YOUR REASONS?
A. I'M NOT SAYING THAT. WE ARE A STATE AGENCY. WE ARE THE STATE'S MEDICAL UNIVERSITY. THE OTHER AGENCIES YOU MENTIONED ARE ALSO ARMS OF THE STATE.
Q. DO YOU SEE A DIFFERENT ROLE FOR A STATE HOSPITAL AS OPPOSED TO PRIVATE HOSPITAL?
A. YES, SIR, VERY DEFINITELY.
Q. YOU SO YOUR ROLE AS A STATE HOSPITAL, HAVING PERHAPS A STRONGER DUTY TO COOPERATE WITH PROSECUTION THAN A PRIVATE HOSPITAL WOULD HAVE?
A. NO, SIR. I WOULD HOPE THAT ALL WOULD.
Q. HOW DO YOU SEE A STATE HOSPITAL ROLE BEING DIFFERENT, MR. GOOD?
A. AS THE STATE'S MEDICAL UNIVERSITY, I THINK THE THOUGHT

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[GOOD 202]

Q. SO THE PHYSICIANS HAD DISCRETION AS TO WHETHER TO REPORT PEOPLE TO THE SOLICITOR'S OFFICE AND THE POLICE?

A. THE DISCRETION COMES FROM THE POLICY. THE POLICY MANDATED TO THEM, AS DID THE LAW, WHEN THEY WERE TO REPORT. NOW FROM THAT POINT OF VIEW THEY HAD NO DISCRETION.

Q. YOU SAID IN YOUR DECEMBER 19TH LETTER THAT YOU WERE NOT HAPPY WITH THE CONSENT FORM THAT THE PATIENTS SIGNED. IS THAT FAIR?

A. AT THAT TIME, YES, SIR.

Q. WELL, DID YOU GET HAPPY WITH IT LATER ON?

A. YES, SIR. I WILL EXPLAIN THAT TO YOU. AGAIN -

Q. I'LL ASK YOU TO EXPLAIN IT IF I NEED THE EXPLANATION, I JUST WANTED TO UNDERSTAND.

MR. HOOD: IF THE COURT PLEASE.

THE COURT: I THINK HE HAS GOT A RIGHT TO EXPLAIN IT. HE ANSWERED YOUR QUESTION AND HE CAN EXPLAIN IT.

THE WITNESS: THANK YOU.

A. COUNSEL, IN A PERFECT WORLD, AND I'M OVERLY CAUTIOUS AND KIND OF A KNITPICKER ABOUT THAT, I WOULD LIKE TO SEE THE

MOTHER SIGN AN INDEPENDENT CONSENT FORM LAWYERS ARE LIKE

ONCE THE CHILD IS BORN, I WOULD LIKE ANOTHER CONSENT FORM THAT, WE LIKE TO FILL OUR FILES WITH CONSENT FORMS. AND IN A PERFECT SOCIETY, WE WOULD DO THAT. BUT, YOU KNOW, WE WERE NOT WORKING UNDER PERFECT CIRCUMSTANCES.

Q. WHY? IT WAS DIFFICULT TO DRAW UP A NEW FORM?

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[GOOD 206]

Q. SO, IS IT STILL YOUR TESTIMONY, TODAY, THAT SHIRLEY BROWN WAS NOT ONE OF THE FOUNDERS?

A. SHE WAS ONE OF THE PRINCIPALS. I CONSIDER MYSELF ONE OF THE PRINCIPALS, TOO, IN THE EVOLUTION OF THAT POLICY. SO BOTH OF US WOULD BE FOUNDERS, ALONG WITH DR. NEWMAN, DR. HORGER AND THE OTHER AGENCIES INVOLVED, YES, SIR.

Q. YOU WROTE TO A SOUTH CAROLINA SENATOR, SENATOR RHODES AND CALLED SHIRLEY BROWN A FOUNDER, DIDN'T YOU?

A. YES, SIR.

Q. WERE YOU KIDDING WHEN YOU WROTE THAT, SIR?

A. NO, SIR.

Q. NOW, WITH RESPECT TO THE CONSENT FORMS, IS IT YOUR POSITION THAT THE, QUOTE, INFORMED CONSENT FORM ADEQUATELY

NOTIFIED THE PLAINTIFFS THAT THEIR MEDICAL INFORMATION MIGHT BE TURNED OVER TO THE POLICE?
A. YES, SIR.
Q. AND IT WAS THE SAME CONSENT FORM USED BEFORE THE INTERAGENCY POLICY, WASN'T IT?
A. I BELIEVE THAT'S CORRECT.
Q. AND IT'S THE SAME CONSENT FORM SIGNED BY EVERY PATIENT THAT COMES INTO MUSC, FAIR?
A. FAIR.
Q. AND THEY CAME INTO MUSC BEFORE THE POLICY?
A. YES, SIR.
Q. AND SO IS IT YOUR POSITION THAT EVERY PATIENT THAT COMES

[GOOD 207]

INTO MUSC AND IS TREATED BY THAT HOSPITAL CONSENTS TO THEIR MEDICAL RECORDS AND INFORMATION BEING TURNED OVER TO THE POLICE?
A. IF IT'S REQUIRED BY LAW. AND IT WAS IN THIS CASE, JUST LIKE ABUSE OF A CHILD OR A GUNSHOT WOUND OR A STAB WOUND, YES, SIR.
Q. MR. GOOD I TAKE IT THAT YOU WERE INSTRUMENTAL IN DRAWING OR APPROVING THE CONSENT FORMS, RIGHT?
A. I THINK I APPROVED THEM, YES, SIR.
Q. THEY DON'T SAY ANYTHING ABOUT IT'S REQUIRED BY LAW, DO THEY?
A. THAT'S A GIVEN, SIR.

Q. WHETHER OR NOT IT'S A GIVEN, MR. GOOD, THEY DON'T SAY IF REQUIRED BY LAW, DO THEY?
A. THEY DO NOT SAY THAT.
Q. AND, MR. GOOD, ONE OF THE THINGS THAT YOU AND I DO AS LAWYERS IS TO INFORM PEOPLE ABOUT WHAT IS REQUIRED BY LAW, DON'T WE?
A. I DON'T KNOW HOW TO ANSWER THAT.
Q. OKAY. ONE OF THE REASONS WE HAVE LAWYERS IS TO EXPLAIN THE LAW TO PEOPLE, FAIR?
A. YES, SIR. TO CLIENTS, YES, SIR.
Q. AND TO PEOPLE WHO ARE GIVING UP THEIR RIGHTS IN OUR INSTITUTIONS, LIKE OUR HOSPITAL?
A. MY ADVICE IS ONLY TO THE MEDICAL UNIVERSITY AND THEIR

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[GOOD 212]

A. YES, SIR.
Q. WHEN YOU SAY WE HAVE GOT TO TAKE SOME ACTION EVEN IF IT MEANT PUTTING THEM IN JAIL, "WE" BEING THE MEDICAL UNIVERSITY?
A. NO, SIR. WHAT THAT MEANT WAS REPORTING THAT EVEN IF IT MEANT ULTIMATELY THAT SOMEBODY WOULD HAVE TO GO TO JAIL.
Q. SO YOU WOULD AGREE WITH ME THAT THE ULTIMATE ACT CAUSING THE JAIL WAS THE REPORTING BY THE MEDICAL UNIVERSITY?
A. NO, SIR. I'M NOT PLAYING WITH WORDS. WE WERE REQUIRED

BY STATE LAW TO REPORT VIOLATIONS. SOMETIMES THOSE VIOLATIONS, AS A LAST RESULT, ENDED UP IN INCARCERATION OF THESE LADIES. THAT'S ALL I'M SAYING.

Q. SIR, THE REPORTING OF GONORRHEA AND SYPHILIS YOU INDICATED, THOSE REPORTS DON'T GO TO THE POLICE, DO THEY?

A. THE GUNSHOTS AND KNIFE WOUNDS WOULD, BUT THE GONORRHEA AND ALL WOULD GO TO THE HEALTH DEPARTMENT.

Q. I DIDN'T ASK YOU ABOUT GUNSHOTS AND KNIVES, DID I?

A. I'M SORRY.

Q. DO YOU UNDERSTAND RESPONSIVE?

A. YES, SIR.

Q. SO THE ANSWER TO MY QUESTION I TAKE IT IS, NO, THE REPORTS OF GONORRHEA AND SYPHILIS DO NOT GO TO THE POLICE?

A. TO THE HEALTH DEPARTMENT, YES, SIR.

Q. AND MOTHERS, PREGNANT WOMEN ABUSING ALCOHOL, THOSE REPORTS WENT TO THE DIVISION OF SOCIAL SERVICES, DIDN'T THEY?

A. I DON'T KNOW, SIR.

[GOOD 213]

Q. YOU KNOW WHETHER THERE WAS A HOSPITAL POLICY ON THAT, MR GOOD, AS GENERAL COUNSEL?

A. ON ALCOHOL ABUSE?

Q. BY WOMEN WHO WERE PREGNANT CAUSING POTENTIAL FETAL HARM?

A. I DON'T RECALL.

Q. SIR, WITH RESPECT TO THE INTERAGENCY POLICY - WELL, FIRST OF ALL, YOU WERE HERE I THINK IT WAS LAST TUESDAY WHEN DR. DEL BENE TESTIFIED?

A. NO, SIR.

Q. WOULD YOU AGREE WITH ME THAT ONE OF THE AIMS OF THE POLICY, ONE OF THE IMPORTANT AIMS OF THE POLICY WAS TO PROTECT THESE CHILDREN TO BE BORN FROM THIS PREGNANCY AND FUTURE PREGNANCIES?

A. I WOULD AGREE WITH YOU THAT THE MAIN OBJECT IN MY MIND WAS TO PROTECT OR GIVE THE CHILD A CHANCE TO BE BORN NORMAL IN THIS PREGNANCY.

Q. HOW ABOUT FUTURE PREGNANCIES, GETTING THE MOTHER OFF DRUGS SO FUTURE PREGNANCIES AND THIS CHILD WOULD NOT BE IN A HOME WITH A SUBSTANCE-ABUSING APPARENT?

A. RIGHT, SIR. IF, ACCORDING TO THE POLICY THE MOTHER WOULD BE REFERRED FOR PRENATAL CARE, THAT WOULD HELP THE EXISTING CHILD. BUT SHE ALSO WAS REFERRED TO CHARLESTON SUBSTANCE ABUSE, WHICH WOULD HELP HER KICK THE HABIT, WHICH IN TURN WOULD PREVENT RECURRENCE OF THIS EVENT IN THE FUTURE WITH OTHER CHILDREN.

[GOOD 214]

Q. FATHERS OF BABIES BORN AT MUSC, THE FATHERS ABUSING CRACK COCAINE WERE NOT REPORTED TO THE LOCAL POLICE, WERE THEY, BY THE HOSPITAL?

A. CAN I ANSWER AND THEN EXPLAIN THAT. NO. THE FATHER WAS NOT CARRYING THE BABY. THE FATHER WAS NOT CONTINUING THE INJURY OF THE CHILD. THE EXPECTANT MOTHER, BY CONTINUING TO TAKE DRUGS, WAS CONTINUING THE INJURY TO THE CHILD. WE WANTED TO PUT A STOP TO THAT. THE FATHER WAS OUT OF THE PICTURE, SO TO SPEAK.

Q. THE FATHER WAS NOT OUT OF THE HOME, THOUGH, WAS HE?

A. OH, I DON'T KNOW.

MR. WHERRY: NOW, SIR, LET ME HAVE THIS LETTER MARKED FOR IDENTIFICATION.

DEPUTY CLERK: PLAINTIFFS EXHIBIT NUMBER 259.

MR. WHERRY: THANK YOU.

Q. (BY MR. WHERRY, CONTINUING) SHOWING YOU WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 259 FOR IDENTIFICATION, YOU RECEIVED THAT LETTER, DIDN'T YOU?

A. COULD I HAVE A MOMENT TO READ IT TO MYSELF.

Q. SURE.

A. YES, SIR.

Q. AND THAT WAS A LETTER THAT LED TO THE ORIGINAL MEETING FROM WHICH THE POLICY DEVELOPED, FAIR?

A. I WOULD THINK SO, YES, SIR.

MR. WHERRY: YOUR HONOR, I MOVE THIS INTO EVIDENCE.

[GOOD 215]

THE COURT: HAVE YOU SEEN IT?
MR. HOOD: I PROVIDED THEM WITH A COPY.
THE COURT: ANY OBJECTION.
MR. HOOD: THEY DID NOT DESIGNATE IT.
THE COURT: ANY OBJECTION?
MR. HOOD: IT WASN'T DESIGNATED AS A TRIAL EXHIBIT BEFORE HE JUST HANDED IT TO THE WITNESS. THAT'S OUR OBJECTION.
THE COURT: LET ME SEE IT.
OBJECTION OVERRULED.
MR. WHERRY: THANK YOU, SIR.
Q. (BY MR. WHERRY, CONTINUING) MR. GOOD, YOU HAD OTHER CONCERNS ON BEHALF OF THE HOSPITAL AS TO HOW THE POLICY WAS WORKING, DIDN'T YOU, WITH RESPECT TO THE CONFIDENTIALITY OF PATIENTS' RECORDS?
A. AT ONE POINT I WAS CONCERNED ABOUT WHETHER WE WOULD BE TURNING COMPLETE MEDICAL FILES OVER TO THE POLICE, THAT DID CONCERN ME.
Q. AND THAT CONCERN WAS A CONCERN OF CONFIDENTIALITY, WASN'T IT.
A. YES, SIR.
Q. AND YOU WROTE, DIDN'T YOU, TO THE POLICE DEPARTMENT

EXPRESSING THAT CONCERN AND TELLING THEM HOW IN YOUR OPINION TO SOLVE IT?

A. CAN I ANSWER AND THEN EXPLAIN. YES. WHAT I THINK THE

[GOOD 216]

LETTER YOU'RE TALKING ABOUT, THEY HAD AN INTERPRETATION OFFICE MEMORANDUM THAT THEY WERE KIND ENOUGH TO SEND ME A COPY OF. IT RAISED A NUMBER OF QUESTIONS IN MY MIND, AND BEING THE DEVIL'S ADVOCATE, I INQUIRED AS TO WHETHER WE WOULD BE EXPECTED TO TURN MEDICAL RECORDS OVER. AND IF SO, WOULDN'T A SUBPOENA BE REQUIRED OR SOME OTHER COURT RULING TO PROTECT THE UNIVERSITY. I WAS LATER TOLD THAT THAT WOULDN'T BE THE CASE, THAT WE WOULD NOT BE TURNING THOSE RECORDS OVER TO THE POLICE. SO MY FEARS EVAPORATED ON THAT POINT.

Q. IS IT YOUR TESTIMONY, SIR, THAT MEDICAL INFORMATION, FOR INSTANCE A COPY OF THE URINE DRUG SCREEN, WAS NOT TURNED OVER BY THE MEDICAL UNIVERSITY TO THE POLICE?

A. I DON'T RECALL.

Q. SIR, IS IT YOUR UNDERSTANDING THAT THE RESULTS OF URINE DRUG SCREENS WERE NOT COMMUNICATED TO THE CHARLESTON POLICE BY SHIRLEY BROWN WHEN SHE CALLED TO REPORT THE POSITIVE DRUG

SCREEN?
A. OH, THAT'S RIGHT, YES.
Q. AND IT IS YOUR RECOLLECTION, ISN'T IT, SIR, THAT A COPY OF THE UDS WAS GIVEN TO THE POLICE OFFICER WHO CAME TO THE HOSPITAL TO MAKE THE ARREST BEFORE THEY WOULD TAKE THE PATIENT FROM THE HOSPITAL?
A. YES, SIR. BUT THAT WAS REQUIRED BY LAW. BUT I WAS CONCERNED -
Q. SIR, MY QUESTION SIMPLY WAS: WAS A COPY OF THE UDS

[GOOD 217]

GIVEN?
A. I BELIEVE THAT IT WAS.
Q. SO, AND THAT WAS PART OF THE PATIENT'S MEDICAL RECORD, WASN'T IT?
A. I THINK IT EVENTUALLY BECAME A PART OF IT, YES, SIR.
Q. SIR, ALSO, ACCORDING TO THE HOSPITAL, A COPY OF THE PATIENT'S DISCHARGE SUMMARY, THEIR FITNESS PEDIATRICALLY FOR DISCHARGE FROM THE HOSPITAL WAS GIVEN TO THE OFFICER WHO CAME TO THE HOSPITAL TO GET THE PATIENT AND TAKE HER INTO CUSTODY; ISN'T THAT SO?
A. I DON'T KNOW. I WOULD ASSUME THAT YOU'RE RIGHT.
Q. AND THAT, SIR, THE DISCHARGE SUMMARY IS PART OF THE PATIENT'S MEDICAL RECORDS, ISN'T IT?
A. YES, SIR.

Q. AND YOU'RE NOT REQUIRED BY ANY LAW THAT YOU KNOW OF TO REPORT A PATIENT'S DISCHARGE SUMMARY, ARE YOU, TO THE POLICE?
A. NO, SIR. AND I COULD ONLY GUESS WHY. I'LL BE GLAD TO DO THAT, WHY IT WAS DONE, BUT, NO, SIR.
Q. WELL IF THERE IS NO REQUIREMENT LEGALLY FOR DOING IT, SIR, AND IF THERE IS A CONFIDENTIALITY CONCERN, WOULD YOU AGREE WITH ME THAT THE RELEASING OF - IF NOTHING ELSE, THE DISCHARGE SUMMARY TO THE POLICE, VIOLATED THE STANDARDS AND PRACTICE OF THE HOSPITAL WITH RESPECT TO CONFIDENTIALITY OF PATIENT RECORDS?
A. NO, SIR, I WOULDN'T AGREE.

[GOOD 218]

Q. SIR, THAT DISCHARGE SUMMARY CONTAINS INFORMATION ABOUT THINGS LIKE PRIOR MEDICAL HISTORY, SEXUALLY TRANSMITTED DISEASES, STERILIZATION PROCEDURES DONE WHILE IN THE HOSPITAL, HIV STATUS, THINGS LIKE THAT, DOESN'T IT?
A. I BELIEVE THAT IT DOES. AND THAT'S PROBABLY THE REASON THEY DID THAT.
Q. WOMEN WHO TESTED POSITIVE FOR AMPHETAMINES WAS REPORTED ONLY TO DSS AND NOT TO THE POLICE; ISN'T THAT SO?
A. I DON'T KNOW, SIR.

Q. WELL, SIR, DO YOU KNOW WHAT THE POLICY - DO YOU KNOW WHAT THE POLICY REQUIRED? DO YOU KNOW HOW THE POLICY WAS APPLIED. THAT'S PROBABLY A BETTER QUESTION.

DO YOU KNOW HOW THE POLICY WAS APPLIED WITH RESPECT TO THE REPORTING OF WOMEN WHO TESTED POSITIVE FOR ANY DRUG OTHER THAN COCAINE?

A. NO, SIR.

Q. WOULD THAT NOT BE IMPORTANT TO KNOW, SIR, IF THERE WAS AN OBLIGATION, AS YOU SAY IT, TO REPORT TO THE POLICE SUBSTANCE-ABUSING PREGNANT WOMEN?

A. YES, SIR. I ASSUME THAT THEY FOLLOWED THE LAW.

Q. AND, SIR, IF IN FACT AMPHETAMINES, BARBITURATES, HALLUCINOGENS, OPIATES WERE NOT REPORTED TO THE POLICE, BUT TO SOMETIMES DSS, WOULD YOU NOT TAKE THE POSITION THAT THE HOSPITAL WAS BREAKING THE LAW THAT YOU SAID THAT YOU HAD TO ABIDE BY.

[GOOD 219]

A. I'M NOT HEDGING ON YOU, I WOULD HAVE TO KNOW A PARTICULAR CASE WHETHER CRACK COCAINE WAS ALSO INVOLVED IN THAT. BUT IF IT WASN'T, POSSIBLY THEY DID BY NOT REPORTING IT.

Q. WHY, SIR? WHAT WAS THE RATIONAL OF THE HOSPITAL? WHAT

WAS THE RATIONAL OF THE HOSPITAL OF LIMITING IT TO CRACK COCAINE AND NOT TO OPIATES, BARBITURATES, HALLUCINOGENS AND AMPHETAMINES?

A. THAT'S A MEDICAL QUESTION. I COULDN'T ANSWER YOU.

Q. WELL, SIR, DIDN'T IT BECOME A LEGAL QUESTION TO INVOLVE YOU WITH RESPECT TO THE CONCEPT OF NARROWLY TAILORING A POSITION POLICY?

A. NO, SIR. AGAIN, THEY TOLD ME THAT THERE WAS AN EPIDEMIC OF CRACK COCAINE THAT WAS KILLING BABIES. AND THE DOCTORS WANTED A POLICY THAT WAS FAIR AND NONDISCRIMINATORY. AND ASKED MY ADVICE ON HOW TO IMPLEMENT SUCH A POLICY. AND I WAS INSTRUMENTAL, A FOUNDER, ALONG WITH SHIRLEY BROWN OR WHOEVER, DOZEN OTHER PEOPLE IN OTHER AGENCIES, IN GETTING A POLICY THAT. WORKED TO SAVE THESE BABIES LIVES. THAT'S ALL THE ADVICE I GAVE THEM. AND THAT'S ALL I WAS TOLD. WE HAD AN EPIDEMIC, WE HAD TO DO SOMETHING, AND IT HAD TO DO WITH CRACK COCAINE.

Q. YOUR OBLIGATION TO REPORT GUNSHOT WOUNDS, YOU KEEP TELLING US ABOUT THAT. THAT OBLIGATION DOESN'T CHANGE DEPENDING UPON THE KIND OF BULLET OR THE KIND OF GUN, DOES IT?

A. NO, SIR.

Q. AND THE OBLIGATION TO REPORT SUBSTANCE-ABUSING PREGNANT

[GOOD 220]

WOMEN DOESN'T CHANGE WITH RESPECT TO THE KIND OF SUBSTANCE THAT THEY'RE ABUSING WHEN IT COMES TO THE ABUSE OF THE CHILD?

A. I AGREE WITH THAT.

Q. BUT THIS POLICY DID CHANGE WITH RESPECT TO WHAT DRUGS GOT REPORTED TO THE POLICE?

A. THIS POLICY WAS DIRECTED AT A SPECIFIC PROBLEM, CRACK COCAINE EPIDEMIC.

Q. DID YOU TAKE ANY AFFIRMATIVE STEPS AS THE GENERAL COUNSEL FOR THE HOSPITAL TO ENSURE THAT ALL SUBSTANCE-ABUSING PREGNANT WOMEN CAME UNDER THE POLICY?

A. I'M NOT SURE I UNDERSTOOD. THAT -

Q. DID YOU TAKE ANY STEPS AS GENERAL COUNSEL TO THE HOSPITAL IN ORDER TO ENSURE THAT THE POLICY WAS NOT DISCRIMINATORY TO MAKE SURE THAT ALL DRUGS USED BY PREGNANT WOMEN WERE REPORTED TO THE POLICE?

A. NO, SIR. I WAS CONCERNED WITH THIS ONE PARTICULAR POLICY ONLY.

Q. HOW MANY - LET ME WITHDRAW THAT. THERE WAS NO PURPOSE, SIR, WITH RESPECT TO FETAL WELL-BEING, WAS THERE, FOR REPORTING A WOMEN WHO HAD ALREADY DELIVERED A CHILD? DIDN'T HELP PROTECT THAT CHILD, DID IT?

A. NO, SIR. BUT IT MAY HAVE PROTECTED ADDITIONAL CHILDREN.

I WAS TOLD THAT MANY OF OUR CLIENTS HAD THREE, FOUR, FIVE, SIX BABIES ALL BORN ADDICTED TO CRACK COCAINE. SO I THINK THAT'S WHAT THE THINKING WAS THAT IF EVERYTHING ELSE FAILED YOU DID

[GOOD 221]

REPORT THAT AND MAYBE YOU COULD PREVENT IT FROM RECURRING THE NEXT YEAR.

Q. ONE OF THE CRITERIA, ONE OF THE CRITERIA USED TO - USED AS THE FOUNDATION FOR RUNNING THE URINE DRUG SCREEN WAS LACK OF PRENATAL CARE OR LATE PRENATAL CARE. YOU WERE AWARE OF THAT, WEREN'T YOU?

A. YES, SIR.

Q. WERE YOU AWARE, SIR, THAT LATE PRENATAL CARE OR LACK OF PRENATAL CARE WAS MUCH MORE PREVALENT IN THE BLACK COMMUNITY THAN THE WHITE COMMUNITY WHEN THAT WAS SELECTED AS A CRITERIA?

A. NO, SIR.

Q. WOULD YOU AGREE WITH ME, SIR, THAT IF THAT IS TRUE, WHERE WE THEN COMBINE THAT WITH THE RACIAL MAKEUP OF THE PATIENTS SERVED AT MUSC, WE BEGIN TO HAVE A DISPARATE IMPACT PROBLEM?

A. I DON'T KNOW THAT I AGREE WITH THAT. WHAT YOU'RE SAYING IS THAT THE DOCTORS SAT AROUND AND FIGURED UP MEDICAL CRITERIA WHICH WOULD TARGET A CLASS OF PEOPLE, AND I JUST DON'T THINK

THAT THAT WAS THE CASE.
MR. WHERRY: BEAR WE ME FOR JUST ONE MOMENT, YOUR HONOR.
(PAUSE IN PROCEEDINGS.)
Q. (BY MR. WHERRY, CONTINUING) ONE LAST QUESTION. ALL OF THE DATA THAT YOU GOT THAT CAUSED YOU TO BE CONCERNED ABOUT THE CRISES IN SUBSTANCE-ABUSING PREGNANT WOMEN, THE NUMBER OF THEM COMING INTO THE HOSPITAL, THAT DATA ALL CAME FROM SHIRLEY

[GOOD 222]

BROWN, DIDN'T IT?
A. NO, SIR. I READ IN THE STATE NEWSPAPER AND THE GREENVILLE NEWS AND NEWS AND COURIER IN CHARLESTON, I READ CERTAIN LEGAL PUBLICATIONS THAT TALKED ABOUT AN EPIDEMIC. I TALKED TO ATTORNEYS IN OTHER STATES AND OTHER UNIVERSITIES IN THE NORTHEAST. IT WAS TERRIBLE IN CALIFORNIA, WAS AN EPIDEMIC. AND I BECAME CONCERNED THAT IF IT COULD HAPPEN THERE IT COULD HAPPEN IN SOUTH CAROLINA. AND THAT'S HOW I GOT INTERESTED IN IT.
Q. WERE YOU SAYING, SIR, THAT BEFORE THE POLICY WAS DEVELOPED YOU HAD NO STATISTICS AS TO WHETHER IT WAS A CRISES IN CHARLESTON, SOUTH CAROLINA?
A. OH, I HAD NO IDEA UNTIL I STARTED READING IN THE

PUBLICATIONS AND WATCHING ON TV AND TALKING TO OTHER COUNSEL ACROSS THE COUNTRY THAT WE EVEN HAD A PROBLEM. I'M A LITTLE BIT IGNORANT, I'M STILL NOT SURE THAT I KNOW WHAT CRACK COCAINE IS.

Q. WAS THAT BEFORE OR AFTER THE MEDICAL UNIVERSITY STARTED GIVING INFORMATION TO THE CHARLESTON POLICE DEPARTMENT TO ARREST WOMEN THAT YOU - THAT YOU BEGAN TO HEAR ABOUT IT?

A. LONG BEFORE THAT, YES, SIR.

Q. AND LONG BEFORE YOU WROTE THE SOLICITOR CONDON?

A. WELL, THAT WAS ONE OF THE REASONS THAT I WROTE HIM BECAUSE OF WHAT I HEARD AND READ.

Q. NOT WHY DID YOU WRITE TO HIM, MR. GOOD, LONG BEFORE YOU

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF REUBEN GREENBERG

[GREENBERG 129]

Q. AND YOU HAVE BEEN THE POLICE CHIEF IN CHARLESTON SINCE WHEN?
A. APRIL 12, 1982, WHICH MAKES IT ALMOST 15 YEARS NOW. FOURTEEN AND A HALF YEARS OR SO.
Q. GOOD. I HOPE IT WILL BE ANOTHER 40 YEARS.
A. YES, SIR.
Q. LET'S TALK ABOUT THIS INTERAGENCY POLICY AND YOUR ROLE IN THE FORMULATION OF THE POLICY.
FIRST OF ALL, HOW DID YOU BECOME AWARE OF THE SUBJECT MATTER OF COCAINE USE B[illegible] PREGNANT WOMEN?
A. WELL I BECAME AWARE OF IT IN GENERAL AS A MEMBER OF THE TASK FORCE, THE OFFICE OF JUVENILE JUSTICE AND DELIQUENCY PREVENTION, WHICH IS A FEDERAL GOVERNMENT AGENCY THAT IS INTERESTED IN REDUCING THE INCIDENCE OF JUVENILE PERPETRATION OF VARIOUS KINDS OF CRIMES AND ALSO JUVENILE VICTIMIZATION, THAT'S WHERE I FIRST HEARD ABOUT THAT PARTICULAR TOPIC.

Q. ALL RIGHT, SIR. AND WERE YOU INVOLVED WITH THE FORMATION OF A COMMITTEE AND THE STUDYING OF THIS INTERAGENCY POLICY BEFORE IT WAS ADOPTED AT THE MEDICAL UNIVERSITY?
A. YES.
Q. AND WHAT WAS THE GOAL, AS YOU UNDERSTOOD, IT FROM THIS POLICY?
A. WELL, THE GOAL WAS TO STOP BABIES FROM BEING BORN ADDICTED TO DRUGS.
Q. AND DID YOU - DID YOU SET FORTH, OR DID MR. CONDON SET

[GREENBERG 130]

FORTH MEDICAL CRITERIA BY WHICH WOMEN WOULD HAVE THEIR URINE TESTED?
A. NO. WE HAD NO ROLE IN DETERMINING HOW, OR WHOM FOR THAT MATTER, IT WOULD TEST. I JUST ASSUMED THAT THE HOSPITAL TEST PEOPLE THAT THEY TREAT. I HAD NO ROLE IN THAT MYSELF, NO.
Q. SO THE MEDICAL CRITERIA FOR PATIENTS BEING TESTED, WAS THAT SOMETHING THAT THE POLICE ASKED FOR?
MS. DUNN: OBJECTION, YOUR HONOR, HE IS REALLY LEADING.
MR. HOOD: OKAY.
Q. (BY MR. HOOD, CONTINUING) THE MEDICAL CRITERIA, WHO CAME UP WITH THAT?

A. I ASSUME THAT IT WAS THE PEOPLE AT THE MEDICAL UNIVERSITY CAME UP WITH THAT CRITERIA.
Q. YES, SIR. WITH REGARD TO THE SOUTH CAROLINA CHILD ABUSE STATUTE, IS THERE A REPORTING REQUIREMENT?
A. YES, THERE IS A REPORTING REQUIREMENT, YES, SIR. I RECALL THAT IT PROVIDES CRIMINAL PENALTIES FOR FAILURE TO REPORT AS WELL.
Q. YES, SIR. AND WERE THE ARRESTS THAT WERE MADE, AND PARTICULARLY OF THE TEN PLAINTIFFS IN THIS LAWSUIT, UNDER THIS POLICY, WERE THEY MADE IN CONFORMITY WITH THE STANDARD POLICIES AND PROCEDURES OF THE CITY POLICE DEPARTMENT?
A. YES, SIR, THEY WERE.
Q. AND DID THOSE ARRESTS CONFORM WITH THE NORMS AND

[GREENBERG 131]

STANDARDS OF CHARLESTON CITY POLICE DEPARTMENT?
A. YES, SIR, THEY DID.
Q. NOW, SOME OF THESE WOMEN, WHEN THEY WERE ARRESTED, HAD HANDCUFFS PUT ON THEM AND THEY HAD CHAINS PUT ON THEIR FEET. EXPLAIN TO THE JURY WHY THAT IS DONE?
A. WELL, I - ABOUT TEN YEARS AGO I ORDERED THAT EVERY PERSON TRANSPORTED FROM THE POLICE FACILITY TO THE HOSPITAL OR

FROM THE HOSPITAL TO A POLICE FACILITY, THAT THAT PERSON BE HANDCUFFED AND THAT THEY BE RESTRAINED WITH LEG RESTRAINTS AND THAT THE HANDCUFFS BE IN SUCH A FASHION THAT THEY'RE NOT ABLE TO, YOU KNOW, GRAB AN ITEM, YOU KNOW, EVEN HANDCUFFED AND STRIKE SOMEBODY WITH IT.

THE PURPOSE OF THAT WAS TO PREVENT FURTHER ESCAPES. WE HAD SOME ESCAPES FROM THE HOSPITAL OF PEOPLE THAT WE WERE WATCHING THERE, AND THEY ESCAPED AND WERE OUT ON THE STREET FOR MANY WEEKS BREAKING INTO PEOPLES' HOUSES, ATTACKING PEOPLE, ROBBING PEOPLE. IN ORDER TO PREVENT THOSE KIND OF INCIDENTS FROM RECURRING, WE ORDERED THAT THE RESTRAINTS BE PUT ON THE FEET, FOR EXAMPLE, BECAUSE WHAT HAPPENED BEFORE IS THEY ACTUALLY OUTRAN THE OFFICERS. I MEAN, THE OFFICERS COULDN'T GUARANTEE THAT THEY COULD OUTRUN EVERYBODY THAT THEY HAD ARRESTED. AND SINCE THEY COULDN'T GUARANTEE THEY WOULD OUTRUN THEM, THEN WE PUT RESTRAINTS ON THEIR LEGS SO ALMOST ANYONE COULD APPREHEND THEM.

Q. THANK YOU. THE INFORMATION THAT WAS -

[GREENBERG 132]

A. I WOULD JUST LIKE TO ADD, WE HAVE HAD NO ESCAPES IN OVER

TEN YEARS BECAUSE OF THAT POLICY. NO ONE HAS ESCAPED.
Q. CONGRATULATIONS.
AND WHAT ABOUT OFFICERS GETTING HURT?
A. WE HAVE HAD -
MS. DUNN: OBJECTION, YOUR HONOR. IT'S GOING BEYOND ANYTHING THAT IS REALLY RELEVANT HERE.
THE COURT: I WILL PERMIT IT. GO AHEAD.
Q. (BY MR. HOOD, CONTINUING) YES, SIR.
A. WE HAVE HAD NO OFFICERS INJURED AS A RESULT OF SOMEONE WHO WAS CONFINED.
Q. CHIEF GREENBERG, WERE THE ARRESTS UNDER THIS POLICY BASED ON INFORMATION RECEIVED FROM EITHER CHARLESTON COUNTY SUBSTANCE ABUSE OR FROM THE MEDICAL UNIVERSITY?
A. AS I RECALL THE ARRESTS CAME ONLY FROM INFORMATION RECEIVED FROM THE MEDICAL UNIVERSITY.
Q. OKAY. IS IT PROPER TO ARREST A PERSON FOR THE COMMITTING OF A CRIME BASED ON INFORMATION FROM AN INFORMANT SUCH AS THAT?
A. YES, SIR.
Q. DO YOU NEED A SEARCH WARRANT, A SUBPOENA OR ARREST WARRANT?
MS. DUNN: OBJECTION, YOUR HONOR, HE IS JUST CONTINUALLY LEADING AT THIS POINT.
MR. HOOD: DO YOU NEED.

* * *

[GREENBERG 134]

HAD TO GET AN ARREST WARRANT, GENERALLY SPEAKING, IS NOT RELEVANT. IT'S A QUESTION OF WHETHER OR NOT UNDER THE LAW AND THE FACTS THAT THE JURY FINDS TO HAVE EXISTED IN THE CASE WARRANT THE ARREST OR NOT.

MR. HOOD: I'LL TRY AGAIN.

Q. (BY MR. HOOD, CONTINUING) WAS A SEARCH WARRANT OR SUBPOENA NECESSARY TO PROSECUTE THESE WOMEN?

A. NO.

MS. DUNN: OBJECTION, YOUR HONOR. IT'S THE SAME.

THE COURT: I SUSTAIN THE OBJECTION. UNLESS YOU CAN TELL ME SOME REASON WHY IT'S RELEVANT. AND THE REASON YOU HAVE GIVEN ME IS NOT SUFFICIENT SO FAR.

Q. (BY MR. HOOD, CONTINUING) IF A PREGNANT WOMEN COMMITS A CRIME, DO THE POLICE ARREST THEM?

A. YES.

Q. WAS THIS POLICY AND THE ARREST OF THESE WOMEN UNDERTAKEN IN THE NORMAL, STANDARD FASHION BY YOUR POLICE DEPARTMENT?

A. YES.

Q. IF THE POLICE DEPARTMENT WAS NOTIFIED BY A HOSPITAL OTHER THAN THE MEDICAL UNIVERSITY THAT A WOMEN WAS USING COCAINE WHO WAS PREGNANT, WOULD YOUR DEPARTMENT HAVE RESPONDED?

MS. DUNN: OBJECTION, YOUR HONOR. THIS CALLS FOR SPECULATION.

THE COURT: I DON'T THINK SO. I OVERRULE THE OBJECTION?

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[GREENBERG 136]

THAT SOMETHING POSITIVE COULD BE DONE, YES.

Q. AND YOU WANTED, AS A POLICE OFFICER, TO BE ABLE TO PARTICIPATE IN THAT POSITIVE SOLUTION?

A. NO, I DIDN'T WANT LIKE - I DIDN'T PARTICULARLY WANT A POLICE OFFICER TO PARTICIPATE IN IT. WHAT I WOULD LIKE TO HAVE DONE IS FOR THE PROBLEM TO HAVE GONE AWAY BY THE SUBJECT IN THIS CASE TO STOP USING ILLEGAL DRUGS. THAT WOULD BE THE EASIEST WAY, BUT UNFORTUNATELY WE HAVE NOT, OVER THESE MANY YEARS, BEEN ABLE TO PERSUADE THEM TO DO SO. SO CONSEQUENTLY IF THE OPPORTUNITY AROSE, WHICH IT DID IN THIS CASE WHERE I COULD ASSIST IN THAT OUTCOME, THAT I WOULD PARTICIPATE IN IT.

Q. AND THE OPPORTUNITY THAT AROSE WHEN THE MEDICAL UNIVERSITY CAME AND OFFERED TO PROVIDE THE POLICE DEPARTMENT THE INFORMATION THEY NEEDED IN ORDER TO ARREST; IS THAT FAIR?

A. THAT'S FAIR. THAT'S VERY COMMON. MANY CITIZENS DO THAT ALL THE TIME.
Q. THAT'S NOT THE QUESTION I ASKED. I ASKED IN THIS SITUATION, DID THE MEDICAL UNIVERSITY COME FORWARD AND VOLUNTARILY PROVIDE YOU THE INFORMATION THAT YOU NEEDED?
A. THEY WEREN'T THE INITIAL PERSONS THAT CAME FORWARD. AS I RECALL SOMEONE FROM THE SOLICITOR'S OFFICE CONTACTED ME AND THEN WE MET WITH THE MEDICAL UNIVERSITY PEOPLE AS A GROUP. PEOPLE FROM THE POLICE DEPARTMENT, THE MEDICAL UNIVERSITY AND ALSO THE SOLICITOR'S OFFICE. AND THE SOLICITOR'S OFFICE

[GREENBERG 137]

INDICATED THAT THEY WOULD PROVIDE INFORMATION TO US FOR CERTAIN CATEGORIES OF THEIR PATIENTS WHO HAD REUSED TREATMENT AND WHO HAD - WERE - THEY HAD SOME INDICATION THEY WERE IN VIOLATION OF CRIMINAL LAWS OF THE STATE.
Q. BUT THE CRITICAL PIECE THAT YOU NEEDED WAS THE INFORMATION. WITHOUT THE INFORMATION FROM THE MEDICAL UNIVERSITY, THERE WOULD BE NO BASIS FOR ARREST, IS THAT FAIR?
A. WITHOUT THE INFORMATION FOR MOST CRIMES FROM CITIZENS WE

WOULD HAVE NO BASIS FOR ARREST. THIS - THE ANSWER TO THAT QUESTION IS YES. VERY SIMILAR TO ANY OTHER CRIME THAT IS COMMITTED.

Q. AND THERE WAS NO FORMAL POLICY WITH ANY OTHER HEALTH CARE INSTITUTION IN THE CHARLESTON AREA, OTHER THAN THE MEDICAL UNIVERSITY, TO PROVIDE THESE REPORTS IN THE FASHION THAT WAS DESIGNED UNDER THE INTERAGENCY POLICY?

A. A FORMAL POLICY?

Q. YES.

A. NO, NOT A FORMAL POLICY, BECAUSE THE LAW REQUIRES THEM TO PRESENT US WITH THIS INFORMATION. AND THE SAME WAY THAT IF SOMEONE IS SHOT, NO ONE CAN TREAT A PERSON WHO HAS BEEN SHOT WITHOUT CONTACTING THE POLICE OR ANYONE. IN CHILD ABUSE CASES OR ABUSE OF THE ELDERLY, IT'S AGAINST THE LAW FOR THEM TO TREAT THOSE INDIVIDUALS WITHOUT CONTACTING THE LOCAL POLICE DEPARTMENT.

SO THERE WAS NO PARTICULAR FORMAL POLICY WITH ANY

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[GREENBERG 143]

Q. AND TO MAKE THAT DETERMINATION ON A CASE-BY-CASE BASIS?

A. WELL, I DON'T MAKE IT ON A CASE-BY-CASE BASIS. EVERY

TIME YOU ARREST SOMEONE YOU CAN'T ARREST A POLICY OF PEOPLE, YOU ARREST PEOPLE ON THE BASE OF THE INDIVIDUAL ACTS THAT MIGHT CONFORM TO A PARTICULAR POLICY. IN THIS CASE THE POLICY WOULD BE THE LAW THAT IF PEOPLE, I DETERMINE THAT A CRIME HAS BEEN COMMITTED AGAINST THE JUVENILE OR THAT HE MAY SUFFER NEGLECT OR SHE MAY SUFFER NEGLECT IF LEFT AT THAT PARTICULAR LOCATION, IT IS INCUMBENT UPON ME TO REMOVE THAT CHILD FROM THAT LOCATION TO A PLACE OF SAFETY.

Q. TO PROTECT THE CHILD?

A. TO PROTECT THE CHILD.

Q. THERE WERE NOT ARRESTS MADE OF SUBSTANCE-ABUSING PREGNANT WOMEN DURING THE TIME THE POLICY WAS IN PLACE AT ANY HOSPITALS OTHER THAN THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, WERE THERE?

A. BECAUSE OF SUBSTANCE ABUSE?

Q. RIGHT.

A. I DON'T RECALL THAT THERE WERE, NO.

Q. AND PART OF THE ARRANGEMENT BETWEEN THE POLICE DEPARTMENT AND THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WAS THAT IF THEY WOULD GIVE YOU THE INFORMATION THAT WAS THE BASIS FOR THE ARRESTS, YOU WOULD ASSURE THAT IN FACT YOU WOULD ARREST AND THAT THEY COULD SAY THAT TO THEIR PATIENTS, THAT IF YOU DON'T

TAKE THESE CERTAIN STEPS, YOU WILL BE ARRESTED? THAT WAS PART

* * *

[GREENBERG 148]

A. WELL, MY PARTICULAR INTEREST WAS THAT IT WAS - CONSTITUTED CHILD ABUSE AND AS SUCH WAS AGAINST THE LAWS OF THIS STATE. BUT ALSO I HAD AN INTEREST IN THE SENSE THAT I WOULD LIKE TO HAVE SEEN FOR EVERY BABY THAT WAS BORN IN THIS COUNTRY TO AT LEAST AT THAT POINT OF BIRTH, IF AT NO OTHER POINT IN HIS OR HER LIFE, AT LEAST AT THAT POINT TO BE EQUAL. IF NO OTHER TIME, THROUGH ENVIRONMENTAL FACTORS OR WHATEVER HAPPENED LATER, AT LEAST AT THAT POINT THAT HE SAW THE FIRST LIGHT OF DAY THAT IT BE EQUAL TO EVERY LITTLE BABY. THAT'S A PERSONAL INTEREST THAT I HAD, BUT I WAS NOT NECESSARILY PUSHING THAT PARTICULAR INTEREST, I WAS INTERESTED IN ENFORCING THE LAW.

Q. AND YOUR UNDERSTANDING OF THE POLICY, WHAT COULD HAVE HAPPENED IS THAT A WOMEN IN THE LATER PART OF HER PREGNANCY COULD HAVE BEEN PUT IN JAIL FOR THE DURATION OF THE PREGNANCY IN ORDER TO PROTECT HERSELF AND THE UNBORN CHILD; ISN'T THAT TRUE?

A. WHILE - WHILE USING ILLEGAL - TO PREVENT THEM FROM USING ILLEGAL SUBSTANCES.
Q. YES.
A. YES, THAT COULD HAVE HAPPENED, YES.
Q. AND THE PURPOSE FOR THAT INCARCERATION WOULD HAVE BEEN FOR HER PROTECTION AND THE PROTECTION OF THE UNBORN CHILD?
A. WELL THE PURPOSE OF IT, IN THAT PARTICULAR SITUATION THERE, WOULD BE FOR PREVENTING FURTHER CHILD ABUSE.

* * *

[GREENBERG 154]

Q. (BY MS. DUNN, CONTINUING) YOU SAID THAT IT WAS YOUR EXPERIENCE THAT SOME PEOPLE COULD STOP WITHOUT ANY HELP IN TERMS OF QUITTING SUBSTANCES THEY WERE ADDICTED TO?
A. HAVING BEEN A POLICE OFFICER AND ALSO BEEN A JAILER RUNNING LARGE JAILS, I HAVE SEEN IT HAPPEN MANY, MANY TIMES.
Q. ISN'T IT ALSO YOUR EXPERIENCE THAT SOME PEOPLE HAVE A VERY, VERY DIFFICULT TIME, THEY RELAPSE AGAIN AND AGAIN AND AGAIN?
A. IT'S MY EXPERIENCE INDICATES THAT – IT TAKES ABOUT FOUR TIMES ON THE AVERAGE FOR THEM TO TRY TO STOP USING SOME DRUGS. OTHER DRUGS ARE SOMEWHAT EASIER TO ABANDON. BUT THAT

WHEN YOU TALK ABOUT TREATMENT AND TALK ABOUT BEDS, YOU CAN'T TALK ABOUT ONE BED FOR THAT PERSON, YOU'VE GOT TO TALK ABOUT FOUR BEDS OVER A PERIOD OF TIME.

Q. SO YOUR REAL EXPERIENCE IS THAT RELAPSE OFTEN IS A VERY MUCH A PART OF THE TREATMENT?

A. MY REAL EXPERIENCE IS THAT VERY FEW PEOPLE EVEN SEEK TREATMENT UNLESS A PROBATION OFFICER OR A JUDGE OR A MOTHER OR A WIFE SAYS IF YOU DON'T SEEK TREATMENT THEN I'M GOING TO DO THIS OR THAT OR WHATEVER, OR GIRLFRIEND OR WHATEVER. THAT'S WHY ALMOST NOBODY JUST COMES IN OFF THE STREET AND SAYS I'M JUST GOING TO GIVE IT UP. IT'S USUALLY BECAUSE SOMEBODY ELSE WHO CARES ABOUT THEM IN SOME WAY HAS ACTED IN ORDER TO DISSUADE THEM TO TRY TO GET THEM TO DO IT.

MS. DUNN: NO FURTHER QUESTIONS.

[GREENBERG 155]

REDIRECT EXAMINATION

BY MR. HOOD:

Q. DID THIS INTERAGENCY POLICY HAVE AN EFFECT UPON THAT?

MS. DUNN: OBJECTION, YOUR HONOR.

THE COURT: SAY WHAT?

MS. DUNN: OBJECTION. I DON'T THINK THERE WAS ANY QUESTION.

THE COURT: I'LL PERMIT IT. GO AHEAD.

A. YES, I BELIEVE THAT THIS INTERAGENCY POLICY WAS ONE OF A - MANY HAMMERS THAT CAN EXIST IN A SOCIETY IN ORDER TO INDUCE PEOPLE TO STOP SOME SORT OF ILLEGAL OR COUNTERPRODUCTIVE ACTIVITY.

MR. HOOD: THANK YOU, CHIEF.

THE COURT: ANYTHING FURTHER FROM THE PLAINTIFF?

MS. DUNN: NO, YOUR HONOR.

THE COURT: THANK YOU, CHIEF GREENBERG. YOU'RE EXCUSED.

(TESTIMONY COMPLETED.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF LORI GRIFFIN

[GRIFFIN 4]

A. YES, SIR.
Q. DO YOU REMEMBER THE DATE THAT SHE WAS BORN?
A. OCTOBER 26TH, 1989.
Q. PRIOR TO YOUR DAUGHTER DANIELL BEING BORN, DID YOU RECEIVE PRENATAL CARE?
A. YES, I DID.
Q. WHERE DID YOU BEGIN RECEIVING PRENATAL CARE?
A. I FIRST STARTED GETTING PRENATAL CARE AT A CLINIC AT ST. JAMES SANTEE CLINIC IN MC CLELLANVILLE. AND THEY REFERRED ME TO THE MEDICAL UNIVERSITY.
Q. OKAY. WAIT FOR JUST A MOMENT NOW. MC CLELANVILLE, IS THAT WHERE YOU LIVED THEN?
A. YES, SIR.
Q. YOU INDICATED THAT THAT CLINIC REFERRED YOU TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. YES, SIR.
Q. DID THEY TELL YOU WHY?
A. NOT - NOT DIRECTLY, NO.
Q. HAVING RECEIVED THE REFERRAL TO THE MEDICAL UNIVERSITY, DID YOU THEN CHANGE AND RECEIVE YOUR PRENATAL CARE AT THE MEDICAL UNIVERSITY?

A. YES.
Q. THE FIRST TIME YOU WENT TO MUSC, HERE IN CHARLESTON, DID THEY DO ANY MEDICAL TESTS ON YOU? DID THEY TAKE BLOOD SAMPLES, URINE SAMPLES, EXAMINE YOU PHYSICALLY?

[GRIFFIN 5]

A. YES. YES, SIR. THAT'S NORMAL, YES.
Q. AT THAT TIME, DID THEY TAKE A MEDICAL HISTORY FROM YOU? DID THEY ASK YOU ABOUT YOUR PREVIOUS BIRTHS AND ANY PROBLEMS YOU HAVE WITH YOUR HEALTH?
A. YES, SIR.
Q. ON THAT FIRST VISIT TO MUSC, DID ANYONE AT THAT HOSPITAL REFER YOU TO ANY SUBSTANCE ABUSE COUNSELING OR ANY OTHER HEALTH CARE PROVIDERS?
A. NO, SIR.
Q. DID ANYONE YOU SAW IN THAT FIRST VISIT TO MUSC THEMSELVES GIVE YOU ANY SUBSTANCE ABUSE OR ALCOHOL COUNSELING?
A. NO, SIR.
Q. AT THAT TIME IN YOUR LIFE, MS. GRIFFIN, WERE YOU USING DRUGS?
A. YES, SIR, I WAS.
Q. WHAT DRUGS?
A. COCAINE.
Q. AT THAT TIME IN YOUR LIFE, WHEN YOU WERE PREGNANT WITH DANIELL, WERE YOU AWARE OF THE DIFFICULTIES OR DANGERS CAUSED

BY USING COCAINE WHEN YOU WERE PREGNANT?
A. NO. NOT REALLY, NO.
Q. DID YOU CONTINUE COMING FROM MC CLELLANVILLE TO CHARLESTON FOR YOUR PRENATAL CARE AFTER THAT FIRST TRIP?
A. YES.
Q. ON THE SECOND TIME THAT YOU CAME TO CHARLESTON, DID THEY

[GRIFFIN 6]

EXAMINE YOU AND AGAIN GIVE YOU ROUTINELY THE SAME KIND OF TESTS THAT THEY GAVE YOU THE FIRST TIME?
A. YES, SIR.
Q. ON THAT SECOND TIME THEN, WERE YOU REFERRED TO ANY SUBSTANCE ABUSE COUNSELING OR DID YOU RECEIVE ANY FROM THE PEOPLE AT THE MEDICAL UNIVERSITY?
A. NO, SIR.
Q. AND IN ORDER TO SPEED THINGS UP A LITTLE BIT, MS. GRIFFIN, DID THAT SAME COURSE OF CONDUCT CONTINUE EACH TIME YOU WENT FOR THE PRENATAL CARE?
A. YES, SIR.
Q. I WOULD LIKE TO DIRECT YOUR ATTENTION TO OCTOBER 7TH OF THAT YEAR. DID YOU GO TO - WELL, LET ME WITHDRAW THAT, IF I MAY.
DO YOU REMEMBER WHAT HAPPENED THE END OF SEPTEMBER OF THAT YEAR?

THE COURT: LET'S SEE WHAT YEAR IT IS. I DON'T KNOW THAT THE JURY HAS BEEN TOLD WHEN SHE WENT THERE.

MR. WHERRY: I THINK YOUR ABSOLUTELY RIGHT.

Q. (BY MR. WHERRY, CONTINUING) WHAT YEAR WAS THIS THAT YOU RECEIVED YOUR PRENATAL CARE?

A. UMM, WELL OCTOBER THE BABY WAS BORN, SO PRENATAL WOULD HAVE TO BE SEPTEMBER.

Q. OF WHAT YEAR?

A. 1989.

* * *

[GRIFFIN 8]

Q. AND IS THAT WHILE YOU WERE IN THE HOSPITAL?

A. YES.

Q. DESCRIBE FOR THE JURY, PLEASE WHAT HAPPENED? WHAT TOOK PLACE BETWEEN YOU AND SHIRLEY BROWN WHEN YOU MET?

A. UMM, WHEN I WAS ADMITTED TO THE HOSPITAL THEY TOLD ME THAT THEY WOULD HAVE TO, JUST BECAUSE I WAS HAVING PRE-LABOR PAINS AND THEY TOLD ME THAT THEY WOULD HAVE TO KEEP ME OVERNIGHT. SO WHEN I WENT I WAS SET UP IN A ROOM. AND SHIRLEY BROWN CAME IN THAT MORNING AND SHE - I DON'T REALLY RECALL WHAT SHE SAID TO ME, BUT SHE TOLD ME THAT I WAS GOING HOME. SO I GOT DRESSED. AND AFTER I GOT DRESSED THREE

POLICEMEN CAME IN, PUT HANDCUFFS AND SHACKLES ON ME AND TOLD ME I WAS UNDER ARREST FOR DISTRIBUTION OF COCAINE TO A MINOR.

Q. AT THAT TIME, MS. GRIFFIN, HOW PREGNANT WERE YOU?

A. I WAS EIGHT MONTHS PREGNANT.

Q. MS. GRIFFIN, DID YOU UNDERSTAND WHEN THEY TOLD YOU THAT YOU WERE UNDER ARREST FOR DISTRIBUTION OF COCAINE TO A MINOR, WHO THEY MEANT THAT MINOR WAS?

A. NO, I DID NOT. I THOUGHT IT WAS A DRUG DEALER.

Q. NOW YOU SAID THAT THEY PUT HANDCUFFS ON YOU. DID THEY PUT THE HANDCUFFS ON IN FRONT OF YOU OR BEHIND YOUR BACK?

A. IN FRONT OF ME.

Q. YOU SAID THREE POLICE OFFICERS CAME. WERE ALL THREE OF THEM IN UNIFORM?

A. TWO WERE IN UNIFORM.

[GRIFFIN 9]

Q. THE ONE THAT WAS NOT, WAS THAT A MALE OR FEMALE OFFICER?

A. A FEMALE.

Q. THE TWO THAT WERE IN UNIFORM, WERE THEY MALE OR FEMALE?

A. MALE.

Q. DO YOU KNOW WHAT POLICE DEPARTMENT THEY WERE FROM?

A. NORTH CHARLESTON, I BELIEVE.

Q. MS. GRIFFIN, YOU SAID THAT THEY PUT HANDCUFFS ON YOU.
LET ME WITHDRAW THAT.

YOU SAID THAT THEY PUT SHACKLES ON YOU; IS THAT RIGHT?

A. YES, SIR.

Q. DESCRIBE FOR THE JURY THE SHACKLES. DESCRIBE WHAT THEY WERE?

A. SHACKLES THAT THEY PUT ON ME, IT WAS A -- I HAD WRISTCUFFS AND IT WAS A CHAIN THAT WENT AROUND MY BELLY AND IT DROPPED DOWN TO MY ANKLES AND IT WAS TO - TWO CUFFS FOR EACH ANKLE.

Q. WERE ALL OF THESE THINGS CONNECTED TOGETHER? THAT IS WERE THE CUFFS CONNECTED SOMEHOW WITH THAT CHAIN OR THROUGH THE CHAIN TO THE SHACKLES?

A. YES, SIR. YES, SIR.

Q. DESCRIBE FOR THE JURY HOW THAT FELT? I DON'T MEAN PHYSICALLY, DESCRIBE WHAT YOU WERE EXPERIENCING WHEN THEY TOLD YOU THAT YOU WERE BEING ARRESTED AND THEY PUT THE HANDCUFFS AND CHAINS AND SHACKLES ON YOU?

[GRIFFIN 10]

A. I WAS DEVASTATED. I WAS, WAS IN TOTAL SHOCK. I DIDN'T UNDERSTAND WHAT WAS GOING ON. I NEVER BROKEN THE LAW BEFORE. AND FOR THEM TO JUST COME AND ARREST ME I JUST COULDN'T UNDERSTAND.

Q. PRIOR TO THAT TIME, HAD YOU EVER BEEN IN JAIL?

A. NO.
Q. WHAT WERE YOUR THOUGHTS OR YOUR CONCERNS OR YOUR FEELINGS AS YOU LEFT THE HOSPITAL GOING TO THE JAIL ABOUT THE FACT THAT YOU WERE GOING TO A JAIL?
A. I WILL NEVER TRUST A DOCTOR OR A PHYSICIAN AGAIN. THAT THEY JUST - THEY JUST TORMENTED - TORMENTED ME. I NEVER UNDERSTOOD WHY.
Q. WHEN YOU - I'M SORRY? DID YOU HAVE MORE TO SAY?
A. NO.
Q. WHEN YOU WERE TAKEN FROM YOUR HOSPITAL ROOM TO LEAVE THE HOSPITAL, HOW DID YOU LEAVE THE HOSPITAL? DID YOU WALK OUT?
A. NO.
Q. HOW DID YOU LEAVE?
A. THEY PUT ME IN A WHEELCHAIR AND ONE OF THE POLICE OFFICERS TOOK HIS JACKET OFF SO THEY CAN HIDE MY HANDS.
Q. SO IN THE WHEELCHAIR WERE YOU THEN WHEELED FROM YOUR ROOM TO OUTSIDE THE HOSPITAL?
A. YES.
Q. YOU SAID A POLICE OFFICER WAS KIND ENOUGH TO TAKE HIS JACKET OFF AND PUT IT OVER YOUR HANDS. DID THAT COVER THE

[GRIFFIN 11]

SHACKLES?
A. NO.
Q. HOW DID YOU FEEL AS YOU WERE BEING WHEELED THROUGH THE

HOSPITAL IN THE WHEELCHAIR EIGHT MONTHS PREGNANT WITH THE SHACKLES?

A. LIKE I SAID, I WAS - I WAS NUMB. I FELT LIKE I WAS NOBODY. I FELT LIKE THERE WAS A HOLE I COULD JUST CRAWL IN AND DIE. I COULDN'T RESPOND TO ANYTHING. IT WAS HORRIBLE.

Q. AT THAT TIME ON THAT PARTICULAR DAY, MS. GRIFFIN, YOU HAD TWO OTHER CHILDREN?

A. YES.

Q. HOW OLD WERE THEY THEN? NOW MIND YOU THIS IS 7 YEARS AGO.

A. MY SON ANDREW, HE WAS FOUR. AND STEVIE WAS THREE.

Q. WHO WAS TAKING CARE OF THEM THAT DAY WHEN YOU WENT TO MUSC TO GET YOUR PRENATAL CARE?

A. THE PATERNAL GRANDMOTHER OF MY - THE YOUNGEST DAUGHTER.

Q. WERE ANY ARRANGEMENTS MADE FOR HER TO TAKE CARE OF THESE CHILDREN FOR A LONG PERIOD OF TIME, THREE OR FOUR WEEKS?

A. NO, SIR.

Q. WHEN YOU LEFT YOUR CHILDREN THAT MORNING, WHEN YOU LEFT MC CLELLANVILLE TO COME TO MUSC, DID YOU SAY GOOD-BYE TO YOUR CHILDREN?

A. NO.

Q. DID YOU TELL THEM THAT YOU WOULD BE GONE FOR THREE OR

FOUR WEEKS?
A. NO, I THOUGHT I WAS GOING RIGHT HOME.
Q. DID YOU GO RIGHT HOME?
A. NO, I WENT TO JAIL.
Q. WHAT JAIL WERE YOU TAKEN TO, MS. GRIFFIN?
A. LEEDS AVENUE.
Q. AND IS THAT HERE IN CHARLESTON?
A. YES.
Q. WHEN - I'M SORRY. STEP BACK - JUST ONE STEP BACK.
WHEN YOU LEFT THE HOSPITAL, I TAKE IT THAT YOU WERE DRIVEN TO
THE LEEDS AVENUE JAIL?
A. YES. THEY PUT ME IN THE HOLD FOR ABOUT FIVE HOURS.
Q. WELL, LET'S GO BACK TO WHEN YOU WERE DRIVEN. HOW DID YOU
GET IN THE CAR, MS. GRIFFIN, HANDCUFFED AND SHACKLED AND EIGHT
MONTHS PREGNANT? DESCRIBE FOR THE JURY HOW YOU GOT IN THE
BACK SEAT OF THE CAR OR FRONT SEAT, WHICHEVER SEAT YOU GOT IN?
A. THE POLICE OFFICER, THEY HAD TO HELP ME OUT OF THE
WHEELCHAIR BECAUSE MY BELLY WAS SO BIG. AND I COULDN'T BARELY
MOVE. SO SHE HAD TO HELP ME INTO THE CAR AND OUT OF THE CAR.
AND THEY HAD TO BEND - YOU KNOW, BEND ME DOWN SO I COULD GET
IN, SIT IN THE SEAT IN THE BACK OF THE CAR.
Q. DID THEY DRIVE YOU DIRECTLY TO THE JAIL?
A. NO. WE WENT TO THE - FIRST WE WENT TO THE BOND - THE

BONDS HEARING.
Q. OKAY. AND WHEN YOU WENT TO THE BOND HEARING, WERE YOU

[GRIFFIN 13]

STILL HANDCUFFED AND SHACKLED?
A. YES.
Q. YOU WENT BEFORE A JUDGE?
A. YES, SIR.
Q. WAS BAIL SET, MS. GRIFFIN?
A. YES, SIR.
Q. HOW MUCH BAIL WAS SET?
A. EIGHTY THOUSAND DOLLARS.
Q. DID YOU HAVE EIGHTY THOUSAND DOLLARS TO POST AS BAIL?
A. NO.
Q. DID YOU HAVE EIGHT THOUSAND DOLLARS TO PAY A BAIL BONDSMAN?
A. NO, SIR.
Q. DID YOUR FAMILY?
A. NO, SIR.
Q. DID ANYONE POST BAIL?
A. NO, SIR.
Q. WHERE DID YOU GO?
A. I WENT TO THE HOLDING CELL FOR ABOUT FIVE HOURS.
Q. NOW WHEN YOU SAY A HOLDING CELL, THIS WAS ON LEEDS AVENUE?
A. EXCUSE ME?
Q. THE HOLDING CELL WAS AT LEEDS AVENUE?
A. YES.
DESCRIBE THAT HOLDING CELL FOR THE JURY. JUST EVERY

[GRIFFIN 14]

DETAIL OF IT, WHAT WAS IN IT AND WHAT WAS NOT IN IT.
A. THERE WAS - IT WAS DISGUSTING. I CAN'T EVEN DESCRIBE IT. IT WAS A CELL WITH BARS AND IT WAS A TOILET THAT WAS FILTHY DIRTY. THE FLOORS WERE FILTHY DIRTY. THE BENCH THAT I HAD - THAT I HAD TO SIT ON WAS FILTHY DIRTY. AND IT WAS - IT WAS STINK. IT WAS DISGUSTING.
Q. WHEN YOU SAY THAT THERE WERE BARS, WAS THERE A DOOR THAT HAD BARS IN IT OR WAS THE WHOLE FRONT OF THE CELL BARS?
A. THE WHOLE - THE WHOLE THING WAS BARS ALL AROUND.
Q. YOU SAID THAT THERE WAS A TOILET.
A. YES.
Q. WERE THERE TOILET PARTITIONS? WAS THERE PRIVACY TO USE THE TOILET?
A. NO, IT WAS RIGHT IN THE OPEN.
Q. THE PEOPLE WHO WERE GUARDING YOU THERE, MS. GRIFFIN, WERE THEY MALE OR FEMALE?
A. MALE.
Q. THE BENCH, YOU SAID, WAS FILTHY. WAS THERE ANY OTHER FURNITURE IN THERE, ANYPLACE FOR YOU TO SIT?
A. NO.
Q. WHAT WAS THE BENCH MADE OUT OF, METAL, WOOD, PLASTIC?
A. I BELIEVE IT WAS WOOD.
Q. WHEN YOU SAY IT WAS FILTHY, WHY ARE YOU SAYING THAT? DESCRIBE THAT? WHAT MADE IT FILTHY?

A IT WAS JUST DIRTY. THE FLOOR WAS COVERED IN DIRT. YOU

[GRIFFIN 15]

CAN SEE IT. IT WAS A CEMENT - IT WAS A CEMENT FLOOR.
Q. HOW ABOUT THE TOILET, WAS THAT CLEAN?
A. NO, IT WASN'T CLEAN.
Q. WAS THERE A SINK?
A. NO.
Q. DID YOU USE THE TOILET?
A. NO.
Q. WERE THERE ANY BOOKS OR ANY MATERIALS IN THE CELL?
A. NO, SIR.
Q. ANY TELEVISION?
A. NO, SIR.
Q. ANYTHING TO DO EXCEPT SIT ON THE BENCH?
A. EXCUSE ME?
Q. WAS THERE ANYTHING TO DO BESIDES SIT ON THE BENCH?
A. NO, SIR.
Q. WAS ANYONE ELSE IN THE CELL WITH YOU?
A. NO, NOT AT THIS TIME.
Q. I THINK YOU HAVE ALREADY TOLD US, BUT LET ME ASK YOU AGAIN, HOW LONG WERE YOU IN THAT HOLDING CELL?
A. ABOUT FIVE HOURS.
Q. AT THE END OF FIVE HOURS, WHAT HAPPENED? DID SOMEONE POST BAIL?
A. NO. THEY CAME - THE OFFICERS CAME AND GOT ME. AND THEY

TOOK ME TO INSIDE THE JAIL WHERE I WOULD BE - WHERE I WOULD BE AT.

[GRIFFIN 16]

Q. WHEN YOU CAME IN TO THE LEEDS AVENUE FACILITY, WERE YOU SEARCHED?
A. YES, SIR.
Q. HOW WERE YOU SEARCHED? DESCRIBE THAT FOR THE JURY.
A. I HAD TO TAKE OFF - I HAD TO TAKE OFF ALL OF MY CLOTHES AND GIVE IT TO THE - AND THEY GAVE ME A - THE COUNTY - THE COUNTY ISSUE, I GUESS YOU CALL IT, JAIL GOWN. AND IT DIDN'T EVEN BARELY FIT BECAUSE I WAS SO BIG.
Q. WHEN YOU SAY THAT YOU HAD TO TAKE OFF ALL OF YOUR CLOTHES, DID THAT INCLUDE YOUR UNDERWEAR?
A. NO.
Q. YOU WERE GIVEN THE JAIL ISSUE CLOTHING YOU SAID?
A. YES.
Q. THAT WAS A DRESS?
A. YES.
Q. WAS THAT DRESS DESIGNED OR ABLE TO FUNCTION AS A DRESS FOR A WOMAN THAT WAS EIGHT MONTHS PREGNANT?
A. NO, SIR.
Q. WHERE WAS THAT GIVEN TO YOU? WHILE YOU WERE IN THE HOLDING CELL?
A. NO, SIR. AFTER I GOT TO LEEDS AVENUE.

Q. AFTER BEING GIVEN THIS JAIL-ISSUE DRESS, MS. GRIFFIN,
WERE YOU PLACED IN ANOTHER SELL?
A. YES, SIR.
Q. DESCRIBE THAT FOR THE JURY. WHERE WERE YOU PLACED?

[GRIFFIN 17]

A. I WAS PLACED IN A - IT WAS A - THEY CALL IT THE SICK
BAY. AND IT WAS THREE - THREE - IT WASN'T EVEN A BED, THERE
IS LIKE A METAL TABLE WITH - SOME KIND OF CUSHION ON IT. AND
IT WAS LIKE A TWIN SIZE. NOT EVEN A TWIN SIZE. AND THE ROOM
WAS A BIG METAL DOOR AND A LITTLE HOLE IN IT I GUESS SO THEY
CAN FEED YOU THROUGH THAT. AND
Q. A BIG METAL DOOR YOU SAID?
A. YES.
Q. OKAY.
A. AND INSIDE IT WAS THE - IT WAS A TOILET RIGHT OUT IN THE
OPEN. WITH THE SHOWER IN THE OPEN, TOO. AND THE ROOM WAS
NASTY. AND THERE WAS TWO OTHER WOMEN IN THERE.
Q. WHAT DO YOU MEAN BY THE ROOM WAS NASTY?
A. IT WAS FILTHY. IT WAS A CEMENT FLOOR WITH DUST AND
DIRT. THE WALLS WERE NASTY.
Q. OTHER THAN YOUR BED, COT, WAS THERE ANYPLACE IN THIS ROOM
TO SIT? ANY CHAIRS?
A. NO, SIR.

Q. THERE WERE TWO OTHER PEOPLE THAT YOU SHARED THIS ROOM WITH?
A. YES.
Q. AS YOU ENTERED THIS ROOM AND SAW IT, AND KNEW THAT YOU WOULD BE SHARING IT WITH TWO OTHER WOMEN - I TAKE IT THEY WERE WOMEN?
A. YES.

[GRIFFIN 18]

Q. DESCRIBE FOR THE JURY, PLEASE, HOW YOU FELT? WHAT YOUR EMOTIONS WERE, WHAT YOUR THOUGHTS WERE?
A. MY - MY THOUGHT WAS WHEN I GOT IN THERE I JUST- I DIDN'T WANT NOBODY TO HURT ME, BECAUSE SOME PEOPLE DON'T TAKE - THEY DON'T TAKE KIND TO SEEING SOMEBODY ELSE. AND I THOUGHT WHEN I GOT IN THERE, I JUST - I WAS JUST IN SO MUCH SHOCK I COULDN'T EVEN THINK STRAIGHT.
Q. WHO WERE YOU WORRIED ABOUT HURTING YOU, THE JAIL GUARDS OR OTHER PRISONERS?
A. THE OTHER PRISONERS.
Q. BY THE WAY, DID THAT EVER HAPPEN?
A. NO.
Q. THE OTHER WOMEN WHO WERE IN THERE WITH YOU, DID YOU LEARN
Q. WHATTHEY WERE IN FOR?
A. NO, I DIDN'T EVEN TALK TO THEM.
Q. IN THIS SICK BAY, WITH THE COT AND THE TOILET AND THE

SHOWER, WAS THERE ANY TELEVISION?
A. NO.
Q. RADIO?
A. NO.
Q. BOOKS?
A. NO.
Q. BIBLE?
A. NO.
Q. MAGAZINES?

[GRIFFIN 19]

A. NO.
Q. NEWSPAPERS?
A. NO.
Q. HOW LONG WERE YOU IN THERE?
A. THREE WEEKS.
Q. AND IS THAT BECAUSE YOU COULDN'T POST THE EIGHTY THOUSAND DOLLARS BAIL?
A. YES.
Q. DURING THAT THREE-WEEK PERIOD, DID ANYONE OFFER YOU DRUG COUNSELING?
A. NO, SIR.
Q. DRUG TREATMENT?
A. NO, SIR.
MEDICATION?
A. NO, SIR.
Q. HELP?
A NO, SIR.
Q. PRAYER?
A. NO, SIR.
Q. DURING THAT THREE-WEEK PERIOD DID YOU HAVE OCCASION TO HAVE OTHER MEDICAL PROBLEMS?
A. I KEPT HAVING PREMATURE LABOR PAINS.

Q. AND WHAT WOULD HAPPEN WHEN YOU WOULD HAVE THE PREMATURE LABOR PAINS?
A. THEY WOULD HAVE TO COME AND GET ME AND TAKE ME BACK TO

[GRIFFIN 20]

THE MEDICAL UNIVERSITY TO BE CHECKED OUT.
Q. AND WHEN THEY CAME TO GET YOU AND TAKE YOU BACK TO THE MEDICAL UNIVERSITY TO GET CHECKED OUT, AGAIN HANDCUFFS, SHACKLES?
A. YES, SIR.
Q. HELP GETTING IN AND OUT OF THE CAR?
A. YES, SIR.
Q. WHEN YOU WENT INTO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA IN THE HANDCUFFS AND SHACKLES, WERE THOSE THINGS TAKEN OFF SO THEY COULD GIVE YOU MEDICAL TREATMENT, THE HANDCUFFS AND THE SHACKLES?
A. NO, SIR.
Q. THE DOCTORS WHO EXAMINED YOU AT THE UNIVERSITY, DID IT WITH THE LEG SHACKLES ON?
A. YES, SIR. THEY WOULD A - THEY WOULD LIFT - LET ONE LEG BE FREE AND THE NEXT LEG THEY WOULD ATTACH TO THE BED.
Q. WHEN YOU SAY ATTACH? IS THAT WITH THE HANDCUFF DEVICES?
A. YES, SIR.
Q. IS THAT ALSO TRUE WITH YOUR HANDS AND ARMS?

A. ONE ARM WAS ATTACHED AS WELL.
Q. SO THAT I CAN UNDERSTAND IT, PLEASE CORRECT ME IF I'M WRONG, WOULD THEY TAKE OFF ONE HANDCUFF AND ATTACH THAT HAND CUFF TO THE BED?
A. YES.
Q. SO STILL ONE HANDCUFF ON?

[GRIFFIN 21]

A. YES.
Q. SAME THING WITH THE LEG?
A. YES.
Q. ABOUT HOW MANY TIMES, IF YOU RECALL, WERE YOU TAKEN FROM THE JAIL BACK TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA FOR THIS PRE-TERM LABOR OR OTHER MEDICAL NEEDS?
A. I WOULD SAY ABOUT A GOOD - A GOOD DOZEN OR MORE TIMES.
Q. AND EACH TIME WHEN YOU WENT BACK TO THE JAIL, DID YOU GO INTO THE SAME SICK BAY, SAME ROOM?
A. YES, SIR.
Q. SAME COT, SAME ROOMMATES?
A. YES, SIR.
Q. I TAKE IT, MA'AM, THAT YOU DID USE THE TOILET AND THE SHOWER IN THAT ROOM?
A. YES.
Q. NO PARTITIONS?
A. NO.
Q. DID THERE COME A TIME AT WHICH THE PRE-TERM LABOR WAS NOT PRE-TERM ANYMORE?
A. YES.

Q. AND YOU WERE TAKEN TO THE HOSPITAL TO HAVE THE BABY?
A. YES.
Q. GOING BACK AGAIN FOR A MOMENT, AND I APOLOGIZE. WHEN YOU WENT FOR THESE INTERIM TRIPS TO THE HOSPITAL WHEN YOU HAD PRE-TERM LABOR?

[GRIFFIN 22]

A. YES.
Q. WHEN YOU WERE AT THE HOSPITAL, DID ANYBODY GIVE YOU ANY SUBSTANCE ABUSE COUNSELING?
A. NO, SIR.
Q. SUBSTANCE ABUSE THERAPY?
A. NO, SIR.
Q. REFER YOU OUT TO ANY OTHER PROGRAM?
A. NO, SIR.
Q. RECOMMEND ANY OTHER PROGRAM?
A. NO.
Q. OFFER YOU ANYTHING FOR THE FACT THAT AT SOME POINT IN TIME YOU HAD USED COCAINE?
A. NO.
Q. WHEN YOU WENT IN THE HOSPITAL AND HAD THE BABY, HOW LONG DID YOU STAY IN THE HOSPITAL AFTER DELIVERING THE BABY?
A. ABOUT A WEEK.
Q. WHILE YOU WERE IN THE HOSPITAL AFTER DELIVERING THE BABY, WERE THE HANDCUFFS AND SHACKLES STILL ON?
A. YES. I DO RECALL HAVING AN OFFICER COME IN THE ROOM AND

DETACH THE ONE FROM MY LEG AND MY ARM.
Q. SO AT SOME POINT IN TIME THEY TOOK THEM OFF?
A. YES. AFTER THE BABY WAS BORN.
Q. WERE YOU ABLE TO SEE YOUR BABY?
A. YES.
Q. FEED YOUR BABY?

[GRIFFIN 23]

A. YES.
Q. HOLD YOUR BABY?
A. YES.
Q. AFTER THE FOUR OR FIVE DAYS THAT YOU HAD - DANIELL, WAS IT?
A. YES.
Q. AND YOU WERE READY TO LEAVE THE HOSPITAL, WHAT HAPPENED? DID YOU GO BACK TO JAIL?
A. NO, SIR.
Q. WHERE DID YOU GO?
A. I HAD TO - THEY TOLD ME THAT I HAD TO GO THROUGH TREATMENT IN ORDER TO GET MY BABY BACK.
Q. WHO TOLD YOU THAT?
A. DSS. FAMILY COURT.
Q. MS. GRIFFIN, IF YOU KNOW, WHAT HAPPENED TO THAT EIGHTY THOUSAND DOLLARS BAIL? HOW DID YOU GET OUT OF JAIL?
A. I GUESS MY PUBLIC DEFENDER GOT ME OFF.
Q. AFTER THE BABY WAS BORN?
A. YES.
Q. AFTER THE BABY WAS BORN, WAS THE CHILD TAKEN FROM YOU?

A. YES, IT WAS.
Q. BY WHOM?
A. DSS.
Q. AND DSS IS THE DIVISION OF SOCIAL SERVICES?
A. DEPARTMENT OF SOCIAL SERVICES.

[GRIFFIN 24]

Q. DEPARTMENT?
A. YES.
Q. WAS THAT THE FIRST TIME THAT YOU TALKED WITH OR DEALT WITH ANYBODY WHO GAVE YOU GUIDANCE AS TO WHAT WAS REQUIRED OF YOU. THAT IS, I THINK YOU SAID TREATMENT TO GET YOUR BABY BACK?
A. YES, SIR.
Q. WHAT TREATMENT WERE YOU REQUIRED TO UNDERGO TO GET YOUR BABY BACK?
A. I HAD TO UNDERGO SIX MONTHS IN CHARLESTON COUNTY SUBSTANCE ABUSE CENTER. AND THEY HAD THE BABY - I HAD - COULDN'T HAVE THE BABY FOR SIX MONTHS. AND AFTER COMPLETION, I GET MY BABY BACK.
Q. WHEN YOU SAY SIX MONTHS IN THE SUBSTANCE ABUSE TREATMENT CENTER, DID YOU HAVE TO LIVE THERE? WAS THAT INPATIENT
A. NO, IT WAS OUTPATIENT.
Q. SO YOU GO THERE FOR SOME TIME DURING EACH DAY AND THEN YOU GO HOME AT NIGHT?
A. YES.

Q. WERE YOU TOLD WHY THEY TOOK THE BABY FROM YOU?
A. NO.
Q. IF I RECALL CORRECTLY, YOU SAID THAT YOU HAD TWO OTHER CHILDREN, AGE 4 AND 3?
A. YES.
Q. WHERE WERE THEY? WERE THEY AT HOME?

[GRIFFIN 25]

A. NO, THEY WERE AT HOME.
Q. THEY WERE AT HOME LIVING WITH YOU WHEN YOU WERE OUT OF JAIL FINALLY?
A. YES.
Q. WERE YOU EVER SHOWN A VIDEOTAPE BY ANYONE ABOUT THE DANGERS OF ALCOHOL OR DRUG USE IN PREGNANCY?
A. NO.
Q. WERE YOU EVER GIVEN ANY WRITTEN MATERIAL, ANYBODY GIVE YOU A LETTER OR DOCUMENT OR PAMPHLET OR ANYTHING LIKE THAT ABOUT SUBSTANCE ABUSE WHILE YOU WERE PREGNANT?
A. NO.
Q. AND WHEN YOU ANSWER NO, IS THAT INCLUDE ALL OF THE TIMES WHEN YOU WENT TO MUSC?
A. YES.
Q. AND EVEN ALL OF THE TIMES WHEN YOU WERE IN JAIL?
A. YES.
Q. WERE YOU EVER GIVEN A LIST, EVEN AFTER YOU WENT INTO THE

SUBSTANCE ABUSE TREATMENT, WERE YOU EVER GIVEN A LIST OF AVAILABLE RESOURCES FOR A SUBSTANCE ABUSE TREATMENT?
A. NO.
Q. DID YOU EVER BECOME AWARE OF, UP TO AND INCLUDING THE COMPLETION OF THAT TREATMENT, OF ALTERNATIVE PLACES TO GET TREATMENT, PLACES OTHER THAN THE SUBSTANCE ABUSE TREATMENT CENTER?
A. NO.

[GRIFFIN 26]

Q. WHERE WAS THIS CENTER THAT YOU WENT TO?
A. CHARLESTON COUNTY SUBSTANCE ABUSE CENTER. I BELIEVE IT'S ON - I'M NOT SURE OF THE STREET.
Q. BUT HERE IN CHARLESTON?
A. YES.
Q. HOW FAR IS THAT FROM MC CLELLANVILLE WHERE YOU LIVE?
A. IT'S ABOUT AN HOUR RIDE.
Q. EACH WAY?
A. YES.
Q. HOW OFTEN DID YOU HAVE TO GO?
A. I BELIEVE IT WAS THREE TIMES A WEEK, IF I'M NOT MISTAKEN.
Q. WHAT HOURS?
A. IT WAS NIGHTTIME. IT WAS LIKE FROM I BELIEVE FIVE TILL LIKE NINE.
Q. DID YOU OWN A CAR AT THAT TIME?
A. I HAD ONE, BUT IT WAS BROKE.
Q. HOW DID YOU GET HERE THREE NIGHTS A WEEK, AN HOUR EACH

WAY?
A. MY PATERNAL GRANDMOTHER TOOK ME. PATERNAL GRANDMOTHER OF THE BABY TOOK ME.
Q. DID YOU HAVE TO MAKE THOSE ARRANGEMENTS TO GET YOUR BABY BACK OR WAS THAT DONE THROUGH DSS OR SUBSTANCE ABUSE TREATMENT CENTER?
A. IT WAS DONE THROUGH DEPARTMENT OF SOCIAL SERVICES.
Q. THEY ARRANGED FOR YOUR GRANDMOTHER TO BRING YOU?

[GRIFFIN 27]

A. NO. I HAD TO ASK HER TO TAKE ME BECAUSE I HAD NO OTHER WAY TO GET THERE.
Q. AND WHAT WERE YOU TOLD WOULD HAPPEN IF YOU DIDN'T GET THERE?
A. I WASN'T TOLD ANYTHING IF I DIDN'T -
Q. WHEN YOU WERE ORIGINALLY REFERRED TO MUSC AND THEY PERFORMED THE ORIGINAL TESTS ON YOU?
A. UMM-HMM.
Q. BLOOD, URINE, EXAMINATION AND LIKE THAT, DID ANYONE TELL YOU THAT THE RESULTS OF THOSE EXAMINATIONS WOULD BE TURNED OVER TO THE POLICE?
A. NO, SIR. NEVER HEARD OF THAT.
Q. DID ANYONE TELL YOU THAT THEY WOULD BE DISCLOSED TO ANYONE ELSE?
A. NO, SIR.
Q. DID ANYONE TELL YOU THAT THEY WOULD BE TURNED OVER TO

ATTORNEY GENERAL CONDON?
A. NO, SIR.
Q. DID ANYONE TELL YOU THAT THEY MIGHT BE USED TO PROSECUTE YOU CRIMINALLY?
A. NO, SIR.
Q. ANYONE TELL YOU YOU HAD THE RIGHT TO REFUSE THAT PROCESS?
A. NO, SIR.
Q. ANYONE TELL YOU YOU HAD THE RIGHT TO REFUSE TREATMENT?
A. NO, SIR.

[GRIFFIN 28]

Q. DID YOU CONSENT, DID YOU GIVE YOUR PERMISSION FOR THE DISCLOSURE OF YOUR MEDICAL INFORMATION TO ANYONE ELSE?
A. NOT TO MY KNOWLEDGE.
Q. DID YOU EVER GIVE YOUR PERMISSION FOR DISCLOSURE TO THE POLICE?
A. NO, SIR.
Q. DID ANYONE AT MUSC, INCLUDING SHIRLEY BROWN, EVER ASK YOU ABOUT DRUG USE BY THE FATHER OF THE CHILD? BY DANIELL'S FATHER?
A. NO, I CAN'T RECALL HER EVER SAYING ANYTHING ABOUT THAT.
Q. MS. GRIFFIN, I MEAN NO DISRESPECT, I KNOW NO OTHER WAY TO ASK THIS QUESTION. DO YOU KNOW WHO DANIELL'S FATHER WAS?
A. YES.
Q. WAS THERE ANY MEDICAL HISTORY INFORMATION TAKEN AT MUSC

ABOUT DANIELL'S FATHER AND HIS ALCOHOL ABUSE OR USE OR TOBACCO, COCAINE, HEROIN, BARBITURATES, AMPHETAMINES, MARIJUANA?

A. NO, NOT TO MY KNOWLEDGE.

Q. WHEN YOU WERE REFERRED TO MUSC BY THE CLINIC IN MC CLELLANVILLE AND DROVE THE 40 MINUTES TO GET HERE THE FIRST TIME, WHY WERE YOU COMING? WHAT DID YOU THINK WAS GOING TO HAPPEN? WHY DID YOU COME HERE?

A. I THOUGHT I WAS JUST GOING FOR STANDARD PRENATAL CARE.

Q. AND DID YOU EXPECT TO RECEIVE THAT PRENATAL CARE?

A. YES, I DID.

[GRIFFIN 29]

Q. DID YOU EXPECT THAT TO RESULT IN YOU BEING TURNED OVER TO THE POLICE AND TO THE SOLICITOR'S OFFICE?

A. NO, I DIDN'T.

Q. AFTER DANIELL'S BIRTH, WERE YOU GIVEN ANY INFORMATION BY MUSC OR ANY OF THE DOCTORS OR PEDIATRICIANS THERE ABOUT DANIELL'S HEALTH OR HEALTH CARE, ANY THINGS THAT YOU SHOULD BE AWARE OF OR LOOK OUT FOR?

A. NO.

Q. DID DSS GIVE YOU ANY INFORMATION ABOUT DANIELL'S HEALTH CARE OR THINGS TO BE POTENTIALLY AWARE OF SINCE YOU HAD USED COCAINE WHEN YOU WERE PREGNANT?

A. NO, SIR.
Q. MS. GRIFFIN, IF YOU HAD BEEN TOLD WHEN YOU FIRST WENT TO MUSC ABOUT THE DANGERS OF USING COCAINE WHEN YOU WERE PREGNANT, AND PROVIDED WITH TREATMENT RESOURCES, WOULD YOU HAVE TRIED TO STOP AND TAKEN ADVANTAGE OF THOSE RESOURCES?
A. YES, I WOULD HAVE.
MR. WHERRY: MAY I HAVE JUST ONE MOMENT, PLEASE, YOUR HONOR.
(PAUSE IN PROCEEDINGS.)
Q. (BY MR. WHERRY, CONTINUING) JUST ONE LAST AREA OF QUESTIONS. OF QUESTIONING.
WHEN YOU GOT TO CHARLESTON COUNTY SUBSTANCE ABUSE PROGRAM, DID YOU INQUIRE AS TO WHETHER THEY HAD ANY TREATMENT PROGRAMS FOR PREGNANT OR WOMEN IN THEIR CHILD BEARING YEARS

[GRIFFIN 30]

WHO WERE ABUSING COCAINE?
A. NO.
Q. YOUR TREATMENT THERE AT CCSAC, CHARLESTON COUNTY SUBSTANCE ABUSE, WERE THERE BOTH MEN AND WOMEN IN IT?
A. THE GROUP THAT I WAS IN WAS JUST ALL WOMEN.
Q. ALL WOMEN. JUST, I THINK, TWO MORE QUESTIONS.
AS YOU GO FORWARD WITH YOUR LIFE NOW, MS. GRIFFIN,

WOULD YOU DESCRIBE FOR THE JURY WHAT EFFECT, IF ANY, THIS EXPERIENCE WITH THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, YOUR ARREST, YOUR THREE OR FOUR WEEKS IN JAIL, HAVING YOUR BABY TAKEN FROM YOU, WOULD YOU DESCRIBE FOR THE JURY WHAT EFFECT THAT HAS ON YOU TODAY, IF IT HAS ANY, AS YOU GO FORWARD WITH YOUR LIFE?

A. AS I GO FORWARD WITH MY LIFE NOW, I - I'M MORE PRECAUTIOUS OF WHERE I GET MY MEDICAL TREATMENT FROM AND WHO I TALK TO. IF I TALK TO ANYBODY. I DON'T - THIS EXPERIENCE, TO ME, HAS MADE ME SEE THAT PEOPLE WILL DO ANYTHING THEY WANT TO WITH OR WITHOUT YOUR CONSENT. BUT I KNOW THAT, LIKE I SAID, I WAS USING DRUGS, BUT IF THEY HAD A TOLD ME WHEN I HAD GIVE THEM MY URINE WE FOUND COCAINE IN YOUR URINE, I DEFINITELY WOULD HAVE SEEKED HELP. NOBODY TOLD ME ANYTHING. AS I GO FORWARD IN MY LIFE NOW, I KNOW THAT COCAINE IS NOT GOOD BUT I JUST - MY LIFE IS STILL DEVASTATED EVERY TIME I LOOK AT MY LITTLE GIRL TO KNOW THAT SHE WAS CONCEIVED - ALMOST CONCEIVED IN JAIL.

[GRIFFIN 31]

Q. MS. GRIFFIN, I KNOW I KEEP PROMISING THAT I ONLY HAVE ONE

LAST QUESTION. I THINK THIS IS THE LAST ONE. HOW IS DANIELL?

A. SHE IS PERFECT.

MR. WHERRY: YOUR HONOR, I HAVE NO FURTHER QUESTIONS.

THE COURT: CROSS-EXAMINATION.

CROSS EXAMINATION

BY MR. HOOD:

Q. YOU HAVE BEEN USING COCAINE SINCE YOU WERE NINETEEN?

A. IF THAT.

Q. YOU HAVE HAD THREE CHILDREN?

A. YES.

Q. SECOND ONE WEIGHED TWO POUNDS WHEN IT WAS BORN?

MR. WHERRY: OBJECTION.

MR. HOOD: I'LL PUT THE MEDICAL RECORD IN EVIDENCE.

THE COURT: SAY WHAT, SIR?

MR. HOOD: I'LL PUT ALL OF THE MEDICAL RECORDS IN EVIDENCE SO THERE IS A FOUNDATION FOR THAT QUESTION IMMEDIATELY.

MR. WHERRY: I DON'T DOUBT THAT. MAY I BE HEARD.

I WOULD RESPECTFULLY SUGGEST THAT WE HAVE SERIOUS PRIVILEGE PROBLEMS HERE AND RELEVANCE PROBLEMS WITH RESPECT TO CHILDREN OTHER THAN THE CHILD DANIELL THAT WAS BORN OF MS. GRIFFIN. IT'S NOT RELEVANT, IT'S NOT IN ISSUE. I DON'T KNOW HOW THE RECORDS WERE OBTAINED. WE DO HAVE SERIOUS PRIVILEGE

[GRIFFIN 32]

PROBLEMS AND RELEVANCE PROBLEMS.
THE COURT: I SUSTAIN THE OBJECTION.
MR. WHERRY: THANK YOU.
THE COURT: THE - IF THAT TESTIMONY HAS ANY RELEVANCE, THEN THAT RELEVANCE NEEDS TO BE SHOWN BY EXPLAINING WHY THAT CHILD WAS BORN IN THE FASHION THAT IT WAS BORN IN. IT MAY BE THAT THAT CHILD WAS BORN PREMATURELY OR HAD A WEIGHT THAT WAS UNNATURAL FOR ANY NUMBER OF REASONS. THE INFERENCE FROM ASKING THE QUESTION, IN THE MANNER THAT MR. HOOD DID, IS TO SUGGEST THAT THIS WITNESS'S USE OF COCAINE FROM AN EARLY AGE CAUSED THAT CHILD TO BE BORN UNNATURALLY- OR PREMATURELY OR IN SOME DEFORMED STATE. WE DON'T KNOW THAT. AND FOR YOU TO ASSUME THAT REQUIRES YOU TO SPECULATE. AND YOU CAN'T DO THAT. YOU NEED MEDICAL TESTIMONY. YOU NEED SOME OTHER EVIDENCE TO LINK THAT FACT TO THIS CASE. AND UNTIL THAT FACT THE WEIGHT OF THAT CHILD IS LINKED TO THIS CASE, IT'S IRRELEVANT. SO DISREGARD IT.
NOW, THAT DOESN'T MEAN THAT IT CAN'T BE ADMITTED AT SOME LATER DATE, BUT IT HAS TO BE GIVEN A PROPER UNDERSTANDING FOR YOU SO THAT YOU CAN GIVE IT THE WEIGHT IT DESERVES AND NOT

GUESS AT WHAT THE VALUE OF IT IS. THIS IS NOT A GUESSING GAME. THERE IS A WAY TO GET EVIDENCE INTO THE RECORD SO THAT YOU CAN UNDERSTAND IT AND EVALUATE IT AND GIVE IT PROPER CONSIDERATION. AND THAT HAS NOT BEEN DONE IN THIS CASE, AND SO I ADMONISH YOU AGAIN TO DISREGARD THAT EVIDENCE.

* * *

[GRIFFIN 37]

MR. WHERRY:THANK YOU, SIR.
THE COURT: GIVE IT TO HIM.
MR. HOOD: THE ACTUAL DOCUMENTS?
THE COURT: SURE. UNLESS YOU HAVE GOT A COPY. I DON'T KNOW HOW ELSE HE IS GOING TO LOOK AT THEM.
MR. HOOD: HE HAS HAD THEM.
THE COURT: THEY'RE ENTITLED TO KNOW EXACTLY WHAT YOU'RE PUTTING IN COURT. ARE THEY HOOKED TOGETHER IN ANY FASHION?
MR. WHERRY: THEY'RE RUBBER BANDED, YOUR HONOR.
THE COURT: GO AHEAD. I'LL WITHHOLD RULING ON THOSE UNTIL I CAN HEAR THE PLAINTIFFS' OBJECTIONS, AND THEN I'LL HAVE TO LOOK AT THE RECORDS MYSELF AND JUST SEE IF THERE ARE OBJECTIONS.
Q. (BY MR. HOOD, CONTINUING) YOU WERE REFERRED FROM THE ST.

JAMES HEALTH CLINIC UP IN MC CLELLANVILLE DOWN TO THE MEDICAL UNIVERSITY BECAUSE YOU WERE A HIGH RISK PREGNANCY?

A. YES.

Q. AND YOU WENT TO THE MEDICAL UNIVERSITY ON JUNE THE 28, 1989, AND ONE OF THE FIRST THINGS THAT YOU DID WAS SIGN A CONSENT FORM TO BE TREATED THERE?

A. YES.

Q. AND YOU HAVE READ THAT CONSENT FORM AND YOU SIGNED THAT CONSENT FORM?

A. I MIGHT HAVE SIGNED IT, BUT I PROBABLY DIDN'T READ IT

[GRIFFIN 38]

THOROUGHLY.

Q. IS THIS YOUR SIGNATURE ON THE CONSENT FORM?

MR. WHERRY: MAY I HAVE A NUMBER FOR THAT, YOUR HONOR?

THE COURT: HE HASN'T OFFERED IT. HE IS JUST IDENTIFYING HER SIGNATURE.

MR. HOOD: THIS IS DEFENDANT'S EXHIBIT 2 TO HER DEPOSITION.

THE COURT: I DIDN'T HEAR. I WAS INTERRUPTED BY COUNSEL. DID SHE IDENTIFY THAT AS HER SIGNATURE?

MR. HOOD: I'M SORRY. WAS THIS YOUR SIGNATURE?

THE WITNESS: YES.

MR. HOOD: YOUR HONOR, I WOULD LIKE TO PUBLISH A PORTION OF THIS.
THE COURT: IT'S NOT IN EVIDENCE.
MR. HOOD: I WOULD LIKE TO PUT IT IN EVIDENCE.
THE COURT: ANY OBJECTION? SHOW IT TO COUNSEL.
MR. WHERRY: MAY I SEE IT PLEASE?
(PAUSE IN PROCEEDINGS.)
MR. HOOD: WE MET SEVERAL - WHENEVER IT WAS, SEVERAL WEEKS, AS THE LOCAL RULES REQUIRE. I DON'T THINK THERE IS AN OBJECTION.
MR. WHERRY: ONLY OBJECTION IS TO THE HIGHLIGHTING.
MR. HOOD: I WILL PUT IN A CLEAN COPY.
MR. WHERRY: FINE.

[GRIFFIN 39]

THE COURT: NOW YOU PLAN TO PUBLISH THE PORTION THAT YOU HAVE HIGHLIGHTED IN YELLOW?
MR. HOOD: YOUR HONOR, WHEN WE REVISIT THE MEDICAL RECORDS, AT THAT TIME THE ORIGINAL WILL COME OUT. I'M NOT GOING TO HAND THIS TO THE JURY, I'M JUST GOING TO READ A PORTION OF IT.
THE COURT: LET'S MARK IT AS AN EXHIBIT. NO OBJECTION TO IT. LET'S MARK IT IN.

MR. HOOD: WE HAVE PREPARED PRIOR TO TRIAL, WITH THEIR KNOWLEDGE AND CONSENT, AS DEFENDANT'S EXHIBIT 13.

THE COURT: GIVE IT TO THE CLERK.

DEPUTY CLERK: DEFENDANT EXHIBIT 13 IN EVIDENCE.

MR. HOOD: MAY I PASS THIS TO THE JURY?

THE COURT: ABSOLUTELY. WE'RE GOING TO HAVE A TREMENDOUS VOLUME OF DOCUMENTS, AND IF THE CLERK IS NOT PERMITTED TO PROPERLY INVENTORY AND GET THEM IN EVIDENCE AND KNOW WHAT IS IN EVIDENCE AND NOT IN EVIDENCE, THEN WE CAN'T MAINTAIN A PROPER RECORD. THAT'S THE PROCEDURE WE HAVE TO GO THROUGH. IF YOU WANT TO PUBLISH, YOU'RE WELCOME TO DO SO.

MR. HOOD: YES, SIR.

Q. (BY MR. HOOD, CONTINUING) MS. GRIFFIN, YOU SIGNED THIS CONSENT FOR AMBULATORY CARE AT THE MEDICAL UNIVERSITY ON JUNE 28, 1989. IT WAS WITNESSED. AND THE - ABOUT THE THIRD SENTENCE INTO THE CONSENT FORM IT SAYS: "I FURTHER CONSENT TO THE TESTING FOR DRUGS IF DEEMED ADVISABLE BY OR NECESSARY

[GRIFFIN 40]

IN THE PROFESSIONAL JUDGMENT OF THE PHYSICIAN OR SURGEON OR A

PHYSICIAN OR SURGEON ACTING UNDER THEIR INSTRUCTIONS."

AND THAT'S WHAT THE DOCUMENT SAYS, CORRECT?

A. I DIDN'T READ IT. I JUST SIGNED IT.

Q. OKAY. YOU WANTED TO BE TREATED THERE?

A. I HAD NO CHOICE.

Q. WHAT DO YOU MEAN YOU HAD NO CHOICE?

A. I MEAN, THAT'S WHERE THEY SENT ME, SO THAT'S WHERE I WENT.

Q. YOU DIDN'T HAVE TO WALK INTO THAT HOSPITAL AND ASK THEM TO TREAT YOU, DID YOU? NO ONE MADE YOU DO THAT, DID THEY?

A. THE CLINIC REFERRED ME AND I HAD NO CHOICE. I MEAN.

Q. YOU WERE PREGNANT AND YOU HAD NO CHOICE TO GO TO ANYONE YOU WANTED TO BETWEEN MC CLELLANVILLE AND CHARLESTON TO BE TREATED AS A PREGNANT PERSON?

A. NO. BECAUSE MC CLELLANVILLE IS JUST A CLINIC. I MEAN, THAT'S WHERE I - THAT'S WHERE I NORMALLY WOULD HAVE GONE TO THE CLINIC.

Q. OKAY. YOU PASSED SEVERAL OTHER HOSPITALS GETTING TO THE MEDICAL UNIVERSITY, IS THERE ANY REASON THAT YOU DIDN'T GO TO THOSE?

A. I DON'T KNOW WHY THEY REFERRED ME TO MUSC.

Q. OKAY.

A. I GUESS.

Q. THAT'S WHERE YOU WENT?

[GRIFFIN 41]

A. THAT'S WHERE I WAS SENT.
Q. THE POLICE DIDN'T SEND YOU THERE, YOU WENT THERE FREELY, OF YOUR OWN FREE WILL AND ACCORD TO BE TREATED?
A. I WENT THERE BECAUSE THAT'S WHERE I WAS REFERRED BY THE CLINIC.
Q. OKAY. HAD NOTHING TO DO WITH THE POLICE OR MS. LAWSON OR ANYTHING ELSE, YOU WENT THERE BECAUSE THE ST. JAMES CLINIC REFERRED YOU TO THE MEDICAL UNIVERSITY?
A. YES.
Q. ALL RIGHT. THEY TESTED YOU, THE SECOND DAY YOU WENT THERE JUNE 29TH, AND YOU TESTED POSITIVE FOR COCAINE. DO YOU REMEMBER THAT?
A. NOBODY HAS TOLD ME ANYTHING ABOUT TESTING POSITIVE FOR ANYTHING.
Q. DO YOU REMEMBER THAT THEY TOLD YOU NOT TO TAKE COCAINE, THAT YOU WERE PREGNANT, THAT YOU WOULD HURT YOUR BABY?
A. NOBODY HAS EVER SAID ANYTHING LIKE THAT TO ME.
Q. AND, IN FACT, DID YOU CONTINUE TO TAKE COCAINE DURING THIS PREGNANCY?
A. I DID COCAINE, BUT LIKE I SAID, NOBODY HAS EVER TOLD ME NOT TO.

Q. OKAY. DO YOU THINK TAKING COCAINE WAS GOING TO BE GOOD FOR YOUR BABY?
A. I WASN'T THINKING ABOUT IT.
Q. HAD IT BEEN GOOD FOR YOUR OTHER BABY?

[GRIFFIN 42]

A. I WASN'T USING DRUGS WHEN I HAD MY OTHER CHILDREN.
Q. DID SOMEONE IMMEDIATELY EXPLAIN TO YOU WHAT HAPPENED TO YOUR OTHER BABY?
MR. WHERRY: OBJECTION, RELEVANCE.
THE COURT: OVERRULED.
Q. (BY MR. HOOD, CONTINUING) DO YOU KNOW WHAT ABRUPTIO PLACENTA IS? AN ABRUPTION OF THE PLACENTA?
A. IT MEANS THE PLACENTA DETACH OR ERUPTED OR WHATEVER.
Q. OKAY. HAVE YOU BEEN TOLD BY DOCTORS WHO HAD TREATED YOU THAT THAT CAN BE CAUSED BY COCAINE?
A. THAT'S IMPOSSIBLE, BECAUSE I WAS NOT ON DRUGS.
THE COURT: IF YOU WOULD, PLEASE ANSWER THE QUESTION. HE ASKED YOU A QUESTION ABOUT WHETHER YOU HAD BEEN TOLD BY THE DOCTORS.
A. NO, I WASN'T.
Q. DO YOU UNDERSTAND THAT IF YOU HAVE THAT OCCURRENCE, IT'S A MEDICAL CRISES FOR BOTH YOU AND THE BABY?
A. YES.

Q. DO YOU UNDERSTAND THAT THAT HAS HAPPENED TO YOU?
A. YES.
Q. DO YOU UNDERSTAND NOW THAT COCAINE CAN CAUSE THAT?
A. NO.
Q. YOU WENT BACK TO THE MEDICAL UNIVERSITY - EIGHT OR NINE DAYS LATER ON OCTOBER THE 7, '89, AND AT THAT TIME YOU HAD USED COCAINE THE DAY BEFORE, YOU WERE BLEEDING, YOU WERE

[GRIFFIN 43]

HAVING CRAMPS, CORRECT?
A. SPOTTING, YES.
Q. YOU WERE - ADMITTED TO THE HEALTH CARE PROVIDERS AT THE MEDICAL UNIVERSITY KNOWING THAT THE RISKS OF COCAINE COULD BE HARMFUL TO YOU AND YOUR BABY?
A. REPEAT THAT, PLEASE.
Q. YOU WERE - ADMITTED THAT YOU KNEW THAT THE COCAINE THAT YOU HAD TAKEN THE DAY YOU STARTED THIS BLEEDING AND CRAMPING COULD BE HARMFUL TO YOU AND YOUR BABY?
A. NO, I DON'T RECALL SAYING THAT.
Q. YOU DIDN'T SAY THAT?
A. NOT TO MY KNOWLEDGE, NO.
Q. DID YOU TALK TO A DOCTOR ABOUT WHAT IT COULD DO TO YOUR BABY?
A. NO.
Q. YOU WERE ARRESTED ON OCTOBER THE 10TH. YOU TOLD US ABOUT THAT?

A. YES, I WAS ARRESTED.
Q. YOU WERE TAKEN TO JAIL?
A. YES.
Q. NOW YOU SAY THAT YOU WERE RESTRAINED WITH CHAINS. ARE YOU SURE THAT IS RIGHT?
A. YES, SIR.
Q. YOU SAY THAT A COAT WAS PUT OVER YOU, ARE YOU SURE THAT IS RIGHT?

* * *

[GRIFFIN 46]

A. YES.
Q. NOW, SOME GOOD CAME FROM ALL OF THIS, DIDN'T IT? YOU GOT OFF OF COCAINE?
A. I RELAPSED.
Q. AND HAVE YOU RELAPSED SINCE WE TOOK YOUR DEPOSITION? YOU'RE OFF OF IT NOW?
A. OH, I'M OFF OF IT NOW, YES.
Q. GOOD. CONGRATULATIONS.
A. THANK YOU.
Q. AND YOU NOW KNOW IT'S AWFUL, AND PARTICULARLY IF YOU'RE PREGNANT, IT'S AWFUL TO USE COCAINE?
A. YES.
Q. YOU KNOW NOW, WITH THE HELP OF SUBSTANCE ABUSE AND THE VIDEOTAPES THEY HAVE SHOWN YOU AND COUNSELING AND WORK THEY HAVE DONE WITH YOU, AND THE WORK - AND THE HELP YOU HAVE GIVEN OTHER PEOPLE GOING THROUGH COUNSELING, THAT THIS IS NOT SOMETHING THAT A LITTLE BABY THAT CAN'T DEFEND ITSELF SHOULD

BE SUBJECTED TO, COCAINE IS AWFUL? YOU KNOW THAT, DON'T YOU?
A. YES, I DO NOW.
Q. AND IN FACT, AS BAD AS IT WAS, YOU AGREE WITH ME THAT GOING TO JAIL GAVE YOU AN INCENTIVE TO GET OFF COCAINE, AND YOU HAVE?
A. I WOULDN'T SO MUCH SAY IT WAS THE JAIL PART. I FINALLY FOUND GOD IN MY LIFE AND THAT'S WHAT GAVE ME THE INCENTIVE TO GET OFF DRUGS.

[GRIFFIN 47]

Q. AND YOU AGREE THAT THAT LITTLE DAUGHTER OF YOURS HAD A RIGHT TO BE BROUGHT INTO THIS WORLD WITHOUT FIRST BEING EXPOSED TO COCAINE, DON'T YOU?
A. YES.
MR. HOOD: EXCUSE ME ONE SECOND.
(PAUSE.)
MR. HOOD: THOSE ARE ALL OF THE QUESTIONS. THANK YOU.
THE COURT: REDIRECT.
MR. WHERRY: JUST ONE.
<u>REDIRECT EXAMINATION</u>
BY MR. WHERRY:
Q. ALL OF THE HOSPITALS THAT EXISTED BETWEEN MC CLELLANVILLE AND CHARLESTON, DID YOU HAVE ANY MONEY TO PAY FOR THEIR PRENATAL TREATMENT OF YOU?
A. NO, SIR.

Q. DID ANY OF THEM TAKE WHATEVER INSURANCE YOU HAD, WHATEVER COVERAGE YOU HAD FOR PRENATAL TREATMENT, OR WAS IT ONLY THE MEDICAL UNIVERSITY?
A. I DIDN'T EVEN HAVE INSURANCE.
Q. AND WOULD ANY OF THOSE OTHER PLACES THAT MR. HOOD ASKED YOU ABOUT TREAT YOU IF YOU DIDN'T HAVE INSURANCE OR MONEY?
A. NO, SIR.
Q. BUT WOULD MUSC?
A. YES.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF PAULA HALE

[HALE 31]

Q. OKAY. SO COCAINE IS THE ONLY DRUG YOU WERE USING AT THAT TIME?
A. YES.
Q. WERE YOU DRINKING ALCOHOL DURING YOUR PREGNANCY?
A. YES. I WAS.
Q. HOW OFTEN WERE YOU DRINKING ALCOHOL?
A. MAYBE EVERY OTHER DAY OR SO.
Q. AND HOW MUCH WOULD YOU DRINK?
A. MAYBE TWO OR THREE CANS. I DON'T KNOW.
Q. OF BEER?
A. BEER.
Q. AND HOW MUCH COCAINE WERE YOU USING AT THAT TIME?
A. I DON'T KNOW. I DIDN'T MEASURE. I MEAN...
Q. ABOUT HOW – HOW MUCH WOULD IT COST YOU A DAY?
A. MOST OF THE TIME I DIDN'T PAY FOR IT.
Q. YOU WEREN'T PAYING FOR IT? WHO WAS PAYING FOR IT?
A. I KNEW A LOT OF PEOPLE, AND SO I DIDN'T PAY FOR IT MOST OF THE TIME.

Q. SO THE PEOPLE YOU KNEW WERE SUPPLYING THE COCAINE FOR YOU?
A. RIGHT.
Q. IN WHAT FORM WERE YOU USING THE COCAINE?
A. I WOULD SNIFF IT AND FREE BASING.

[HALE 32]

Q. WHEN DID YOU FIRST START USING COCAINE?
A. MAYBE WHEN I WAS THIRTEEN. I'M NOT SURE.
EXPERIMENTING.
Q. HOW OFTEN DID YOU USE IT WHEN YOU WERE THIRTEEN?
A. NOT THAT OFTEN. I WAS JUST EXPERIMENTING. THAT WAS LIKE MY FIRST TIME.
Q. WHEN DID YOU FIRST START DRINKING ALCOHOL?
A. AROUND THE SAME TIME.
Q. WHEN DID YOUR USE BECOME MORE FREQUENT?
A. AFTER I STARTED WORKING ON THE STREETS.
Q. WHICH WAS WHEN?
A. APPROXIMATELY '83. I DON'T KNOW. MAYBE – YEAH, AROUND THAT TIME. AFTER I LEFT MY HUSBAND.
Q. SO AFTER YOU LEFT YOUR HUSBAND YOU STARTED WORKING ON THE STREETS. WHAT DO YOU MEAN BY WORKING ON THE STREETS?
A. I WAS PROSTITUTING.

Q. OKAY. AND WHERE WERE YOU DOING THIS, DOWNTOWN, OR WHERE?
A. NO, I WAS IN THE NORTH AREA.
Q. SO YOUR USE OF COCAINE BECAME MORE FREQUENT IN 1983?
A. APPROXIMATELY AROUND THERE.
Q. WOULD YOUR JOHN SUPPLY YOU WITH COCAINE?
A. IT WAS VARIOUS WAYS I WAS GETTING IT.

* * *

[HALE 40]

A. MY . . .
Q. I MEAN, WITH YOUR SECOND SON MICHAEL?
A. RIGHT.
Q. WERE THOSE THE ONLY REASONS WHY YOU DIDN'T SEEK PRENATAL CARE?
A. YEAH. AND I DIDN'T KNOW HOW TO HELP MYSELF, YOU KNOW. IF THERE WAS ANOTHER ALTERNATIVE, IF THERE WAS A WAY THAT I COULD GET HELP WITHOUT GOING TO JAIL I PROBABLY WOULD HAVE, BUT I DIDN'T SEE ANY OTHER WAY. I DIDN'T KNOW OF ANY OTHER WAY. AND THEN I ACTUALLY GOT ARRESTED.
Q. WHEN DID YOU GET ARRESTED?
A. AFTER THE BIRTH OF MICHAEL, BECAUSE I HAD DRUGS IN MY SYSTEM.
Q. OKAY. WHERE WERE YOU WHEN YOU GOT ARRESTED?

A. I'M NOT SURE, BUT THEY HAD A WARRANT FOR MY ARREST. CONTRIBUTING TO - I'M NOT SURE OF THE CHARGE.
Q. AND YOU'RE THINKING THAT'S WITH MICHAEL?
A. I'M PRETTY SURE. I'M PRETTY SURE.
Q. OKAY. WERE YOU ARRESTED TWO TIMES BECAUSE OF HAVING COCAINE BABIES?
A. I'M NOT - I'M NOT SURE.
Q. OKAY.
A. IT WAS LIKE A REAL ROUGH TIME FOR ME.
Q. OKAY. WELL, LET'S - I WANT TO GO BACK TO THAT, BUT FIRST LET'S TALK ABOUT YOUR THIRD SON. WHAT IS YOUR

[HALE 41]

THIRD SON'S NAME?
A. HENRY LAVEL.
Q. CAN YOU SPELL HIS MIDDLE NAME?
A. L-A-V-E-L.
Q. V-E-L - Hale?
A. UH-HUH.
Q. AND WHEN WAS HE BORN?
A. DECEMBER 13TH, 1989.
Q. AND HOW OLD IS HE?
A. HE'S SIX.
Q. WERE YOU USING COCAINE WHEN YOU WERE PREGNANT WITH HIM?
A. YES, I WAS.
Q. AND DID YOU HAVE PRENATAL CARE WITH HENRY?
A. NO, I DIDN'T.
Q. AND WHY DIDN'T YOU?

A. FOR THE SAME REASON.
Q. THE SAME REASON. AND YOU'RE SAYING YOU HAD ALREADY BEEN ARRESTED BECAUSE YOU HAD A COCAINE BABY?
A. I'M NOT SURE IF IT WAS WITH THE FIRST ONE – I MEAN, THE SECOND ONE OR THE THIRD.
Q. OKAY.
A. I'M NOT REAL SURE.
Q. YOU'RE NOT SURE?
A. BUT I KNOW I WENT TO JAIL.

[HALE 42]

Q. OKAY. BUT YOU'RE NOT SURE WHETHER YOU GOT ARRESTED AFTER YOU HAD MICHAEL OR AFTER YOU HAD HENRY?
A. RIGHT.
Q. OKAY. SO DO YOU KNOW WHEN IT WAS THAT YOU WENT TO JAIL?
A. NO, I'M NOT SURE OF THE DATE.
Q. YOU DON'T REMEMBER THE DATE, OKAY. HOW MUCH COCAINE WERE YOU USING DURING YOUR PREGNANCY WITH HENRY?
A. MAYBE TWO OR THREE TIMES A WEEK. I DON'T KNOW HOW MUCH I WAS USING.
Q. BUT IS IT STILL - ARE YOU TESTIFYING – ARE YOU SAYING, JUST AS YOUR EARLIER TESTIMONY, THAT YOU WERE NOT PURCHASING IT ALL THE TIME?
A. I WASN'T PURCHASING ALL THE TIME.
Q. OKAY.
A. SOMETIMES I DID.

Q. HOW MUCH MONEY WOULD YOU SPEND A WEEK?
A. I NEVER LIKE TOOK NOTICE. I MEAN, I DIDN'T COUNT.
Q. OKAY. LESS THAN $100.00?
A. MAYBE AROUND THERE OR SOMETHING.
Q. LESS THAN $150.00?
A. BETWEEN MAYBE A HUNDRED AND A HUNDRED AND FIFTY.
Q. OKAY.
A. I'M NOT SURE, BUT APPROXIMATELY.

* * *

[HALE 54]

Q. WHO IS ANN SPILLERS?
A. THAT'S LARRY'S SISTER. I WAS LIVING WITH HER OFF AND ON.
Q. OKAY. AND HENRY GASDEN IS?
A. THE FATHER OF HENRY LAVEL.
Q. OKAY. AND WHY DIDN'T YOU HAVE CUSTODY OF HENRY?
A. BECAUSE I HAD DRUGS IN MY SYSTEM, AND HE TESTED POSITIVE.
Q. SO BOTH YOU AND THE BABY TESTED POSITIVE?
A. YES.
Q. SO WHAT HAPPENED - OKAY. WHEN YOU WENT INTO THE HOSPITAL WITH HENRY, WHAT HOSPITAL DID YOU GO TO?
A. THE MEDICAL UNIVERSITY.
Q. MUSC. AND WHEN WAS THE LAST TIME PRIOR TO GOING

INTO THE HOSPITAL THAT YOU HAD USED COCAINE?
A. LIKE THE DAY BEFORE.
Q. OKAY. WHEN DID THEY TELL YOU THAT YOU TESTED POSITIVE?
A. AFTER THE BABY WAS BORN, I BELIEVE.
Q. OKAY. AND YOU . . .
A. BUT I THINK I TOLD THEM.
Q. OKAY. THAT YOU HAD BEEN USING DRUGS?
A. YES.
Q. OKAY. DO YOU REMEMBER SPEAKING WITH SHIRLEY BROWN IN DECEMBER OF 1990 AFTER YOU HAD HENRY?

* * *

[HALE 60]

EIGHTEEN MONTHS AND HE GOT ANOTHER JOB; SO AFTER THAT IT WAS KIND OF A STRUGGLE, THE LAST COUPLE OF MONTHS, GETTING BACK AND FORTH TO WORK. SO I HAVEN'T BEEN MAKING IT.
Q. OKAY. YOU JUST MOVED RECENTLY. WHY IS THAT?
A. BECAUSE WITH IT BEING HARD FOR ME TO GET BACK AND FORTH TO WORK...
Q. UH-HUH.
A. ...AND ME GOING TO WORK MAYBE TWO OR THREE DAYS A WEEK...
Q. UH-HUH.
A. ...IT WAS FINANCIALLY HARD FOR ME TO KEEP MY

TRAILER UP.
Q. UH-HUH.
A. AND SO I HAD – I WAS FORCED TO MOVE TO MY AUNT'S.
Q. SO YOU'RE LIVING WITH YOUR AUNT NOW?
A. WELL, MY UNCLE'S EX-GIRLFRIEND, BUT I STILL CALL HER MY AUNT.
Q. WHAT'S HER NAME?
A. MICHELLE BROOKS.
(LETTER FROM MR. CONDON DATED MARCH 26, 1990 MARKED AS DEFENDANT'S EXHIBIT NUMBER 4.)
Q. OKAY. IF YOU WILL LOOK AT WHAT I HAVE MARKED AS DEFENDANT'S EXHIBIT NUMBER 4?
A. YES, THAT'S MY SIGNATURE.

* * *

[HALE 65]

Q. DO YOU REMEMBER HOW YOU WERE ARRESTED, WHAT YOU WERE DOING, HOW THE OFFICER TREATED YOU?
A. I THINK THEY SERVED ME WITH A WARRANT.
Q. DID THEY PUT YOU IN A SQUAD CAR?
A. I THINK I - I MIGHT HAVE BEEN THERE ON ANOTHER CHARGE WHEN THEY SERVED ME WITH THE WARRANT. I'M NOT SURE.
Q. YOU MIGHT HAVE BEEN AT THE JAIL ON ANOTHER CHARGE?

A. YES.
Q. OKAY. AND YOU BELIEVE YOU WERE IN JAIL FOR THIRTY DAYS BECAUSE OF POSSESSION - OR DISTRIBUTION OF DRUGS TO A MINOR?
A. I'M NOT SURE HOW LONG.
Q. OKAY. AND DID YOU RECEIVE ANY DRUG TREATMENT? WHILE YOU WERE IN JAIL.
A. NO. NO COUNSELING OR NOTHING.
Q. OKAY. AFTER YOU GOT OUT OF JAIL DID YOU GO TO DRUG TREATMENT?
A. I THINK I ATTENDED SOME SESSIONS.
Q. WHERE?
A. PROBABLY DOWNTOWN.
Q. AT CHARLESTON COUNTY SUBSTANCE ABUSE?
A. YES.
Q. AND WHO WOULD HAVE BEEN YOUR COUNSELOR IN THAT?

* * *

[HALE 113]

A. NO. I WAS TRYING TO GO TO MORRIS VILLAGE FOR A LONG TERM TREATMENT, BUT WHEN I WENT TO PROBATE COURT THE JUDGE JUST PUT ME ON A WAITING LIST.
Q. WHEN DID YOU GO TO PROBATE COURT?
A. AFTER I GOT OUT OF THE DETOX.
Q. WHY DID YOU GO TO PROBATE AFTER DETOX?
A. BECAUSE I ASKED MY BROTHER TO HELP ME GET INTO A LONG TERM TREATMENT.

Q. SO HE TRIED TO HAVE YOU INVOLUNTARILY COMMITTED TO LONG TERM TREATMENT? IS THAT WHAT YOU'RE SAYING?
A. RIGHT, A TWENTY EIGHT DAY PROGRAM OR SO.
Q. AND WHAT HAPPENED?
A. THEY PUT ME ON A WAITING LIST.
Q. AND DID YOU EVER GET IN?
A. THE WAITING LIST WAS THREE MONTHS LONG, AND I NEVER GOT IN.
Q. SO THEN WHAT HAPPENED?
A. I WENT BACK TO WORK ON THE STREET.
Q. SO YOU SAY YOU HAVE BEEN OFF DRUGS FOR A YEAR AND A HALF?
A. YES.
Q. AND WHAT HELPED YOU GET OFF DRUGS?
A. I GAVE MY LIFE TO CHRIST, AND THAT, CONSTANT PRAYER AND STUDYING.
Q. WHEN DID THAT HAPPEN?

* * *

[HALE 115]

A. READING, STUDYING, AND PRAYING.
Q. DID YOU HAVE ANY COUNSELING OR MEETINGS WITH ANY PRIESTS OR...
A. THEY HAVE – EXCUSE ME FOR CUTTING YOU OFF. THEY HAVE PEOPLE COMING IN MAYBE TWICE A WEEK OR SO TO HAVE BIBLE STUDIES. IT'S STRICTLY VOLUNTARY. EVERYBODY

DIDN'T ATTEND.
Q. BUT YOU ATTENDED?
A. YES, I DID.
Q. AFTER YOU GOT OUT OF JAIL DID YOU USE ANY DRUGS?
A. NO.
Q. AND YOU CURRENTLY ATTEND CHURCH?
A. YES, I DO.
Q. AND YOU STAYED WITH...
A. REVEREND STAPLES, BUT SINCE THEN HE'S BEEN – WE HAVE A NEW PASTOR, PASTOR HEMDON, MICHAEL HEMDON.
Q. MICHAEL HEMDON?
A. UH-HUH.
Q. DID REVEREND STAPLES OR REVEREND HEMDON COUNSEL YOU ABOUT STAYING OFF DRUGS?
A. I SPOKE TO HIM AND TOLD HIM ABOUT WHAT I USED TO DO. I WAS OPEN, TOTALLY OPEN WITH THEM.
Q. AND DID THEY COUNSEL YOU?
A. NOT DRUGS PER SE. JUST SPIRITUAL COUNSEL.
Q. WHAT DO YOU MEAN BY SPIRITUAL COUNSEL?

* * *

[HALE 117]

OTHER THAN THE MEDICAL UNIVERSITY?
A. FRANKLIN C. FETTER.
Q. I'M SORRY, WHEN YOU WERE PREGNANT WITH MICHAEL OR HENRY?
A. I DIDN'T KNOW OF ANYWHERE ELSE TO GO.

Q. WHY DIDN'T YOU GO TO FRANKLIN C. FETTER WHEN YOU WERE PREGNANT WITH MICHAEL?
A. BECAUSE I HAD A HABIT AT THE TIME. I DIDN'T KNOW. I MEAN, I REALLY WASN'T – I KNEW I WAS ON DRUGS, AND I KNEW THAT, YOU KNOW, IT WAS THE WRONG THING TO DO AT THE TIME.
Q. WHAT WAS THE WRONG THING TO DO?
A. USING DRUGS WHILE I HAD MY – WHILE I WAS PREGNANT.
Q. WERE YOU TAKING CARE OF YOURSELF WHILE YOU WERE PREGNANT WITH MICHAEL OR HENRY?
A. YES, I WAS.
Q. WERE YOU TAKING YOUR VITAMINS?
A. I DIDN'T HAVE ANY VITAMINS, BUT I WAS TAKING – I DIDN'T HAVE ANY PRESCRIBED VITAMINS, BUT I DID TAKE VITAMINS, AND TRIED TO EAT PROPER, AND DRINK PLENTY OF FLUIDS.
Q. WERE YOU WORKING ON THE STREETS WHILE YOU WERE PREGNANT?
A. YES, I WAS.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CHARLES HANNA

[HANNA 193]

WERE THE SEQUENCE OF EVENTS THAT LED UP TO THE APPROVAL AND IMPLEMENTATION OF THIS POLICY DONE IN THE NORMAL COMMITTEE REPORTING AND REVIEWING PROCESS FOR ALL POLICIES AND PROTOCOLS THAT THE MEDICAL UNIVERSITY HANDLED?

A. IT WAS.

Q. WERE THERE ANY DEPARTURES FROM THOSE NORMAL PROCEDURES AND SEQUENCE OF EVENTS?

A. NO, SIR.

Q. SIR?

A. THERE WERE NO DEPARTURES.

Q. IN YOUR 30 YEARS ON THE BOARD OF OUR MEDICAL UNIVERSITY, HAS THE MEDICAL UNIVERSITY ALWAYS COMPLIED WITH MANDATORY REPORTING OF CHILD ABUSE?

A. TO THE BEST OF MY KNOWLEDGE THEY HAVE.

Q. WAS THE POLICY, THIS INTERAGENCY POLICY CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS AND STANDARDS AND PHILOSOPHY?

A. YES.

Q. WHAT WAS THE GOAL OF THIS POLICY, DR. HANNA?

A. TO PROVIDE ADVICE AND HOPES OF IMPROVING THE CARE OF THE MOTHER AND THE ENSURING THE NORMAL DELIVERY OF THE BABY.

Q. WAS THERE ANY INTENTION TO DISCRIMINATE THROUGH THIS POLICY AGAINST BLACK WOMEN?

A. NO, SIR.

MR. HOOD: THANK YOU VERY MUCH.

THE COURT: CROSS-EXAMINATION.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPT FROM TESTIMONY OF LOUISE HAYNES

[HAYNES 60]

Q. AND ARE YOU THE - ARE YOU A MEMBER OF ANY PROFESSIONAL ASSOCIATION?
A. I'M A MEMBER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS.
Q. DO YOU HAVE ANY SPECIAL TRAINING SINCE YOUR GRADUATE DEGREE IN SOCIAL WORK?
A. YES, I HAVE CONSIDERABLE TRAINING IN SUBSTANCE ABUSE.
Q. CAN YOU TELL US WHAT CONSIDERABLE TRAINING MEANS?
A. ATTENDANCE AT A VARIETY OF WORKSHOPS AND TRAINING INSTITUTES REGARDING SUBSTANCE ABUSE, SUCH AS RUTGERS ADVANCED SCHOOL FOR ALCOHOL AND OTHER DRUG STUDIES.
Q. WHAT KIND OF PROGRAM WAS THAT AT RUTGERS?
A. THAT WAS A WEEK-LONG PROGRAM LOOKING AT ADVANCES IN SUBSTANCE ABUSE TREATMENT.
Q. ANY OTHER TRAINING THAT YOU HAVE HAD IN THE SPECIFIC AREA OF SUBSTANCE ABUSE TREATMENT?
A. SPECIFICALLY JUST WORKSHOPS IN THE AREA.

Q. FROM THE PERIOD OF 1988 THROUGH 1992, WHAT DID YOU DO?
A. I WAS DIRECTOR OF THE OFFICE OF WOMEN'S SERVICES FOR THE SOUTH CAROLINA COMMISSION ON ALCOHOL AND DRUG ABUSE.
Q. AND WHO ESTABLISHED THAT COMMISSION?
A. THE COMMISSION?
Q. YES.
A. IT'S A STATE AGENCY. I BELIEVE IT'S ESTABLISHED THROUGH LEGISLATION.

* * *

[HAYNES 63]

A. AS A CONSULTANT TO THAT COMMISSION, YES, I DID.
Q. AND WHEN WAS THAT INVOLVEMENT?
A. THROUGHOUT THE TIME THAT I HELD THAT OFFICE.
Q. SO THROUGHOUT THE TIME THAT YOU HELD THE OFFICE AT THE COMMISSION?
A. RIGHT.
Q. THE SOUTH CAROLINA COMMISSION?
A. RIGHT.
Q. IS THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION OFTEN REFERRED TO JUST BY THE TERM CCSAC?
A. YES.
Q. SO IF WE SAY CCSAC, THAT'S THE SAME PLACE THAT YOU'RE FAMILIAR WITH?
A. YES.
Q. IN THE SUMMER OF 1989, WERE YOU PERSONALLY - 1989, WERE

YOU PERSONALLY FAMILIAR WITH WHAT TREATMENT WAS AVAILABLE FOR WOMEN IN GENERAL PROVIDED BY CCSAC?
A. YES.
Q. AND WHAT WAS AVAILABLE?
A. GENERALLY WHAT WAS AVAILABLE WAS OUTPATIENT COUNSELING. THEY DID HAVE, I'M NOT SURE ABOUT THE SUMMER OF 1989, BUT I'M - IT WAS DURING THE SUMMER OF 1989, AN INTENSIVE OUTPATIENT PROGRAM WAS ALSO IN EXISTENCE AT CCSAC, BUT PRIMARILY IT WAS OUTPATIENT COUNSELING.
Q. WAS THERE ANY SPECIFIC TREATMENT PROGRAM IN PLACE AT

[HAYNES 64]

CCSAC DIRECTED TOWARD WOMEN WHO USED COCAINE?
A. NOT TO MY KNOWLEDGE.
Q. WAS THERE ANY SPECIFIC PROGRAM IN PLACE FOR PREGNANT WOMEN WHO USED COCAINE AT CCSAC?
A. NO.
Q. WAS THERE ANY SPECIFIC PROGRAM IN PLACE FOR PREGNANT WOMEN WHO USED DRUGS OF ANY SORT AT CCSAC IN THE SUMMER OF 1989?
A. NO.
Q. IN THE LATE PART OF THE SUMMER OF 1989 AND THE FALL OF 1989, WERE YOU CONSULTED BY ANYONE FROM THE MEDICAL UNIVERSITY, CITY OF CHARLESTON POLICE DEPARTMENT, OR THE

SOLICITOR'S OFFICE CONCERNING THE DEVELOPMENT OF A POLICY TO DEAL WITH PREGNANT WOMEN AND SUBSTANCE ABUSE PROBLEMS?

A. NO.

Q. WERE YOU AVAILABLE FOR SUCH CONSULTATION AT THAT TIME?

A. YES.

Q. WERE YOU LOCATABLE?

A. YES.

Q. WERE YOU FAMILIAR WITH THE EFFECT THAT HURRICANE HUGO HAD ON THE - THE EFFECTIVENESS OF CCSAC OF CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION?

A. YES.

Q. AND WHAT DID HUGO DO TO THEM?

A. HAVE YOU GO HAD A DEVASTATING EFFECT ON MANY OF THE

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[HAYNES 68]

WOULD BE REFERRED TO THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION FOR TREATMENT. THAT IF THEY FAILED TO COMPLY WITH THAT TREATMENT OR TO CONTINUE TO PARTICIPATE IN THE PRENATAL CARE, THAT THEY COULD - THAT THEY COULD BE ARRESTED.

Q. DID YOU HAVE CONTACT CONCERNING THE INTERAGENCY POLICY IN YOUR WORK WITH CCSAC?

A. YES, I DID.

Q. AND WHAT WAS THAT?

A. I CAME TO CHARLESTON AND MET WITH MEMBERS OF THE STAFF OF

THE CHARLESTON COUNTY COMMISSION TO DISCUSS WITH THEM WHAT THEIR INVOLVEMENT HAD BEEN IN DEVELOPING THE POLICY. AND WHAT THEIR EXPERIENCE WAS IN TRYING TO IMPLEMENT THE POLICY.

Q. WERE YOU ALSO FAMILIAR, THROUGH YOUR WORK, WITH WHAT TREATMENT FACILITIES WERE AVAILABLE IN THE CHARLESTON AREA FOR PREGNANT WOMEN WITH SUBSTANCE ABUSE PROBLEMS IN THE FALL OF 1989?

A. YES.

Q. YOU HAVE ALREADY TESTIFIED TO WHAT WAS AVAILABLE THROUGH CCSAC. WHAT ELSE WAS AVAILABLE IN THIS AREA?

A. THERE WERE - THERE WAS - THERE WERE VERY FEW OTHER RESOURCES AVAILABLE AT THAT TIME. SEVERAL OF THE PRIVATE HOSPITALS MAY HAVE HAD SMALL INPATIENT UNITS, BUT IN TERMS OF A TRUE SUBSTANCE ABUSE PROGRAM, CCSAC WAS, FOR ALL PRACTICAL PURPOSES, THE ONLY SOURCE OF TREATMENT.

Q. AND IN - IN YOUR WORK, HAVE YOU HAD TO DIRECT - HAVE

* * *

[HAYNES 73]

ABUSE COMMISSION DID OPERATE A DETOXIFICATION FACILITY,

Q. DOES A DETOXIFICATION FACILITY HAVE ANY IMPACT UPON SOMEONE WITH A COCAINE PROBLEM?

A. THERE IS NOT A MEDICAL PROCEDURE TO DETOXIFY SOMEONE FROM COCAINE. DETOXIFICATION AS A MEDICAL PROCEDURE IS GENERALLY USED FOR ALCOHOL AND HEROIN.

Q. WHAT IS DETOXIFICATION, THEN?

A. DETOXIFICATION IS A PROCESS OF ESSENTIALLY WEANING SOMEONE OFF OF A DRUG SO THAT THEY DO NOT HAVE A MEDICAL PROBLEM AS A RESULT OF STOPPING THE USE OF THAT DRUG. FOR INSTANCE FOR ALCOHOL OR SOME PRESCRIPTION DRUGS YOU WOULD BE CONCERNED ABOUT SEIZURES, HIGH BLOOD PRESSURE, AND A NUMBER OF MEDICAL COMPLICATIONS. AND SO MEDICATION IS GIVEN TO KEEP SOMEONE FROM HAVING THOSE PROBLEMS. BUT THERE USUALLY YOU DO NOT GIVE MEDICATION TO DETOXIFY SOMEONE FROM COCAINE.

Q. IN THE FALL OF 1989, WERE THERE ANY SUBSTANCE ABUSE TREATMENT FACILITIES AVAILABLE IN THE CHARLESTON AREA THAT PROVIDED ANY KIND OF CHILD CARE?

A. NO.

Q. WHY WOULD THAT MAKE ANY DIFFERENCE?

A. WELL, VERY OFTEN THE LACK OF CHILD CARE IS A BARRIER FOR WOMEN TO SEEK TREATMENT. IF THEY HAVE PRIMARY RESPONSIBILITY FOR CARRYING FOR THEIR CHILDREN, AND THEY HAVE TO LEAVE THE CHILDREN IN ORDER TO GO TO TREATMENT, THAT PRESENTS A PROBLEM.

Q. WERE YOU FAMILIAR WITH THE LOCATION OF THE CHARLESTON

* * *

[HAYNES 80]

COULD BE A BARRIER.
Q. DO YOU KNOW WHO WAS WATCHING THEIR CHILDREN WHILE THEY WERE BUYING DRUGS OR USING DRUG?
MS. DUNN: OBJECTION, YOUR HONOR. THERE IS NO WAY THIS WITNESS COULD BE COMPETENT TO ANSWER THIS.
THE COURT: I SUSTAIN THE OBJECTION.
Q. (BY MS. SHOWERS, CONTINUING) MS. HAYNES, YOU BELIEVE THAT SOME WOMEN COULD HAVE BENEFITED FROM THE TREATMENT PROVIDED AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION, CORRECT?
A. YES.
Q. AND THE SOJOURNER'S CENTER, WHICH OPENED SOMETIME IN THE EARLY '90'S, HAS PROVIDED GREAT IMPROVEMENT IN THE SUBSTANCE ABUSE TREATMENT HERE IN CHARLESTON?
A. I BELIEVE THAT THAT IS TRUE.
Q. AND YOU HAVE TESTIFIED THAT YOU WERE FAMILIAR WITH THE INTERAGENCY POLICY AND IT WAS YOUR UNDERSTANDING THAT THE GOAL OF THE POLICY WAS TO IMPROVE THE HEALTH CARE OF THE MOTHERS' AND TO PROTECT THEIR UNBORN BABIES, TRUE?
A. THAT'S CORRECT.

Q. AND THE POLICY DID NOT UNDERTAKE TO PROVIDE SUBSTANCE ABUSE TREATMENT, IT MERELY FACILITATED GETTING WOMEN INTO THE TREATMENT, CORRECT?

A. THAT'S CORRECT.

Q. AND THERE IS NO SUBSTANCE ABUSE EXPERT, THAT YOU'RE AWARE

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF LAURA HILDEBRAND

[HILDEBRAND 124]

(TESTIMONY EXCERPT OF LAURA HILDEBRAND, 12/9/96.)
MS. PALTROW: YOUR HONOR, I WOULD LIKE TO CALL LAURA HILDEBRAND TO THE STAND, PLEASE.

- - -

LAURA HILDEBRAND, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. PALTROW:

Q. GOOD MORNING, COULD YOU STATE YOUR NAME, PLEASE.

A. LAURA GILCHREST HILDEBRAND.

Q. CAN YOU TELL ME WHERE YOU WORK?

A. I WORK AT MUSC.

Q. AND DID YOU WORK AT MUSC IN -- FROM 1987 -

CAN YOU TELL ME A LITTLE BIT ABOUT WHEN YOU WORKED THERE?

A. I STARTED WORKING THERE IN 1987 AS A PEDIATRIC NURSE ON A SUBSPECIALTY UNIT, AND I WORKED ON THAT UNIT UNTIL FEBRUARY OF 1990 WHEN I BECAME THE SUSPECTED CHILD ABUSE AND NEGLECT

COORDINATOR. AND I MAINTAINED THAT POSITION UNTIL APRIL OF '92. AND THEN I STAYED OUT FOR AWHILE AND WENT BACK IN A NURSING RESOURCE POOL. AND NOW I'M THERE WORKING WITH THE KIDNEY PANCREAS TRANSPLANT PROGRAM.

Q. CAN YOU DESCRIBE WHAT YOU DID AS A SCAN COORDINATOR?

A. AS THE SCAN COORDINATOR I WAS RESPONSIBLE FOR COORDINATING THE CARE OF CHILDREN WHO HAD BEEN SUSPECTED OF

[HILDEBRAND 125]

CHILD ABUSE AND NEGLECT. I WAS LIAISON BETWEEN THE PHYSICIANS AND THE HOSPITAL AND USUALLY THE DEPARTMENT OF SOCIAL SERVICES.

I ALSO WAS RESPONSIBLE FOR COORDINATING A MONTHLY MEETING WHERE SEVERAL DISCIPLINES THAT WERE INVOLVED WITH SUSPECTED CASES OF ABUSE AND NEGLECT GOT TOGETHER AND DISCUSSED THE CASES, OFFERING SUGGESTIONS FOR ISSUES THAT WERE RELEVANT TO THE WELL-BEING OF THAT FAMILY AND ESPECIALLY THE CHILD.

Q. AND AT THE BEGINNING WHEN YOU BEGAN YOUR WORK WITH THE SCAN COMMITTEE IN FEBRUARY OF 1990, AT THAT POINT IN TIME IT DIDN'T HAVE ANYTHING TO DO WITH THE INTERAGENCY POLICY; ISN'T THAT CORRECT?

A. NOT REALLY. WE DID GET SCAN REFERRAL FORMS ON ALL CASES OF CHILDREN WHO WERE SUSPECTED OF ABUSE OR NEGLECT. ANY CASE. I WAS GETTING SCAN REFERRALS FROM ALL OVER THE HOSPITAL AND ALSO FROM CHARLESTON MEMORIAL HOSPITAL.

Q. AND THAT WOULD INCLUDE REFERRALS, FOR EXAMPLE, FOR A PREGNANT WOMAN WHO IS DRINKING ALCOHOL?

A. YES, ANY CHILDREN THAT WERE AT RISK.

Q. BUT AT THAT POINT IN TIME THERE WAS NO PARTICULAR COORDINATION IN TERMS OF THE INTERAGENCY POLICY REGARDING REPORTING TO THE POLICE AND SOLICITOR'S OFFICE; IS THAT CORRECT?

A. WELL D. WARING WAS ALWAYS PRESENT AT THE MEETINGS. AND

[HILDEBRAND 126]

THE SOLICITOR'S OFFICE WAS ALSO SENT AN AGENDA ON ANY CASES OF ABUSE AND NEGLECT OR SUSPECTED CASES.

Q. WHEN YOU SAY THAT THEY WERE SENT AGENDAS, CAN YOU EXPLAIN WHAT A SCAN AGENDA IS, PLEASE?

A. WELL, AS I SAID, I RECEIVED WHAT WAS CALLED A SCAN REFERRAL FROM A HOSPITAL SOCIAL WORKER ANYWHERE IN MUSC, ANYWHERE AT CHARLESTON MEMORIAL HOSPITAL. AND THAT HAD A

BRIEF SYNOPSIS OF THE CASE. I THEN IN TURN PUT THAT ON WHAT I CALLED A SCAN AGENDA. AND THE SCAN AGENDAS WERE MAILED OUT TO ALL OF THE MEMBERS OF THE SCAN TEAM, WHICH WERE SEVERAL DISCIPLINES.

Q. AND THAT AGENDA MIGHT INCLUDE A VARIETY OF MEDICAL INFORMATION ABOUT A PERSON; ISN'T THAT CORRECT?

A. RIGHT.

Q. IT MIGHT EVEN INCLUDE, FOR EXAMPLE, WHETHER SOMEONE WAS HIV POSITIVE?

A. IT MIGHT.

Q. AND IT MIGHT INCLUDE WHETHER THEY WERE HAVING A TUBAL LIGATION; ISN'T THAT CORRECT?

A. YES.

Q. I'M GOING TO SHOW YOU WHAT HAS BEEN PREMARKED EXHIBIT "228-E."

MS. SHOWERS: 228? IT SAYS 268.

Q. (BY MS. PALTROW, CONTINUING) CAN YOU TELL ME IF YOU RECOGNIZE THESE DOCUMENTS?

* * *

[HILDEBRAND 134]

THE COURT: IF THE OTHER HANDWRITING, LADIES AND GENTLEMEN, IS IDENTIFIED AS BEING SOMEONE THEN IT CAN COME IN ALSO, BUT UNTIL SOMEBODY IDENTIFIES THIS HANDWRITING, WE DON'T KNOW WHO WROTE IT AND THEREFORE IT'S GOING TO BE WHITED OUT

UNLESS SOMEBODY IDENTIFIES IT.
Q. (BY MS. PALTROW, CONTINUING) CAN YOU TELL US IN WHAT CAPACITY GARDEN BLINCOW WAS ATTENDING THE SCAN MEETING AT THE TIME THAT YOU WERE COORDINATING?
A. SHE CAME FROM THE SOLICITOR'S OFFICE. I WASN'T INVOLVED IN WHAT PARTICULAR INFORMATION THAT SHE WAS REALLY GATHERING. BUT SHE WAS THERE TO COMMUNICATE WITH US ON CHILDREN THAT HAD - I HAD RECEIVED SCAN REFERRALS ON THAT HAD BEEN SUSPECTED OF BEING EXPOSED TO DRUGS WHILE THEY WERE IN THE WOMB.
Q. SO THIS WAS IN RELATIONSHIP TO THE INTERAGENCY POLICY; IS THAT CORRECT?
A. YES, I BELIEVE IT WAS.
Q. AND SHE WAS NOT THERE TO ATTEND FOR ANY OTHER PORTIONS OF THE MEETING?
A. NO.
Q. MAYBE YOU SHOULD EXPLAIN THAT AT SOME POINT ISN'T IT CORRECT THAT YOU SEGREGATED OUT OF THE SCAN MEETINGS THOSE PORTIONS IN WHICH YOU WERE DISCUSSING CHILDREN EXPOSED TO COCAINE?
A. RIGHT.
Q. AND WHEN YOU SAY THAT YOU PROVIDED THESE SCAN AGENDAS TO

[HILDEBRAND 135]

A GARDEN BLINCOW, WHEN DID YOU THAT DID YOU SEND THEM BY

REGULAR MAIL?
A. I BELIEVE THAT I DID. I DON'T RECALL.
Q. AND UNDER YOUR OWN - WHERE DID YOU KEEP THESE - YOUR OWN COPIES OF THESE AGENDAS?
A. I HAD A FILE CABINET IN MY OFFICE.
Q. AND WAS THAT A LOCKED FILE CABINET?
A. I DON'T REALLY REMEMBER IF I LOCKED IT ALL OF THE TIME, BUT IT WAS IN MY CUBICLE AND IT WAS MY FILE CABINET.
Q. AND YOU DIDN'T HAVE ANY PARTICULAR WRITTEN PROCEDURES FOR THE SECURITY OF THESE PARTICULAR SCAN REPORTS, DID YOU?
A. NO.
Q. I WOULD LIKE TO SHOW YOU WHAT HAS BEEN PREMARKED PLAINTIFF'S EXHIBIT 172-C. CAN YOU TELL ME WHETHER YOU RECOGNIZE THIS DOCUMENT?
A. THE TYPED PORTION APPEARS TO BE A SCAN AGENDA THAT I SENT OUT.
Q. DO YOU RECOGNIZE THE HANDWRITING?
A. NO.
MS. PALTROW: YOUR HONOR, I WOULD LIKE TO MOVE INTO EVIDENCE THE EXHIBIT AGAIN WITH THE QUALIFYING OF HAVING THE PORTION THAT SHE DOESN'T RECOGNIZE WHITED OUT AND THEN I WOULD LIKE TO ASK HER TO PUBLISH TWO SENTENCES FROM IT.
THE COURT: HAVE YOU SEEN THIS?

MS. SHOWERS: NO, SIR, NOT UNTIL SHE JUST HANDED IT

[HILDEBRAND 136]

TO ME. BUT WE WOULD OBJECT TO RELEVANCE. IT'S A NON-PLAINTIFF.

MS. PALTROW: YOUR HONOR, THESE WERE ALL PRODUCED - THESE WERE ALL SCAN REPORTS CONCERNING THE INTERAGENCY POLICY, AND I WOULD LIKE TO BE ABLE TO ASK HER QUESTIONS ABOUT THIS PARTICULAR ONE BECAUSE IT, OF THE MANY -

THE COURT: LET ME SEE IT, IF YOU DON'T MIND.

MS. PALTROW: THIS ONE HAPPENS TO BE HIGHLIGHTED.

THE COURT: I SUSTAIN THE OBJECTION AS TO RELEVANCE AND AS TO 403 CONSIDERATION.

Q. (BY MS. PALTROW, CONTINUING) WHEN YOU MAILED THE SCAN DOCUMENTS TO GARDEN BLINCOW AT THE SOLICITOR'S OFFICE YOU DIDN'T HAVE A SEARCH WARRANT BEFORE YOU DID THAT, DID YOU?

A. NO.

Q. YOU DIDN'T HAVE A COURT ORDER BEFORE YOU DID THAT?

A. NO.

Q. AND DID YOU ALSO SEND SCAN REPORTS, SCAN AGENDAS SUMMARIZING THE CASES TO CINDY LEGARE AT THE SOLICITOR'S OFFICE?

A. I CAN'T REMEMBER REALLY WHO I SENT THEM TO OVER THERE. IF I SENT ONE SET OF AGENDAS OR TWO SETS OF AGENDAS, I REALLY DON'T REMEMBER.

Q. AND WOULDN'T IT BE CORRECT TO SAY THAT PART OF WHAT YOU WERE TRACKING WAS WHETHER WOMEN WERE BEING ARRESTED PURSUANT TO THE POLICY?

* * *

[HILDEBRAND 144]

A. I DON'T -- I REALLY DON'T REMEMBER. I KNOW AT ONE POINT IN TIME I DO REMEMBER ONE OF HER OFFICES WHERE IT WAS JUST HER DESK AND THERE WAS SOME RESOURCE MATERIALS ON A WALL. I DON'T EVEN KNOW, I CAN'T REMEMBER WHERE IT WAS IN THE BUILDING.

Q. BUT WOULD IT BE CORRECT TO SAY THAT YOU DIDN'T LEAVE IT, FOR EXAMPLE, IN A LOCKED FILE DRAWER?

A. NO, I DIDN'T PUT IT IN A LOCKED DRAWER.

Q. IN YOUR CAPACITY FILLING IN FOR SHIRLEY BROWN AND TAKING YOU SAID A HISTORY?

A. YES.

Q. WOULD THERE HAVE BEEN ANY REASON FOR YOU IN DOING THAT TO KNOW THE RACE OF THE FATHER?

MS. SHOWERS: OBJECTION, YOUR HONOR, 401 AND 403.

THE COURT: I'LL PERMIT IT.

A. NO, I DID NOT DOCUMENT RACE. I WAS TAKING A SOCIAL

HISTORY OF THE MOTHER.
Q. I WANT TO SHOW YOU NOW WHAT HAS BEEN PREMARKED PLAINTIFF'S EXHIBIT 229-E. CAN YOU TELL ME. WHETHER YOU RECOGNIZE THESE?
A. IT'S MY WRITING. I HAVE TO READ THROUGH IT TO REALLY REMEMBER IT.
Q. BUT THIS IS YOUR HANDWRITING?
A. RIGHT.
Q. AND THIS IS FROM A MEDICAL RECORD; IS THAT CORRECT?
A. YES, IT IS.

[HILDEBRAND 145]

Q. AND CAN YOU TELL US WHOSE MEDICAL RECORD IT WOULD BE FROM?
A. THE PATIENT?
Q. YES.
A. THERESA JOSEPH.
Q. AND THESE WOULD HAVE BEEN NOTES THAT YOU MADE IN YOUR CAPACITY FILLING IN FOR SHIRLEY BROWN; ISN'T THAT CORRECT?
A. YES.
MS. PALTROW: YOUR HONOR, I WOULD LIKE TO AT THIS POINT MOVE THIS EXHIBIT INTO EVIDENCE.
MS. SHOWERS,: YOUR HONOR, WE WOULD ASK THAT THE ENTIRE MEDICAL RECORD OF MS. JOSEPH BE ADMITTED INTO EVIDENCE. SHE IS A PLAINTIFF. I'M SURE THAT SHE WILL PROBABLY TESTIFY, BUT WE WOULD PREFER THE ENTIRE MEDICAL

RECORD SO IT'S NOT TAKEN OUT OF CONTEXT.

MS. PALTROW: YOUR HONOR, I HAVE NO OBJECTION -- I MEAN, WE'LL DO THAT I'M SURE SUBJECT TO MAKING SURE THAT WE ALL HAVE THE SAME PAGES, BUT I WOULD LIKE TO ASK THIS PARTICULAR WITNESS TO PUBLISH A PORTION OF HER OWN NOTES FROM THAT RECORD.

THE COURT: I UNDERSTAND THIS EXHIBIT IS IN WITHOUT OBJECTION, BUT COUNSEL WANTS THE ENTIRE MEDICAL RECORD.

MS. PALTROW: WE HAVE NO OBJECTION.

THE COURT: YOU HAVE NO OBJECTION TO THAT.

MS. PALTROW: SUBJECT TO OUR AGREEING THAT YOU HAVE

[HILDEBRAND 146]

THE RIGHT RECORDS.

THE COURT: THAT YOU WHAT?

MS. PALTROW: SUBJECT TO THE OPPORTUNITY TO LOOK AT THE ORIGINALS.

THE COURT: SURE. SURE. ALL OF THE MEDICAL RECORDS, LADIES AND GENTLEMEN, WHEN THEY HAVE COME IN WITHOUT OBJECTION, I HAVE ADDED TO THAT THE FACT THAT I WANT THE LAWYERS TO AT SOME POINT IN TIME DESIGNATE WHAT PORTIONS OF THEM ARE RELEVANT SO YOU WON'T HAVE TO STUDY THE ENTIRE

RECORD. SO THIS COMES IN WITH THAT SAME UNDERSTANDING.
Q. (BY MS. PALTROW, CONTINUING) AT THIS POINT, MS. HILDEBRAND, I WOULD LIKE TO ASK YOU TO READ FROM YOUR NOTES STARTING ON THE SECOND PAGE WITH THE WORD SPOKE.
THE COURT: WHAT NUMBER IS THIS?
MS. PALTROW: 229-E.
THE COURT: DO I HAVE A COPY OF IT?
MS. PALTROW: I DON'T THINK I PASSED IT UP TO YOU, YOUR HONOR.
THE COURT: THANK YOU.
A. I CAN'T READ THE DATE OR TIME. "SPOKE WITH THERESA AGAIN. SHE EXPRESSED A DESIRE TO GET OFF DRUGS AS WELL AS HER BOYFRIEND. SHE PROMISED THAT SHE WOULD KEEP APPOINTMENTS AND WORK HARD TO GET OFF DRUGS. ALL INFORMATION PASSED ONTO S. WITTSCHEN, O.B. HOSPITAL SOCIAL WORKER." AND THEN I SIGNED MY NAME.

[HILDEBRAND 147]

Q OKAY. TO THE END OF THE PAGE?
A. "RECEIVED CALL FROM DOCTOR TATE IN REGARDS TO PATIENT'S THREAT TO LEAVE AMA. WENT IN WITH THERESA. FOUND HER IN ROOM IN THE DARK CRYING. PATIENT STATES SHE NEEDS TO GET AWAY TO

THINK AND BE ALONE. SHE WAS ENCOURAGED TO STAY AND COMPLETE TREATMENT FOR RIGHT FOOT CELLULITIS. SHE WAS TOLD THAT SHE WOULD BE RISKING HER HEALTH AS WELL AS THE UNBORN CHILD'S. NOTIFIED MR. JOHN SANDERS REGARDING PATIENT AND LEGALITIES OF POLICY AS MOTHER HAS COMPLETED AND SIGNED ALL LETTERS IN REGARDS TO CCSAC COUNSELING AND PRENATAL VISITS. AT THIS POINT WE DO NOT HAVE LEGAL GROUND TO ARREST AS SHE HAS NOT MISSED THOSE APPOINTMENTS YET." AND THEN I SIGNED MY NAME.

Q. CAN YOU TELL ME WHAT AMA STANDS FOR?

A. AGAINST MEDICAL ADVICE.

Q. AND WHAT -- CAN YOU EXPLAIN WHAT THAT MIGHT MEAN?

A. WELL IT SOUNDS LIKE SHE WANTED TO LEAVE THE HOSPITAL BUT SHE HAD RIGHT FOOT CELLULITIS AND THE MEDICAL TEAM WAS REQUESTING THAT SHE STAY AND RECEIVE TREATMENT FOR THAT.

Q. AND WOULD THESE NOTES HAVE BEEN MADE AFTER YOU HAD MET WITH HER CONCERNING THE INTERAGENCY POLICY?

A. I CAN'T SEE THE TIMES, BUT IT LOOKS LIKE I HAD ALREADY MET WITH HER AND HAD THE CONSENT FORMS SIGNED.

Q. AND CAN YOU TELL ME WHAT CCSAC IS?

A. CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION.

Q. AND IN YOUR CAPACITY, MOVING ON TO - MORE GENERALLY, IN

[HILDEBRAND 148]

YOUR CAPACITY FILLING IN FOR SHIRLEY BROWN, GIVING OUT THESE FORMS, WAS THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION THE ONLY PLACE THAT YOU WERE REFERRING WOMEN TO AT THAT POINT?

A. YES.

Q. AND DID YOU DID NOT GIVE --

A. WELL, I TAKE THAT BACK. SOME WOMEN WHO HAD NOT RECEIVED PRENATAL CARE, I WOULD MAKE AN APPOINTMENT AT AN O.B. CLINIC.

Q. IN ADDITION TO THIS?

A. RIGHT. AND I MAY HAVE ON OCCASION BEEN THE PERSON THAT TALKED TO DSS REGARDING OTHER CHILDREN IN THE HOME AND THE BABY IN THE WOMB.

Q. IN YOUR CAPACITY FILLING IN FOR SHIRLEY BROWN, YOU DIDN'T PROVIDE THE PATIENTS WHO TESTED POSITIVE WITH ANY KIND OF A LIST OF RESOURCES IDENTIFYING A NUMBER OF TREATMENT PROGRAMS THEY MIGHT GO TO, DID YOU?

A. NO. I WOULD JUST GIVE THEM THE NUMBER OF WHERE I HAD MADE THEIR APPOINTMENT AND THE NAME.

Q. AND WERE THERE OCCASIONS WHEN YOU WERE FILLING IN FOR SHIRLEY BROWN WHEN YOU DID NOT MEET THE PATIENT UNTIL THE POINT WHEN SHE HAD ALREADY GIVEN BIRTH?

A. I DON'T REMEMBER SPECIFIC EXAMPLES.
Q. BUT WOULD IT BE FAIR TO SAY THAT YOU WEREN'T ONLY COUNSELING WOMEN WHEN THEY WERE PREGNANT, SOME OF THEM ALSO HAD ALREADY DELIVERED?
A. I DID IT SO FEW TIMES I NEED TO KNOW SPECIFICS. I DON'T

* * *

[HILDEBRAND 150]

Q. WHO TAUGHT YOU WHAT TO DO WHEN YOU FILLED IN FOR SHIRLEY BROWN?
A. SHIRLEY AND I MET BRIEFLY BEFORE THIS - SHE EVER - WHEN THIS CAME UP THAT SHE MAY NEED A DAY OFF, WE MET PREVIOUSLY AND SHE SHOWED ME THE FORMS THAT NEEDED TO BE SIGNED AND SHOWED ME WHERE THE VIDEOS WERE, AND THAT'S WHAT WE DID FOR MY ORIENTATION.
Q. DID SHE TELL WHAT INFORMATION TO COLLECT WHEN YOU INTERVIEWED THE PATIENTS?
A. I JUST HAD TO GET A SOCIAL HISTORY, DISCUSS WITH THE MOTHERS WHAT WE HAD FOUND ON THE DRUG TESTING. AND HAVE THOSE THREE FORMS SIGNED.
Q. DID SHIRLEY TELL YOU TO NOTE THE RACE OF A PATIENT WHEN YOU TOOK THE HISTORY?
A. NO.
Q. IS RACE NOTED IN EVERY PATIENT'S CHART AT THE MEDICAL

17 UNIVERSITY?
18 A. I BELIEVE ON THE FRONT ADMISSION SHEET, IT'S RACE AND AGE
19 THAT IS NOTED.
20 Q. DO YOU STILL HAVE EXHIBIT 229-E IN FRONT OF YOU, THE
21 NOTES ABOUT THERESA JOSEPH?
22 A. YES.
23 Q. YOU WERE ASKED TO READ THE SECOND PAGE. I WOULD LIKE YOU
24 TO READ THE FIRST PAGE OF YOUR NOTE TO THE JURY, PLEASE.
25 A. OKAY. 6/14 AT 9:30 IN THE MORNING I WROTE, "REVIEWED

[HILDEBRAND 151]

1 PATIENT'S LABORATORY DATA: URINE DRUG SCREEN IS POSITIVE FOR
2 COCAINE, OPIATES, MORPHINE AND BENZ" - I CAN'T READ MY OWN
3 WRITING "BENZAPHECGONINE."
4 Q. I'M GLAD YOU'RE PRONOUNCING THAT.
5 A. "PATIENT IS 33-YEAR-OLD WHO IS 14 WEEKS PREGNANT AND
6 TOTAL OF THREE CHILDREN, TWO CHILDREN, NAMES WITHHELD, LIVE IN
7 NEW YORK WITH THEIR FATHER, NAME WITHHELD. THE THIRD CHILD IS
8 SIX-YEAR-OLD SON WHO LIVES WITH HIS FATHER MR. WILLIAM NIXON.
9 THERESA REFUSES TO GIVE A PERMANENT ADDRESS. STATES SHE LIVES
10 WITH DIFFERENT FRIENDS. SHE DID GIVE HER EX-HUSBAND'S ADDRESS
11 FOR MAIL. MR WILLIAM MOREY AT 2020 ALTON STREET, NORTH

CHARLESTON, 29406. DISCUSSED WITH S. WITTSCHEN TO TALK WITH MS. JOSEPH REGARDING HOUSING OPTIONS. SHE APPLIED FOR MEDICAID ON LAST ADMISSION ON 6/6/91. ENCOURAGED HER TO GET WIC AND FOOD STAMPS, ETCETERA. S. WITTSCHEN TO DISCUSS FURTHER WITH MS. JOSEPH. PRENATAL APPOINTMENT MADE FOR 6/6/91 AT MUSC AT 8:30 A.M. AS OF PRESENT SHE HAS HAD NO PRENATAL CARE. MS. JOSEPH SMOKES A HALF PACK OF CIGARETTES PER DAY AND SHE WAS ENCOURAGED TO TRY TO DECREASE THAT AMOUNT. SHE PRESENTLY DOES NOT CONSUME ALCOHOL OR MARIJUANA. MS. JOSEPH READILY ADMITS TO HEROIN AND COCAINE USE DAILY. SHE REPORTS USING FIFTY DOLLARS PER DAY. SHE REPORTS MIXING COCAINE AND HEROIN AND SHOOTS IT UP INTRAVENOUSLY. HER HABIT IS SUPPORTED BY HER BOYFRIEND AND SHE DOES NOT WORK. THIS MAN WHOSE NAME WAS WITHHELD ALSO USES DRUGS REPORTEDLY BY THERESA. THE VIDEO

* * *

[HILDEBRAND 153]

THE COURT: WHEN WE TALK ABOUT WHAT PORTIONS OF THE RECORD ARE RELEVANT.

MS. PALTROW: OKAY.

THE COURT: SHE HAD SOME POSITIVES, THAT WAS MY

UNDERSTANDING. THEN YOU HAVE TO REMEMBER TO BRING IT TO MY ATTENTION.

MS. SHOWERS: RIGHT.

THE COURT: AT SOME POINT IN TIME SOMEBODY HAS GOT TO SIT DOWN AND GO THROUGH THESE RECORDS AND SEE WHICH PART GOES TO THE JURY

MS. SHOWERS: I WASN'T GOING TO GO INTO ANY OF THAT.

THE COURT: ALL RIGHT.

Q. (BY MS. SHOWERS, CONTINUING) WHILE EMPLOYED AT THE MUSC FROM 1990 TO 1992 YOU WERE THE SCAN COORDINATOR?

A. RIGHT.

Q. COULD YOU EXPLAIN TO THE JURY WHAT THE SCAN MEETINGS WERE?

A. AS I SAID EARLIER, I RECEIVED SCAN REFERRALS FROM SOCIAL WORKERS THROUGHOUT THE HOSPITAL AND FROM CHARLESTON MEMORIAL HOSPITAL, AND WE DISCUSSED WITH VARIOUS DISCIPLINES WHO WERE INVOLVED WITH CASES OF SUSPECTED ABUSE OR NEGLECT REALLY WAYS OF TRYING TO HELP THESE CHILDREN AND THE FAMILIES.

Q. WHAT WAS THE GOAL OF THE SCAN MEETING?

A. IT WAS TO PROVIDE COMMUNICATIONS, TO PROVIDE - HOPEFULLY PROVIDE BETTER CARE FOR THE CHILDREN. THE FAMILIES,

* * *

Supreme Court, U.S.
FILED
JUN 1 - 2000
CLERK

No. 99-936

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX
VOLUME II OF III, (Pages 624 to 1130)

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PETITION FOR CERTIORARI FILED DECEMBER 1, 1999
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF EDWARD HORGER

[HORGER 4]

Q. AND BEFORE YOU WENT THERE, WERE YOU ASSOCIATED WITH THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. YES, SIR, I WAS.
Q. HOW LONG WERE YOU THERE?
A. TWENTY-ONE YEARS.
Q. AND WHAT WAS YOUR POSITION THERE?
A. OVER A PERIOD OF 21 YEARS, I ROSE FROM AN ASSISTANT PROFESSOR TO PROFESSOR OF OBSTETRICS AND GYNECOLOGY AND DIRECTOR OF THE DIVISION OF MATERNAL FETAL MEDICINE.
Q. SAW A LOT OF BABIES BORN OVER THOSE 21 YEARS, DIDN'T YOU?
A. YES.
Q. DURING THE COURSE OF YOUR WORK AT THE MEDICAL UNIVERSITY WAS THERE A TIME PERIOD IN WHICH YOU BECAME AWARE OR STARTED NOTICING WITHIN THE POPULATION THAT YOU WERE SERVING AN INCREASE IN THE USE OF COCAINE?
A. YES, I THINK SO.
Q. AND ABOUT WHEN WAS THAT?
A. PROBABLY IN SOMETIME IN 1988. IT MAY HAVE BEGUN IN

THIS PAGE LEFT BLANK INTENTIONALLY

1987. WE WERE NOTICING NATIONWIDE WHAT WAS ULTIMATELY CLAIMED TO BE A CRISES IN TERMS OF COCAINE AND ITS PROBLEMS IN PREGNANCY. AND WE CAME TO REALIZE, GEE, WE HAVE THIS HERE ALSO.

Q. AND SO IS IT FAIR TO SAY THAT WHAT BROUGHT IT TO YOUR ATTENTION INITIALLY WAS HEARING THE INFORMATION THAT OTHER

[HORGER 5]

PLACES WERE HAVING A PROBLEM WITH THIS?

A. I THINK THIS PROBABLY BROUGHT THE REALIZATION TO US THAT WE WERE DEALING WITH THE SAME TYPE OF PROBLEMS THAT WE WERE GOING OFF TO MEETINGS, READING IN JOURNALS, THAT WE HAVE GOT THESE SAME TYPES OF PROBLEMS INCREASING IN OUR HOSPITAL AND PERHAPS WE'RE DEALING WITH THE SAME COCAINE.

Q. SO YOU TOOK THAT INFORMATION BACK TO THE PEOPLE YOU WERE TRYING TO SERVE AND STARTED WATCHING PERHAPS MORE CAREFULLY NOW FOR SOME OF THE SAME SIGNS, IS THAT FAIR?

A. I THINK THIS IS TRUE. I THINK PERHAPS THE VERY FIRST TIME IT CAME TO LIGHT WAS FOLLOWING A CASE OF AN ABRUPTIO PLACENTA WITH A - I TRULY CAN'T RECALL WHETHER IT WAS A DEAD

FETUS AS A RESULT OF THE ABRUPTION, BUT IT WAS A DEFINITE ABRUPTION OF THE PLACENTA. AND I MADE THE COMMENT THAT, GEE, I JUST HEARD SOMEONE AT SUCH AND SUCH A MEETING TALKING ABOUT THIS. AND SOMEONE SAID, WELL, MAYBE WE SHOULD SCREEN FOR COCAINE. WE SCREENED AND IT WAS POSITIVE.

Q. YOU HEARD DOCTOR NEWMAN'S TESTIMONY EARLIER TODAY?

A. YES, I DID.

Q. WAS THAT THE SAME EVENT HE WAS DESCRIBING?

A. NO, I DON'T THINK DR. NEWMAN, HE WAS NOT INVOLVED IN THAT PARTICULAR EVENT, UNLESS MAYBE IT WAS PERIPHERALLY HEARING US TALK ABOUT IT.

Q. BUT IT WAS THE EVENT THAT YOU DESCRIBE, A PARTICULAR TRAUMATIC EVENT FOR YOU AND OTHER PEOPLE WHO WORKED ON THAT

[HORGER 6]

PARTICULAR -

A. I THINK IT WAS A PARTICULAR REVELATION TO ME THAT, GEE, WE HAVE THE SAME PROBLEMS THAT THEY HAVE UP IN NEW YORK AND CALIFORNIA.

Q. WAS THERE ANYTIME DURING THIS EARLY TIME THAT YOU'RE TALKING ABOUT, COMING TO BE AWARE OF A PROBLEM WITHIN THE COMMUNITY THAT YOU SERVED, FOR USING COCAINE, WAS THERE

ANYTIME WHEN YOU DID UNIVERSAL TESTING TO ESTABLISH WHAT - WHAT THE FULL USE MIGHT HAVE BEEN?

A. NO, WE NEVER DID ANY UNIVERSAL TESTING.

Q. AND WHAT IS UNIVERSAL TESTING?

A. I WOULD ASSUME THAT YOU REFER TO TESTING EVERY PATIENT, SUCH AS THE DRUG PREVALENT STUDY, THAT WAS BROUGHT INTO EVIDENCE EARLIER.

Q. AND WOULD IT BE FAIR TO SAY THEN WHAT YOU BASE YOUR INFORMATION ON IN TERMS OF THERE BEING AN INCREASE IN USE OF COCAINE BY THE WOMEN THAT YOU WERE SERVING OR CLINICAL OBSERVATIONS?

A. I THINK THAT WE'RE GOING IN THE SAME DIRECTION. I BELIEVE IT WAS CLINICAL OBSERVATIONS THAT SAID PERHAPS THIS PROBLEM IS CAUSED BY COCAINE. PERHAPS WE SHOULD BE SCREENING FOR DRUG ABUSE. WE DID NOT KNOW THAT WE WERE DEALING WITH COCAINE. WE CAME TO THE REALIZATION AFTER HEARING OTHERS TALKING ABOUT IT, THAT WE DO SEEM TO HAVE HAD MORE ABRUPTIONS OF THE PLACENTA IN THE PAST SIX OR EIGHT OR TEN MONTHS. WE DO

[HORGER 7]

SEEM TO HAVE MORE PRE-TERM LABORS THAT WE ARE UNSUCCESSFUL IN STOPPING WITH OUR USUAL TREATMENT TO STOP PRE-TERM LABOR.

PERHAPS THERE IS A REASON FOR IT, SOMETHING THAT IS DRIVING IT THAT WE HAD NOT BEEN SUSPICION OF PREVIOUSLY.

Q. OKAY. BUT IN FACT AT THAT TIME YOU DID NOT HAVE DATA THAT DOCUMENTED AN INCREASE IN ABRUPTION AND CONNECTED THAT INCREASE WITH THE USE OF COCAINE?

A. I THINK I WOULD AGREE WITH WHAT YOU'RE SAYING, MS. DUNN. I'M NOT REAL SURE WHEN YOU SAY AT THAT TIME. NOW AT WHAT TIME?

Q. I'M TALKING ABOUT THE EARLY TIME.

A. WHEN WE FIRST STARTED LOOKING IN TERMS OF, I DON'T KNOW THIS FOR CERTAIN, BUT I BELIEVE THE FIRST TIME WE EVER DID A URINE DRUG SCREEN WAS PROBABLY IN THE FALL OF 1988. THE FIRST TIME WE EVER DID IT, NO, WE HAD NO INFORMATION IN CHARLESTON THAT SAID WE'RE GOING TO COME UP WITH A LOT OF POSITIVE DRUG SCREENS.

Q. OKAY. SO WAS THIS OCTOBER OF 1988?

A. I BELIEVE THAT IS CORRECT.

Q. OKAY. AND WHEN YOU SAY YOU FIRST STARTED DOING THE URINE DRUG SCREENS IN THE OB/GYN HIGH-RISK CLINIC, HOW DID THOSE SCREENS TAKE PLACE?

A. I THINK THAT THOSE FIRST SCREENS - WHEN I SAY FIRST SCREENS I MAY BE TALKING ABOUT FIVE PATIENTS OR WHATEVER, PROBABLY AROSE JUST LIKE THE ONE THAT I GAVE AN EXAMPLE OF.

[HORGER 8]

HERE IS A PATIENT WITH AN ABRUPTIO PLACENTA, I WONDER IF THIS IS THE SAME CAUSE OF ABRUPTION THAT WE HAVE BEEN HEARING ABOUT AND READING ABOUT. LET'S CHECK THE DRUG SCREEN.

I THINK THE FIRST ONES HAD NO SET POLICY FOR DOING SO. OR POLICY IS A BAD WORD AROUND HERE. NO SET PROTOCOL FOR DOING SO. BUT - BUT THE MEDICAL JUDGMENT WAS THAT HERE IS SOMETHING THAT MAY HAVE RESULTED FROM THE USE OF COCAINE, LET'S SCREEN FOR IT.

Q. SO ARE YOU DESCRIBING A SITUATION THEN WHERE THE INDIVIDUAL'S PHYSICIAN MADE A DECISION BASED UPON THE CLINICAL MANIFESTATIONS?

A. THAT'S CORRECT.

Q. SO THAT THAT WOULD BE A SITUATION WERE THE UDS DRUG SCREEN WAS DONE IN A CIRCUMSTANCE WHERE THE PHYSICIAN, THE PARTICULAR PHYSICIAN OF A PATIENT MADE A DETERMINATION, DEEMED THAT IT WAS NECESSARY FOR THAT PATIENT?

A. THAT'S CORRECT.

Q. AND YOU DESCRIBED THIS TIME PERIOD WHEN THE INITIAL DRUG SCREENS WERE DONE WHEN THE DOCTOR SAW SOME REASON IN CONNECTION WITH A PARTICULAR PATIENT TO DO IT, STARTED IN THE

OB/GYN CLINIC IN OCTOBER OF 1988?
A. I'M NOT CONFIDENT THAT I WOULD SAY WITHIN THE OB/GYN CLINIC. IT STARTED WITHIN THE OB/GYN DEPARTMENT OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. I SUSPECT STRONGLY THAT THE FIRST ONES THAT WERE DONE WERE HOSPITALIZED PATIENTS,

[HORGER 9]

THESE WERE NOT OUTPATIENTS IN THE CLINIC.
Q. BUT, YOU ARE CERTAIN OF THE TIME FRAME THAT WAS AROUND OCTOBER OF 988?
A. AS LONG AS I CAN SAY AROUND OCTOBER, YES.
Q. AND IN APRIL OF 1989, DID YOU FORMALIZE SOME KIND OF PROTOCOL WITHIN YOUR DEPARTMENT FOR THE SCREENING OF UDS FOR SUSPECTED USE OF COCAINE BY PREGNANT WOMEN?
A. YES. I FEEL LIKE BY THAT TIME WE HAD SEEN THAT MORE AND MORE OF OUR SUSPICIONS OF POSITIVE - OF PATIENTS WHO MAY HAVE BEEN POSITIVE FOR DRUG USE WERE BORNE OUT BY THE DRUG TESTING. BY THE URINE DRUG SCREENS. CONSEQUENTLY I FEARED THAT WE BETTER GET THIS THING ON A REGULAR STRAIGHTFORWARD, NO. QUESTIONS PROTOCOL, LET'S SCREEN THESE PATIENTS WHO HAVE THESE INDICATIONS. I WANTED TO REMOVE ANY SUBJECTIVITY FROM IT. I

HATED THE POSSIBILITY OF SOMEONE SAYING, WELL, SUSAN DUNN, TO USE AN EXAMPLE, LOOKS THIS SHE MIGHT HAVE USED A DRUG, LET'S SCREEN HER. WE WANTED TO AVOID THAT AND PUT IT STRICTLY ON A PROTOCOL BASIS.

Q. AND AT THE TIME IN APRIL OF 1989 WHEN THE PROTOCOL WAS ADOPTED - PROTOCOL IS JUST CONSISTED OF A LIST, THESE ARE THE THINGS THAT YOU SHOULD TEST FOR?

A. CORRECT. SIX INDICATORS.

Q. AND IF I READ THOSE SIX TO YOU WOULD YOU REMEMBER

A. I THINK I CAN REMEMBER THEM WITHOUT.

Q. LET ME LET YOU DO IT THEN.

[HORGER 10]

A. I THINK IT WAS KNOWN SUBSTANCE ABUSE OR KNOWN HISTORY OF SUBSTANCE ABUSE. AND ABSENCE OF PRENATAL CARE. INTRAUTERINE FETAL DEATH. INTRAUTERINE FETAL GROWTH RETARDATION. PRE-TERM. LABOR AND ABRUPTIO PLACENTA.

Q. SO THAT WAS THE FIRST SIX?

A. THAT WAS THE FIRST SIX.

Q. OKAY. AND I'M HANDING YOU A DOCUMENT THAT HAS BEEN PRESENTLY MARKED PLAINTIFF'S EXHIBIT NUMBER 1. DO YOU RECOGNIZE THIS DOCUMENT, DR. HORGER?

A. YES, I DO.

Q. CAN YOU TELL US WHAT IT IS?

A. THIS IS A MEMO SENT TO THE OB/GYN RESIDENTS. AT THAT

TIME IT LOOKS LIKE JUNE OF 1989 ON THIS DOCUMENT. SENT TO THE OB/GYN RESIDENTS AND THE MATERNAL FETAL MEDICINE FACULTY AND FELLOWS WHO WERE INVOLVED IN CARING FOR HIGH-RISK PREGNANCIES.

Q. AND WHAT IS THE DATE OF THIS DOCUMENT?

A. THE DATE OF THIS DOCUMENT IS JUNE THE 30TH.

Q. BUT IT'S YOUR RECOLLECTION THAT THE PROTOCOL WAS ACTUALLY ESTABLISHED IN APRIL?

A. I'M CONFIDENT THAT THE FIRST TIME THAT SUCH - AS A MATTER OF FACT I RECALL SPECIFICALLY THE FIRST TIME THAT IT WAS SENT OUT WAS APRIL. I THINK THAT THE –THAT - THE CHANGE IN THE APRIL DOCUMENT, IN THIS DOCUMENT IS THE ADDITIVE DOWN HERE OF NO OBVIOUS CAUSE ON SEVERAL OF THE INDICATORS.

Q. ALL RIGHT.

[HORGER 11]

A. I BELIEVE THE FIRST DOCUMENT DID NOT HAVE THIS NO OBVIOUS CAUSE. WE TRIED TO REMOVE, FOR INSTANCE, PRE-TERM LABOR. AS WAS POINTED OUT BY THE ATTORNEY EARLIER TODAY AND BY DR. NEWMAN, IT MAY BE VERY WELL KNOWN THAT IF WE HAVE GOT A TRIPLET PREGNANCY OR POLYHYDRAMNIOS, OR SOMETHING OF THIS SORT, WE CAN EXPECT HER TO HAVE PRE-TERM LABOR. WE'RE NOT

TRYING TO CLUTTER UP EVERYTHING BY TESTING EVERYBODY WHO COMES ALONG, IF WE COULD COME UP WITH A REASON WITH THESE WE WOULD REMOVE THAT PATIENT FROM SCREENING.

MS. DUNN: I WOULD LIKE TO MOVE THIS DOCUMENT INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MR. HOOD: NO.

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NUMBER 1 IN EVIDENCE.

Q. (BY MS. DUNN, CONTINUING) SO, DR. HORGER, IN APRIL OF 1989, A PROTOCOL NOW THAT HAS SIX FACTORS WAS PUT INTO PLACE. WHAT DID YOU USE THAT PROTOCOL TO DETERMINE? WHAT DID THE PROTOCOL DO DURING THAT TIME PERIOD?

A. WHAT DID IT DO?

Q. YES.

A. I THINK WE USED IT TO DETERMINE WHICH PATIENTS IN OUR HOSPITAL OR IN OUR CLINIC WE FELT SHOULD HAVE COCAINE SCREENING.

Q. WAS ANYBODY COLLECTING THE INFORMATION ONCE YOU GOT IT,

[HORGER 12]

PUTTING IT TOGETHER TO FIND OUT HOW MANY PEOPLE ACTUALLY TESTED POSITIVE?

A. YES, I THINK THAT INFORMATION WAS BEING COLLECTED,

Q. WAS THAT BEING COLLECTED BY SHIRLEY BROWN?

A. TO MY RECOLLECTION IT WAS BEING COLLECTED BY SHIRLEY BROWN. AND I FEEL PRETTY CONFIDENT THAT IT COULD BE OBTAINED - THE NUMBER OF POSITIVES AT ANY RATE COULD BE OBTAINED THROUGH THE HOSPITAL LABORATORY.

Q. BUT YOU WEREN'T COLLECTING IT YOURSELF?

A. NO.

Q. SO THAT IF YOU NEEDED TO KNOW HOW MANY POSITIVE DRUG SCREENS FOR COCAINE?

A. I WOULD PROBABLY HAVE REFERRED TO OUR CASE MANAGER AND ASKED FOR THE ANSWER.

Q. AND THE CASE MANAGER THEN WOULD HAVE BEEN SHIRLEY

A. THAT'S CORRECT.

Q. DURING THIS TIME PERIOD OF - FROM APRIL OF 1989 THROUGH THE NEXT SIX MONTHS, WAS THERE ANY PARTICULAR EDUCATION PIECE THAT WAS ALSO BEING PROVIDED FOR THIS -THE POPULATION THAT YOU WERE SERVING OR WERE YOU SIMPLY JUST DOING THE UDS DRUG SCREEN?

A. NO, IT WAS NOT USED AS A - THERE WAS NO EDUCATIONAL PIECE ADDED TO IT OTHER THAN IF WE HAD SOMEONE WHO HAD A COCAINE POSITIVE, HEROIN POSITIVE OR WHATEVER ELSE DURING PREGNANCY, WE WOULD CERTAINLY TRY TO ADVISE THE PATIENT OF THE

RISKS, FROM AN EDUCATIONAL STANDPOINT OF THE RISKS OF CONTINUING TO USE SUCH DRUGS. SIMILAR TO THAT WE WOULD - WITH A PRESCRIPTION MEDICATION THAT WE FELT MIGHT BE CONTRAINDICATED, YOU SHOULDN'T BE ON IT.

Q. AND THERE WAS NO ADDITION TO THE PROTOCOL THAT REQUIRED THE PHYSICIAN OR ANYONE ELSE TREATING THE PATIENT TO REPORT A POSITIVE DRUG SCREEN FOR COCAINE TO THE POLICE, WAS THERE?

A. NO.

Q. WAS THERE PROTOCOL THAT REQUIRED - THAT REQUIRED THAT FOR EACH PATIENT THAT HAD A POSITIVE DRUG SCREEN THAT THAT PATIENT BE REPORTED TO THE DEPARTMENT OF SOCIAL SERVICES?

A. I'M NOT CONFIDENT OF THAT. I THINK THAT PARTICULARLY THOSE WHO HAD DELIVERED WHEN THEY CAME UP WITH A POSITIVE DRUG SCREEN, I SUSPECT THAT DSS WAS PROBABLY ADVISED OF THIS.

Q. BUT WAS DSS ADVISED OF THAT ON A CASE-BY-CASE BASIS?

A. FOR AN INDIVIDUAL PATIENT?

Q. YES.

A. I SUSPECT SO, BUT I'M NOT CONFIDENT OF THAT.

Q. DID THERE COME A TIME AS A RESULT OF HAVING GATHERED THE INFORMATION THAT YOU HAVE FROM THE PROTOCOL THAT WAS PUT IN PLACE IN APRIL OF 1989, THAT YOU AND OTHER PEOPLE WORKING WITH

YOU DECIDED THAT YOU NEEDED TO DO SOMETHING MORE?
A. YES.
Q. WHEN WAS THAT?
A. IN OCTOBER OF 1989.

[HORGER 14]

Q. WHY DID YOU DECIDE YOU NEEDED TO DO SOMETHING MORE?
A. WE FELT AS THOUGH THE NUMBERS OF POSITIVE SCREENS USING OUR LIST OF SIX INDICATORS WAS GETTING TO BE MORE AND MORE COMMON IN OUR POPULATION. WE WERE SEEING MORE AND MORE POSITIVES. WE WERE HAVING, WE FELT LIKE, MORE AND MORE BAD OUTCOMES OF PREGNANCY WHICH COULD BE ATTRIBUTED TO THE USE OF ILLICIT DRUGS.
Q. AND WAS IT AS A RESULT OF THAT THAT YOU MET WITH SOLICITOR CONDON AND REUBEN GREENBERG TO START COMING UP WITH WAYS TO DEAL WITH THIS PROBLEM?
A. I SUSPECT THAT IT WAS, MS. DUNN. I AM NOT TOTALLY CONFIDENT OF HOW THE FIRST MEETING OF THAT GROUP OCCURRED. I WAS NOT INVOLVED. I THINK IT WAS PROBABLY THE SECOND MEETING WHICH WAS THE FIRST I HAD HEARD ABOUT. AND AT THAT TIME THERE WAS SOME STRUCTURE IN PLACE THAT YOU GUYS ARE BREAKING THE LAW, YOU'RE NOT REPORTING THINGS THAT YOU SHOULD BE REPORTING, AND IT CAUSED US GREAT ALARM.

Q. DID ANYONE REPORT TO YOU THAT BETWEEN THE SUMMER OF 1989 AND THE FALL OF 1989, OCTOBER 1989, THAT THERE HAD BEEN ANY CHANGE IN THE STATE LAW?
A. NO, SIR.
Q. DO YOU KNOW HOW YOU CAME TO GO TO THE SECOND MEETING, THE ONE THAT YOU DESCRIBE THAT YOU WENT TO?
A. NO, I DON'T. I - SOMEONE ASKED ME IF I WOULD MEET WITH A GROUP. THERE HAD BEEN NO OBSTETRICIANS INVOLVED IN THE

[HORGER 15]

FIRST MEETING AND BOTH DR. ROGER NEWMAN AND I WE'RE ASKED TO ATTEND THE SECOND MEETING.
Q. DO YOU RECALL WHO ELSE WAS IN ATTENDANCE?
A. AT THE SECOND MEETING?
Q. YES.
A. SOMEONE ELSE WAS CRITICIZED FOR GUESSING. MY THOUGHTS ARE, I DO RECALL THAT CAPTAIN ROBERTS WAS THERE. I RECALL THAT SHIRLEY BROWN WAS THERE. I THINK THAT CHARLES CONDON WAS THERE. THERE WAS MR. FRANK JOHNSON, WHO IS, DR. FRANK JOHNSON WHO IS THE DIRECTOR OF THE CHARLESTON COUNTY SUBSTANCE ABUSE. THERE WAS A NEONATOLOGIST DR. PITTARD WHO WAS THERE. I THINK A SECOND NEONATOLOGIST, DR. ADMIRAL LEFCOFF (PH.) WAS THERE.

BUT I'M REALLY PULLING FROM SEVEN YEARS AGO AND I'M NOT ABSOLUTELY CERTAIN OF WHO ELSE MAY HAVE BEEN.

Q. DO YOU RECALL IN THE MEETING THAT YOU ATTENDED WHETHER THIS MEETING TOOK PLACE BEFORE OR AFTER HURRICANE HUGO?

A. I HAVE NO KNOWLEDGE OF THAT WHATEVER.

Q. OKAY.

A. THE MEETING THAT I ATTENDED?

Q. YES.

A. IT HAD TO HAVE BEEN AFTER IN THAT IT WAS IN IT WAS NOT IN SEPTEMBER.

Q. BUT YOU DON'T HAVE ANY DOUBT THAT ALONG ABOUT OCTOBER OF 1989, AS A RESULT OF THE CONVERSATIONS THAT TOOK PLACE IN SOME MEETINGS, INCLUDING THE MEETING THAT YOU WERE INVOLVED IN, A

[HORGER 16]

WORKING OPERATION, A PROTOCOL WAS PUT INTO PLACE THAT INVOLVED NOT ONLY SCREENING AND TESTING, BUT ALSO REPORTING TO THE POLICE AND SOMETIMES ARREST; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. OKAY. AND AT THAT TIME THE TESTING PROTOCOL ACTUALLY EXPANDED FROM THE SIX SCREENING CRITERIA THAT YOU DESCRIBED WERE ADOPTED IN APRIL OF 1989?

A. NO, I BELIEVE THAT INITIALLY IN THIS OCTOBER 1989 TIME

WHEN WE FIRST INITIATED WHAT HAS COME TO BE KNOWN AS THE POLICY, WE USED THE SAME SIX PARAMETERS THAT WE HAD BEEN WORKING ON FOR SIX MONTHS. IT WAS SEVERAL MONTHS LATER THAT WE ADDED THREE TO IT.

Q. OKAY. AND HOW DID THAT COME ABOUT?

A. I THINK MORE EDUCATION ON OUR OWN PART THAT THERE WERE OTHER INDICATORS THAT MAY - MAY BE - MAY BE JUST AS ATTRIBUTABLE TO DRUG ABUSE, SUCH AS LATE PRENATAL CARE, NONCOMPLIANCE WITH PRENATAL CARE AND FETAL GROWTH - EXCUSE ME, FETAL ANOMALIES.

Q. BUT THE PROTOCOL DID CHANGE IN TERMS OF THE SCREENING CRITERIA, YOU ADDED MORE?

A. YES, ABSOLUTELY.

Q. OKAY. AND APPARENTLY BECAUSE OF THAT, THERE IS NO REAL WAY THAT YOU CAN REALLY COMPARE INFORMATION THAT WAS GAINED FROM OCTOBER OF 1988 ALL THE WAY THROUGH OCTOBER OF 1989 AND BEYOND. YOU CAN'T COMPARE THEM BECAUSE WE'RE TESTING FOR

[HORGER 17]

DIFFERENT THINGS; ISN'T THAT FAIR?

A. I'M NOT SURE THAT WAS A COMPLETE STATEMENT. I FEEL HAVING ADDED MORE INDICATORS, I WOULD EXPECT - CAN WE COMPARE

THEM? WE DON'T HAVE QUITE THE SAME GROUP, BUT WE CERTAINLY WOULD HAVE EXPECTED TO PICK UP MORE POSITIVE SCREENS BY EXPANDING OUR INDICATOR LIST.

Q. RIGHT. SO THAT IF ONE MONTH THE LIST ONLY HAD SIX CRITERIA?

A. RIGHT.

Q. AND YOU GOT, I'M JUST GIVING YOU AN EXAMPLE, YOU GOT TEN POSITIVE DRUG SCREENS FROM USING SIX CRITERIA, IF THE NEXT MONTH YOU USED NINE CRITERIA, AREN'T YOU GOING TO EXPECT TO GET MORE POSITIVE DRUG SCREENS?

A. YES, I WOULD HAVE EXPECTED SO.

Q. AND THAT HAD ALSO HAPPENED IN THE MONTHS IMMEDIATELY PRIOR TO THE ADOPTION OF THE INTERAGENCY POLICY. YOU ADDED MORE CRITERIA?

A. I DON'T THINK THAT'S CORRECT. THE SIX CRITERIA ARE INDICATORS THAT WE USED FROM PROBABLY A FULL YEAR. IF WE SAY THAT THE PROTOCOL, THE POLICY WAS INITIATED IN NOVEMBER OF 1989, THE OTHER THREE CRITERIA WERE ADDED SEVERAL MONTHS LATER AS I RECALL.

Q. BUT, MY QUESTION MAY NOT HAVE BEEN CLEAR, DR. HORGER. BUT IN THE TIME PERIOD IMMEDIATELY BEFORE THE INTERAGENCY POLICY WAS ADOPTED, THAT'S THE ONLY TIME PERIOD WHEN THERE WAS

A PROTOCOL IN PLACE FOR SCREENING FOR COCAINE?
A. FOR SIX MONTHS PRIOR.
Q. SIX MONTHS PRIOR TO THAT?
A. THAT'S CORRECT.
Q. SIX MONTHS PRIOR TO IT YOU FOUND IT?
A. YES.
Q. AND THEN IN OCTOBER OF 1989 YOU DECIDED THAT YOU HAD TO DO SOMETHING MORE; IS THAT FAIR?
A. THAT'S CORRECT.
Q. AND YOU'VE ALSO CLAIMED THAT ONE OF THE REASONS THAT THE POLICY NEEDED TO BE PUT IN PLACE IS BECAUSE PATIENTS WERE BEING REFERRED VOLUNTARILY TO SUBSTANCE ABUSE TREATMENT. WOMEN WHO TESTED POSITIVE FOR COCAINE DURING THEIR PREGNANCIES OR AT THE TIME A CHILD WAS BORN WERE BEING REFERRED, BUT THEY DIDN'T GO?
A. PRIOR TO THE TIME THAT WE USED THE - THAT WE INITIATED THE POLICY USING THE SOLICITOR'S OFFICE AND THE CHARLESTON CITY POLICE, WE NEVER HAD - WE - NEVER IS A TERRIBLE WORD, BUT IT WAS EXTREMELY DIFFICULT TO GET COMPLIANCE FROM ANYONE SAYING YOU HAVE GOT A PROBLEM, WHY DON'T WE GO TO SUBSTANCE ABUSE COUNSELING. NO ONE WOULD GO.
Q. AND YOUR BASIS FOR THAT INFORMATION IS FROM SHIRLEY BROWN?
A. THAT'S CORRECT.

Q. AND AS YOU UNDERSTOOD IT, THE PERSON IN THE MONTHS PRIOR

[HORGER 19]

TO THE ADOPTION OF THE INTERAGENCY POLICY WHO WAS THE PERSON WHO WAS MAKING THE REFERRALS AND ATTEMPTING TO GET THE WOMEN TO GO TO TREATMENT WAS SHIRLEY BROWN?

A. I DON'T THINK IT WAS SOLELY SHIRLEY BROWN. SHIRLEY WORKED IN THE CAPACITY AS A CASE MANAGER FOR THE HOSPITAL, AND I BELIEVE UNDER THE DIRECTION OF MYSELF, WHO WAS CHIEF OF OBSTETRICS AT THE TIME. SO, THESE PROBABLY - PARDON ME. THESE CHANNEL FROM THE DECISIONS MADE BY THE PHYSICIANS TO HAVE SHIRLEY INSTRUCT THIS PATIENT TO GET COUNSELING.

Q. BUT THE QUESTION I ASKED IS THAT AT LEAST PRIMARILY SHIRLEY BROWN WAS THE PERSON WHO WAS TRYING TO GET - TRYING VERY HARD TO GET THESE WOMEN TO GO INTO TREATMENT?

A. I THINK THAT WOULD BE PRIMARILY SHIRLEY BROWN'S DISCUSSION WITH PATIENTS.

Q. AND IT WAS SHIRLEY BROWN WHO WAS TELLING YOU THAT THEY DIDN'T GO?

A. THAT'S CORRECT.

Q. DO YOU KNOW OF ANY FOLLOW-UP PROTOCOL THAT WAS IN PLACE

PRIOR TO THE INITIATION OF THE INTERAGENCY POLICY WITH ANY SUBSTANCE ABUSE PROVIDER TO REPORT BACK TO THE MEDICAL UNIVERSITY AS TO WHETHER ANY OF THESE PATIENTS HAD IN FACT FOLLOWED THROUGH?

A. NO, I DO NOT HAVE SUCH A PROTOCOL IN PLACE. WE DO KNOW THAT OF THOSE THAT WERE REFERRED FOR PRENATAL CARE, WHICH WAS NOT A HUGE, LARGE NUMBER OF PATIENTS, BECAUSE MOST OF THEM

[HORGER 20]

DELIVERED BEFORE WE EVER FOUND THE FIRST COCAINE POSITIVE OR WHATEVER POSITIVE, OF THOSE REFERRED FOR PRENATAL CARE, WE KNOW WE DID NOT SEE THOSE IN PRENATAL CLINICS. THE NEXT TIME WE SAW THEM WAS WHEN THEY CAME INTO THE HOSPITAL - CAME BACK INTO THE HOSPITAL FOR DELIVERY. SO I KNOW THAT THEY HAD NOT KEPT PRENATAL CARE APPOINTMENTS.

Q. BUT I WASN'T ASKING ABOUT PRENATAL CARE.

A. OKAY.

Q. I WAS ASKING ABOUT SUBSTANCE ABUSE?

A. I BEG YOUR PARDON.

Q. IT'S BEEN REPORTED THAT ONE OF THE REAL BASIS FOR THE NEED OF THIS POLICY IS BECAUSE PEOPLE WOULDN'T GO WHEN THEY WERE ASKED TO GO AND SOMETHING ELSE HAD TO BE DONE?

A. ALL RIGHT.
Q. AND WAS THERE ANY MECHANISM IN PLACE TO EVEN KNOW WHETHER WOMEN WERE NOT GOING?
A. THERE WAS NO WRITTEN MECHANISM TO HAVE SUBSTANCE ABUSE CALLING TO TELL THEM WHETHER OR NOT THE PATIENT HAD SHOWN UP.
Q. DURING THE TIME PERIOD FROM APRIL OF 1989 THROUGH OCTOBER - APRIL OF 1989 THROUGH OCTOBER OF 1989, WAS THERE ANYONE IN YOUR DEPARTMENT WHO WORKED ON SITE IN THE DEPARTMENT WHO HAD ANY SPECIFIC SUBSTANCE ABUSE COUNSELING TRAINING?
A. NOT TO MY KNOWLEDGE.
Q. WERE THERE PEOPLE WHO HAD SUBSTANCE ABUSE COUNSELING TRAINING AVAILABLE TO YOUR DEPARTMENT WITHIN THE MEDICAL

[HORGER 21]

UNIVERSITY?
A. THERE WERE WITHIN THE DEPARTMENT OF PSYCHIATRY. OR AT LEAST ONE WITH WHOM WE DISCUSSED THIS ON A NUMBER OF OCCASIONS AND ONE WITHIN THE CHARLESTON COUNTY SUBSTANCE ABUSE WITH WHOM I TALKED TO THEM MORE THAN ONE OCCASION.
Q. BUT NONE OF THE CASE MANAGERS WHO WORK?
A. NO.
Q. HAD ANY SUBSTANCE ABUSE TRAINING THAT YOU KNEW OF?
A. NO.

Q. OKAY. AND YOU DON'T CLAIM TO HAVE ANY SPECIALTY IN SUBSTANCE ABUSE?
A. NO, I HAVE NO SPECIALTY IN SUBSTANCE ABUSE.
Q. OKAY. IS THERE ANYONE - WAS THERE ANYONE IN OCTOBER OF 1989, OR THE MONTHS PRIOR TO THAT, AT THE MEDICAL UNIVERSITY IN YOUR DEPARTMENT WHO HAD ANY SPECIFIC SPECIALTY IN THE OVERLAP OF PRENATAL CARE AND SUBSTANCE ABUSE?
A. I DON'T THINK SO.
Q. DR. HORGER, YOU HAD AN OCCASION WITH SHIRLEY BROWN AND CHARLIE CONDON TO REPORT ON THE INTERAGENCY POLICY IN A JOURNAL ARTICLE; IS THAT CORRECT?
A. THAT'S CORRECT.
Q. AND IN THAT REPORT YOU CLAIMED THAT YOU WERE PRESENTING THIS REPORT TO SUPPORT A COMBINED MEDICAL/LEGAL, APPROACH TO THE COCAINE PROBLEM?
A. THAT'S CORRECT.

[HORGER 22]

Q. IN THAT REPORT YOU REPORT THAT SHIRLEY BROWN ACTUALLY COUNSELED EACH ONE OF THE PATIENTS THAT WERE SEEN BEFORE THE POLICY WHO DIDN'T GO TO SUBSTANCE ABUSE, THAT SHE WAS THE ONE THAT DID THE COUNSELING?
A. ALL RIGHT.
Q. I MEAN, DID YOU?
A. I -

Q. WOULD YOU LIKE TO LOOK AT IT?
A. IF THAT'S WHAT IT SAYS, I WILL ACCEPT THAT. I THINK THAT HER COUNSELING WAS FROM AN EDUCATIONAL STANDPOINT. YOU NEED TO BE FREE OF - FREE OF ILLICIT DRUGS.
Q. IN EVALUATING WHAT WAS KNOWN ABOUT THE COCAINE USE IN THE POPULATION THAT YOU SERVED, PRIOR TO OCTOBER OF 1989, WERE THERE ANY QUESTIONS RAISED ABOUT WHETHER IN FACT THERE WAS SOME OTHER REASONS WHY THE PATIENTS MIGHT NOT BE FOLLOWING UP ON REFERRALS OTHER THAN THEIR OWN WILLINGNESS TO DO IT?
A. NO.
Q. DID - WAS THERE ANY CONSULTATION ABOUT HOW A REFERRAL OUGHT TO BE MADE TO SUBSTANCE ABUSE?
A. OH, I CERTAINLY UNDERSTAND THAT REFERRAL IS MADE TO SUBSTANCE ABUSE BY CALLING SUBSTANCE ABUSE AND MAKING THE APPOINTMENT FOR THEM.
Q. BUT WAS THERE ANY - THERE WASN'T - YOU DIDN'T ASK ANYONE, YOU DIDN'T ASK ANYONE WHAT REALLY NEEDED TO HAPPEN TO HAVE A SUCCESSFUL SUBSTANCE ABUSE REFERRAL, DID YOU?

[HORGER 23]

A. NO, I DIDN'T FEEL THAT WE WERE IN THE POSITION TO TAKE THE COUNSELING ASPECT OF IT. OUR OUTLOOK FOR SOMEONE GOING TO

SUBSTANCE ABUSE WAS FOR THE DETERMINATION OF WHETHER OR NOT THIS PATIENT HAS AN ABUSE PROBLEM, IS A ONETIME RECREATIONAL USER OF WHATEVER DRUG, I FELT THAT THIS WAS UP TO THE ADDICTION ANALYST OR THE SUBSTANCE ABUSE COUNSELORS WHO WERE AVAILABLE.

Q. BUT DIDN'T YOU MAKE THE DETERMINATION IN OCTOBER OF 1989 THAT YOUR DEPARTMENT JUST COULDN'T IGNORE THIS PROBLEM ANYMORE AND THAT YOU HAD TO DO MORE, YOU HAD TO GET INVOLVED IN SUBSTANCE ABUSE?

A. AGREED.

Q. THAT YOU JUST COULDN'T AVOID IT? YOU COULDN'T DO YOUR JOB RIGHT WITHOUT DOING IT?

A. ALL RIGHT.

Q. AT THAT TIME DID - DID YOU CONTACT ANYONE OUTSIDE OF THE CHARLESTON COMMUNITY TO FIND OUT WHAT MIGHT HAVE BEEN SUCCESSFUL IN SIMILAR CIRCUMSTANCES?

A. OUTSIDE OF THE CHARLESTON COMMUNITY?

Q. YES.

A. NO, WE DID NOT.

Q. DID YOU CONSULT ANY NATIONAL GROUPS THAT MIGHT HAVE POLICIES THAT COULD HAVE HELPED YOU IN DETERMINING WHAT WOULD BE USEFUL?

A. IN TERMS OF CONTACTING TO ASK FOR POLICIES, NO. IN TERMS

OF READING WHAT HAD BEEN REPORTED, YES. AND UNFORTUNATELY TO A LARGE EXTENT IT APPEARED INVARIABLY TO BE NOT TOTALLY SUCCESSFUL. PEOPLE WERE TALKING ABOUT THE PROBLEM ALL OVER THE COUNTRY, WE HAVE GOT A PROBLEM, COCAINE IS A CRISIS, WE HAVE GOT TO DO SOMETHING ABOUT IT. WE NEED TO COUNSEL OUR PATIENTS. WE NEED TO EDUCATE OUR PATIENTS. WE NEED TO KNOW. MY FIRM BELIEF WAS NO ONE WAS REALLY DOING ANYTHING ABOUT IT. WE WERE DOING A LOT OF TALKING ABOUT IT WITHOUT GETTING ANYWHERE.

Q. BUT YOU COULDN'T FIND ANYPLACE THAT WAS REPORTING SUCCESS THAT HAD BEEN STUDIED OVER A PERIOD OF TIME?

A. COULD I FIND SUCCESS OVER A PERIOD OF TIME? YES, I THINK WE COULD FIND SOME SUCCESS OVER A PERIOD OF TIME. FOR THE MOST PART WHAT WE WOULD FIND IS THAT SOMEONE HAD THE RESOURCES, THE FINANCE, THE PERSONNEL TO UNDERTAKE PROLONGED COUNSELING, AS WITH ANY OTHER SUBSTANCE ABUSE PROBLEM. AND WE FELT WITHIN OBSTETRICS THAT WE WERE DEALING IN A VERY FINITE PERIOD, THAT COCAINE WAS WRECKING PREGNANCIES AND WE NEEDED TO GET SOMETHING DONE ABOUT IT. WE WERE TRYING HARD TO GET THESE

PEOPLE WHO WERE USING ILLICIT DRUGS AWAY FROM THEIR ILLICIT DRUGS.

Q. AT THE TIME THAT THE INTERAGENCY POLICY WAS ADOPTED, YOU DID NOT CONTACT DR. HULSEY AND ASK HIM TO HELP DESIGN ANY KIND OF RESEARCH PROTOCOL TO FIND OUT IF COCAINE WAS CAUSING ANY OF THE PROBLEMS THAT HAD BEEN PERCEIVED ON A CLINICAL BASIS, DID

[HORGER 25]

YOU?

A. NO, WE DID NOT.

Q. PRIOR TO THE INITIATION OF THE INTERAGENCY POLICY, THERE WAS NO DATA COLLECTED ASSOCIATED WITH NEWBORNS EXPOSED TO PRENATAL COCAINE, WAS THERE?

A. NO DATA COLLECTED?

Q. YES.

A. AS A MATTER OF FACT, IT IS MY BELIEF THAT SOME OF OUR EARLIEST MEETINGS OCCURRED AS A RESULT OF THE NEONATOLOGIST NOTING AN INCREASE IN PROBLEM WITH THE NEWBORNS. IN TERMS OF DATA COLLECTING FROM A LONG-TERM FOLLOW UP, NO, THERE WASN'T. IN TERMS OF THE NEONATOLOGIST TELLING US WE'RE GIVING THEM MORE AND MORE BABIES THAT ARE EXTREMELY PREMATURE, MANY OF WHOM SHOW THE SOMEWHAT VAGUE WITHDRAWAL-TYPE SYMPTOMATOLOGY THAT ONE MIGHT EXPECT FROM COCAINE, THIS WAS VERY REAL TO THE

NEONATOLOGIST TO DR. PITTARD AND DR. LEFCOFF.
Q. BUT -
A. BUT THERE WAS NO LONG-TERM FOLLOW-UP OF THESE INCIDENTS.
Q. AND THERE WASN'T ANY PARTICULAR DATA? THERE WERE CLINICAL REPORTS, BUT THERE WASN'T HARD DATA?
A. THAT'S CORRECT.
Q. IN THE TIME PERIOD IMMEDIATELY PRIOR TO THE ADOPTION OF THE INTERAGENCY POLICY, I BELIEVE THAT YOU HAVE ALREADY ALLUDED TO THE FACT THAT MOST OF WOMEN WHO WERE IDENTIFIED AS TESTING POSITIVE FOR COCAINE TESTED AT THE TIME OF DELIVERY?

[HORGER 26]

A. THAT'S CORRECT.
Q. AND SOMETIMES THE TEST RESULTS MIGHT NOT HAVE EVEN BEEN BACK BEFORE THEY WERE DISCHARGED FROM THE HOSPITAL; ISN'T THAT POSSIBLE?
A. I WOULD NOT DENY THAT SOMETIMES IT MAY HAVE BEEN POSSIBLE, BUT I THINK THE LIKELIHOOD WOULD HAVE BEEN VERY LOW. I THINK THAT THE DRUG SCREEN WOULD HAVE BEEN REPORTED IN THE GREAT, GREAT MAJORITY OF PATIENTS BEFORE DISCHARGE FROM THE HOSPITAL, POSITIVE OR NEGATIVE.
Q. DR. HORGER, AT THE TIME POINT AT WHICH THE PHYSICIAN

FOUND OUT THAT A PATIENT TESTED POSITIVE FOR COCAINE WAS AFTER A CHILD WAS BORN, WHAT IMPACT CAN THAT POSSIBLY HAVE ON THE PRENATAL CARE THAT'S GOING TO LEAD UP TO THE BIRTH OF A CHILD?

A. ON THE PRENATAL CARE IT WOULD HAVE NO IMPACT ON THAT PREGNANCY. ON SUBSEQUENT PREGNANCIES I THINK IT MAY WELL HAVE HAD AN IMPACT ON IT. I WOULD LIKE TO THINK IT HAD AN IMPACT ON IT, ALTHOUGH UNFORTUNATELY WE RECOGNIZE THAT SOME PATIENTS HAVE TESTED POSITIVE IN SUCCESSIVE PREGNANCIES. FROM THE STANDPOINT - MAY I EXPLAIN FROM A STANDPOINT OF THE NEONATE, I THINK IT MAY HAVE CONSIDERABLE VALUE.

Q. DID THE INTERAGENCY POLICY IN OCTOBER OF 1989 ESTABLISH ANY FOLLOW-UP FOR THE NEONATES?

A. DID THE INTERAGENCY POLICY ESTABLISH A FOLLOW-UP? NO, IT DID NOT BECAUSE THE PATIENT WAS ALSO, THE CASE WAS ALSO

[HORGER 27]

REFERRED TO THE DEPARTMENT OF SOCIAL SERVICES, WHO DID THEN THE FOLLOW-UP.

Q. BUT WAS THERE AT THIS SPECIAL PROGRAM PUT IN PLACE AT THE MEDICAL UNIVERSITY TO FOLLOW UP ON INFANTS WHO MIGHT HAVE BEEN

EXPOSED TO COCAINE DURING THEIR MOTHER'S PREGNANCY?
A. IF THERE WERE, MS. DUNN, IT WAS DONE BY THE NEONATOLOGISTS AND NOT BY OBSTETRICIANS. I DO NOT KNOW THE ANSWER.
Q. AND THE INITIAL CRITERIA THAT WERE ESTABLISHED AS PART OF THE INTERAGENCY POLICY WERE CRITERIA ONLY FOR TESTING MOTHERS; THAT'S CORRECT, ISN'T IT?
A. THE INITIAL CRITERIA WERE FOR MOTHERS ONLY.
Q. DR. HORGER, AFTER THE INTERAGENCY POLICY WAS PUT IN PLACE, WERE THERE ANY REGULAR MEETINGS SET IN PLACE AT THE MEDICAL UNIVERSITY TO EVALUATE HOW THIS POLICY WAS DOING?
A. YES. WE HAD REGULAR MEETINGS FOR AT LEAST THE FIRST SOME MONTHS AFTER THE POLICY WAS SET IN PLACE, AS I RECALL, ON A MONTHLY BASIS IN TERMS OF HOW WAS THIS GOING. THIS WAS A MORE OF A LOGISTIC CHECK THAN ANYTHING INITIALLY. IT ULTIMATELY LED TO SOME CHANGE IN THE POLICY SUCH AS ADDING THE OTHER THREE INDICATORS. IT ULTIMATELY LED TO SOME CHANGE IN THE, WHAT I HAVE HEARD REFERRED TO TODAY AS THE AMNESTY CHANGE IN THE POLICY TO AVOID ARRESTS IMMEDIATELY AFTER CHILDBIRTH. THIS WAS - THESE THINGS RESULTED FROM OUR REGULAR MEETINGS TO DISCUSS THE POLICY.

[HORGER 28]

Q. AND AMNESTY IS A TERM THAT WAS NEVER USED IN ANY OF THE INITIAL MEETINGS CONCERNING THE POLICY, WAS IT?
A. NOT TO MY KNOWLEDGE.
Q. AND THAT WAS SOME NEW SPIN ON THE POLICY AND HOW THEY WERE GOING TO TALK ABOUT IT?
A. I WOULD LIKE TO POINT OUT THAT I LEFT THE MEDICAL UNIVERSITY HOSPITAL SOME MONTHS AFTER THE PROGRAM WAS BEGUN AND I - I SUSPECTED AFTER HEARING HEARD WHAT I DID TODAY THAT IT CAME TO BE KNOWN AS AN AMNESTY THING.
Q. YOU WERE AWARE THAT IN THE EARLY MONTHS OF THE POLICY WOMEN WERE ARRESTED STRAIGHT FROM THE MEDICAL UNIVERSITY?
A. YES.
Q. UPON HAVING TESTED ONE TIME?
A. YES, I WAS AWARE OF THAT.
Q. THOSE WOMEN WEREN'T GIVEN ANY OPPORTUNITIES FOR EDUCATION, WERE THEY?
A. IF THEY HAD - IF THEY HAD PRENATAL CARE, YES, THEY WERE GIVEN AN OPPORTUNITY FOR EDUCATIONAL TESTING. IF THEY WATCHED TELEVISION, THEY WERE GIVEN AN OPPORTUNITY FOR EDUCATIONAL. THIS - WHEN THIS GOT STARTED, IT - IT, AS I RECALL, IT WAS ALL OVER THE MEDIA. IN ADDITION, EVERY PATIENT WHO CAME TO

OUR PRENATAL CLINICS WAS SHOWN THE MOVIE, WAS SHOWN THE LETTER ABOUT HARM TO THE BABY, TO THE FETUS. THIS WAS AN EFFORT IN EDUCATION RIGHT UP FRONT, LET'S HIT THEM WITH HARD NEWS, THIS IS WHAT COCAINE OR WHATEVER DRUG MAY BE CAUSING.

[HORGER 29]

Q. SO YOU WANTED THIS TO HAVE A LOT OF ATTENTION? YOU WANTED TO BRING ATTENTION -

A. WE WANTED TO TRY TO STOP THE USE OF COCAINE AMONG THE OBSTETRIC POPULATION. AND I WISH TO GOODNESS WE COULD STOP IT AMONG EVERYBODY.

Q. YOU KNEW YOUR PATIENTS WERE HAVING THEIR NAMES IN THE PAPER FROM HAVING BEEN ARRESTED RIGHT FROM YOUR HOSPITAL?

A. I DO RECALL THAT SOME NAMES WERE IN THE PAPER.

Q. WERE YOU AT ALL CONCERNED AS A PHYSICIAN IN TERMS OF THE EFFECT ON THESE PATIENTS' MEDICAL CARE TO BE TAKEN IMMEDIATELY FROM THE HOSPITAL TO THE JAIL?

A. I DON'T THINK THAT A PATIENT WOULD HAVE BEEN DISCHARGED FROM THE HOSPITAL HAD SHE NOT BEEN ABLE TO BE DISCHARGED FROM THE HOSPITAL. WAS I CONCERNED ABOUT THEM BEING TAKEN IMMEDIATELY TO JAIL? WITH SOME OF THE THINGS THAT I HAVE

HEARD THAT WERE PAINTED FROM THE STAND HERE EARLIER, THEY DID SOUND UNFORTUNATE. I WISHED THEY HAD NOT BEEN DONE, IF THEY WERE INDEED DONE.

Q. DID ANYBODY IN THE PROCESS -

MR. HOOD: HE IS IN THE MIDDLE OF ANSWERING THE QUESTION.

THE COURT: LET HIM ANSWER THE QUESTION.

A. I SAID, IF THEY WERE INDEED HANDLED THAT WAY. NO PATIENT WAS DISCHARGED FROM THE HOSPITAL PRIOR TO A MEDICAL - I LOST MY WORD, ACCEPTABILITY FOR DISCHARGE. SHE WAS READY FOR

[HORGER 30]

DISCHARGE. KEEP IN MIND THAT PATIENTS CAN BE DISCHARGED FROM THE HOSPITAL EASILY WITHIN 48 HOURS, AT LEAST SO WHAT THE GOVERNMENT SAYS NOW. AND PERHAPS EVEN 24 HOURS IN MANY CASES. EVERY PATIENT WAS READY FOR HOSPITAL DISCHARGE.

Q. BUT DID ANYBODY IN THE FORMULATING - IN THE INITIAL MEETINGS FORMULATING THE POLICY, EVER GO AND LOOK AT WHAT WAS AVAILABLE AT THE JAIL AND WHAT THESE WOMEN WERE SENT TO?

A. TO MY KNOWLEDGE NONE OF THE PHYSICIANS WENT TO STUDY THE JAIL. WE WERE TOLD THAT, YES, WE CAN TAKE CARE OF IT, WE HAVE

THE CAPABILITY, WE HAVE THE FACILITY. WE DID NOT EXPECT THERE TO BE A GREAT NEED FOR CONTINUED NURSING CARE. JUST AS WHEN MY WIFE GOES HOME AFTER DELIVERY THERE -- THERE ISN'T A NEED FOR CONTINUED NURSING CARE.

Q. BUT YOUR WIFE DIDN'T GO TO A JAIL?

A. NO. FORTUNATELY SHE DID NOT USE COCAINE.

Q. DR. HORGER, IN YOUR WORK, YOU HAVE OCCASION, DON'T YOU, TO DEAL WITH PATIENTS IN GENERAL WHO DON'T FOLLOW YOUR ADVICE AS A PHYSICIAN; IS THAT FAIR?

A. THAT IS UNFORTUNATELY TRUE.

Q. I'M SURE THAT YOU TELL MANY A PATIENT, STOP SMOKING AND SHE DOESN'T STOP. YOU TELL HER TO STOP DRINKING AND SHE DOESN'T STOP DRINKING.

A. THIS IS TRUE.

Q. IT'S SOMETIMES YOU TELL, JUST STOP RIGHT NOW, GO COLD TURKEY, DON'T USE IT ANYMORE, IS THAT FAIR?

[HORGER 31]

A. YES.

Q. BUT HAVEN'T YOU FOUND PATIENTS THAT HAVE FOUND THAT REALLY VERY, VERY DIFFICULT TO DO, TO STOP AN ADDICTIVE BEHAVIOR JUST BECAUSE YOU TOLD THEM TO?

A. I BELIEVE THAT YOU'RE CORRECT.

Q. AND YOU HAVE OFTEN, WITH WORKING WITH THOSE PATIENTS, YOU

HAVE TO WORK OUT A WAY TO GET THEM TO CUT DOWN, AT LEAST IF THEY COULDN'T STOP COMPLETELY?

A. TRUE.

Q. AND THEN PART OF YOUR RELATIONSHIP WITH THEM FROM DOCTOR TO PATIENT, YOU'RE DOING THE BEST YOU CAN WITH THE PATIENT YOU HAVE GOT TO WORK WITH; IS THAT FAIR?

A. THIS IS TRUE.

Q. AND THE BEST YOU CAN IN YOUR EXPERIENCE ACTUALLY DOES HAVE AN EFFECT ON THE FETAL - ON THE OUTCOME ON THE PREGNANCY?

A. HOPEFULLY WE ARE DOING SOME GOOD TOWARD GETTING PEOPLE AWAY FROM CIGARETTES AND ALCOHOL AND OTHER BAD THINGS TO USE DURING PREGNANCY. I THINK THAT MOST OF WHAT YOU'RE REFERRING TO THOUGH, PARTICULARLY THE CIGARETTES AND ALCOHOL APPEAR TO BE DOSE RELATED TO A MUCH GREATER EXTENT THAN THE THINGS THAT WE HAVE TALKED ABOUT SO MUCH HERE TODAY, AND FOR THE LAST TWO WEEKS, COCAINE. I AM UNAWARE OF ANY EVIDENCE THAT A SINGLE DRINK OR A SINGLE CIGARETTE CAUSES ANY HARM TO ANY RESEARCH ANIMAL OR HUMAN BEING. A SINGLE COCAINE DOSE DOES.

[HORGER 32]

Q. DR. HORGER, THAT'S NOT THE QUESTION THAT I ASKED YOU. I

WAS ASKING YOU SPECIFICALLY IN TERMS OF WHAT YOU DO TO GET A PATIENT TO -

A. WE DO OUR BEST TO GET THEM TO GET AWAY FROM CIGARETTES.

Q. AND IF YOU HAVE A SITUATION WHERE YOU HAVE PATIENTS WHO NEED SOME KIND OF MEDICAL CARE, SAY YOU HAVE GOT A PATIENT WHO YOU BELIEVE SHOULD HAVE A C-SECTION, YOU HAVE A PATIENT WHO WON'T HAVE IT, REFUSES TO CONSENT TO YOU DOING A C-SECTION, YOU CAN - YOU CAN GO TO COURT AND GET THE COURT TO SAY THAT THAT PATIENT MUST DO WHAT YOU SAY, EVEN IF THE PATIENT REFUSES; ISN'T THAT TRUE?

A. I SUPPOSE YOU CAN DO SO. WOULD I DO SO? PROBABLY NOT.

Q. WOULD YOU THEN JUST LIVE WITH THE CLIENT'S DECISION?

A. DEPENDS ON WHAT THE DECISION - WHAT HER DECISION IS BASED ON AND WHAT MY THOUGHT IS AS TO WHY SHE SHOULD HAVE A CESARIAN.

Q. IF YOU HAD A PATIENT WHO YOU WERE PRESENTING IN PRENATAL CARE WHO WAS SERIOUSLY SUICIDAL, YOU KNEW THAT THE AVAILABILITY OF COMMITMENT WAS THERE FOR YOU TO HELP PROTECT HER FROM HARMING HERSELF, DON'T YOU? THAT WAS AVAILABLE?

A. DO I KNOW THAT THAT IS AVAILABLE?

Q. YES.

A. YES, I'M AWARE THAT IS AVAILABLE.

Q. AND YOU KNEW THAT WAS AVAILABLE IN THE FALL OF 1989?
A. YES.

[HORGER 33]

Q. DR. HORGER, EVEN THOUGH YOU HAVE STATED TODAY ON THE STAND THAT YOU BELIEVE THAT A SINGLE DOSE OF COCAINE CAN HAVE BAD EFFECTS ON PREGNANCY.
A. ALL RIGHT.
Q. THERE IS NO SCIENTIFIC STUDY THAT VALIDATES THAT, IS THERE?
A. THERE ARE QUITE A FEW PAPERS IN THE WELL RESPECTED MEDICAL LITERATURE THAT SAY THAT AFTER A SINGLE DOSE OF COCAINE THIS PATIENT HAD AN ABRUPTIO PLACENTA. IN ONE OF DR. CHASNOFF'S PAPERS PUBLISHED IN '86 HE SAYS AFTER A SINGLE DOSE OF COCAINE THIS PATIENT HAD A FETUS WITH PERINATAL CEREBRAL INFARCTION. THERE ARE A NUMBER OF PAPERS THAT SAY THIS WAS A SINGLE DOSE ISSUE IN THIS PARTICULAR TRAGEDY.
Q. THOSE WERE - THOSE WERE REPORTS WITHIN ARTICLES, THEY WERE NOT STUDIES THAT ESTABLISH, ON A DEFINITIVE BASIS, THAT THAT WAS REALLY THE CAUSE OF THE PROBLEM?
A. N0. THAT WAS NOT A RESEARCH STUDY THAT REPORTED, HERE, SMOKE THIS ROCK AND LET'S SEE WHAT HAPPENS, NO.

Q. IN FACT, IT'S SOMETHING THAT WOULD BE VERY, VERY DIFFICULT TO HAVE GOOD CLINICAL DATA ON, ISN'T IT?
A. I DON'T THINK ANYONE IS GOING TO EVER DO SUCH A RESEARCH PROJECT.
Q. AND TO BE ABLE TO VALIDATE THAT A SINGLE DOSE CAUSED THE PROBLEM, YOU'RE GOING TO HAVE TO BE ABLE TO TRUST THE CLIENT HAS REPORTED TO YOU ACCURATELY?

[HORGER 34]

A. OH, ABSOLUTELY. WE HAVE TO TRUST WHAT SHE SAYS, SHE USED A SINGLE USE OF CRACK ONE TIME IN THE ENTIRE - THE ENTIRE LIFE. DO WE ACCEPT THAT? UNFORTUNATELY AS WE LEARN MORE AND MORE ABOUT WHAT GOES ON WITH THE USE OF CRACK, I THINK IT LESS LIKELY TO REALLY BELIEVE IT. BUT IT'S ALL YOU HAVE GOT TO GO ON. IT'S WHAT ALL OF THESE AUTHORS HAD TO GO ON WHEN THEY REPORTED THIS AS BEING A SINGLE USE. FROM AN EXPERIMENTAL ANIMAL STANDPOINT, A PAPER BY WOOD, IN THE JAMA BACK IN, I'M GUESSING ABOUT 1987, DEALING WITH EXPERIMENTAL ANIMALS, SHOWED THAT A SINGLE INTRAVENOUS INOCULATION INJECTION IN EXPERIMENTAL ANIMALS CAUSED SUCH AND SUCH A PROBLEM. A PAPER BY TOM MOORE IN ROUGHLY 1989 IN THE

AMERICAN JOURNAL OF OB/GYN, EXPERIMENTAL ANIMALS SHOWED THAT A SINGLE USE OF COCAINE COULD CAUSE HORRENDOUS PROBLEMS GENERALLY IN TERMS OF THE BASAL CONSTRICTION ASPECT THAT DR. NEWMAN TALKED ABOUT.

Q. BUT AGAIN -

A. BUT IN HUMANS, NO ONE CAN DO SUCH AN EXPERIMENT.

Q. AND THE DATA HAS NOT BEEN COLLECTED TO VALIDATE THAT?

A. THAT'S CORRECT.

Q. DURING THE TIME PERIOD THAT YOU WORKED AT THE MEDICAL UNIVERSITY, DID YOU HAVE OCCASION TO TREAT PATIENTS WHO TESTED POSITIVE FOR THINGS OTHER THAN COCAINE?

A. DID WE HAVE OCCASION TO TREAT PATIENTS?

Q. YES.

[HORGER 35]

A. I WOULDN'T SAY THAT WE WERE TREATING - PROBABLY UNFORTUNATELY WE WERE NOT TREATING THE PATIENT WHO WAS POSITIVE FOR SUCH AND SUCH FOR THE SUBSTANCE ABUSE ITSELF. IN TERMS OF TREATING THE OBSTETRIC ASPECT OF THE PATIENT WHO HAD A POSITIVE FOR MARIJUANA OR FOR OPIATES, YES.

Q. YOU TREATED THOSE WHEN YOU WORKED AT THE MEDICAL UNIVERSITY?

A. WE SAW THOSE PATIENTS AND MANAGED THEIR PREGNANCIES JUST AS WE WOULD MANAGE ANY OTHER PREGNANCY.
Q. AND WHAT WERE EXAMPLES OF OTHER KIND OF DRUGS THAT YOU SAW IN THE POPULATION?
A. WE HAVE SEEN POSITIVE CANNABINOIDS, WHICH RELATES TO MARIJUANA. WE HAVE SEEN POSITIVE OPIATES, WHICH RELATES TO HEROIN. WE HAVE SEEN POSITIVE BARBITURATE SCREENS, WHICH RELATES TO, I DON'T KNOW WHAT THEY - I DON'T KNOW WHAT WOULD HAVE BEEN TAKEN, SECONAL, FOR INSTANCE. I THINK I HAVE SEEN POSITIVE AMPHETAMINES COME BACK ON SCREENS.
Q. DR. HORGER, YOU'RE AT RICHLAND MEMORIAL HOSPITAL IN COLUMBIA RIGHT NOW?
A. THAT'S CORRECT.
Q. HOW LONG HAVE YOU BEEN THERE?
A. SIX AND A HALF YEARS.
Q. THERE IS NO POLICY IN PLACE THAT USES THE THREAT OF ARREST OR ARREST FOR WOMEN WHO TEST POSITIVE FOR COCAINE AT THAT HOSPITAL, IS THERE?

[HORGER 36]

A. NO, THERE ISN'T.
Q. DR. HORGER, WHEN YOU WROTE YOUR ARTICLE WITH SHIRLEY BROWN AND CHARLES CONDON, THAT ARTICLE PURPORTED TO REPORT THE

SUCCESS OF THIS POLICY; IS THAT CORRECT?
A. I THINK IT - WHAT I TRIED TO SHOW THERE WAS THAT BY UNDERTAKING A MORE AGGRESSIVE APPROACH WE ULTIMATELY LED TO FEWER POSITIVE DRUG SCREENS. IS THAT SUCCESS? THERE WAS NO PROTOCOL SET UP A YEAR EARLIER TO SAY AFTER SUCH AND SUCH A PERIOD OF TIME WE'RE GOING TO FIND OUT WHAT SUCCESS PARAMETERS WE CAN MEASURE. WE DID SHOW FEWER POSITIVE DRUG SCREENS AND FELT THAT - FELT THAT OUR POLICY, IN ADDITION TO - TO THE GREATER MEDIA ATTENTION TO THE DANGERS OF COCAINE, THAT IS A BETTER EDUCATIONAL APPROACH. AND IN ADDITION PERHAPS RELATED ALSO TO BETTER POLICE WORK TRYING TO CUT DOWN ON THE COCAINE AVAILABILITY IN OUR AREA, WE FELT THAT WE WERE GETTING SOMEWHERE.
Q. AS PART OF YOUR RESPONSIBILITY, AS THE HEAD OF THE DEPARTMENT, THE OB/GYN DEPARTMENT, WHEN YOU WERE THERE, DID YOU ACTUALLY OBSERVE SHIRLEY BROWN IN ANY OF THESE COUNSELING SESSIONS WITH WOMEN WHO TEST POSITIVE FOR COCAINE?
A. YES. LET ME - LET ME MAKE ONE CORRECTION. I WAS NOT THE HEAD OF THE DEPARTMENT OF OBSTETRICS AND GYNECOLOGY IN CHARLESTON, I WAS HEAD OF THE DIVISION WITHIN CHARLESTON.

Q. I'M SORRY.
A. YES, I DID OBSERVE SHIRLEY BROWN COUNSELING A PATIENT WHO

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[HORGER 38]

Q. YOU DIDN'T KNOW THAT THAT WAS THE KIND OF THING THAT SOME PEOPLE GET A LOT OF TRAINING IN IN ORDER TO MAKE IT WORK BECAUSE THEY WANT IT TO BE SUCCESSFUL?
A. I WAS AWARE THAT PEOPLE GET AN AWFUL LOT OF TRAINING IN SUBSTANCE ABUSE COUNSELING. IN TERMS OF THE WAY OUR CHARLESTON COUNTY SUBSTANCE ABUSE CLINIC WAS SET UP, TO MAKE AN APPOINTMENT WITH THEM WAS OUR - I FELT LIKE OUR ROLE, THAT THEY THEN WOULD UNDERTAKE THE COUNSELING SESSION.
Q. DO YOU THINK THAT WAS ALL YOU NEEDED TO DO WAS JUST MAKE AN APPOINTMENT?
A. PERHAPS I SHOULD APOLOGIZE, BUT TO MY KNOWLEDGE SIX AND A HALF YEARS LATER, THAT'S WHAT WE WERE DOING.
Q. AND IT'S YOUR BELIEF THAT AFTER THE POLICY WENT IN PLACE THAT THE NUMBERS WERE GOING DOWN IN TERMS OF POSITIVE DRUG SCREENS?
A. THAT'S CORRECT.
Q. WHEN I SAY POSITIVE DRUG SCREENS, IT'S DRUG SCREENS SPECIFICALLY FOR COCAINE, CORRECT?

A. THOSE WERE THE ONES THAT YOU REPORTED IN THE PAPER TO WHICH YOU REFER.
Q. AND WHO WAS THE PERSON WHO COLLECTED THE DATA?
A. SHIRLEY BROWN KEPT THAT DATA FOR ME.
Q. AND THAT DATA WASN'T IN THE PINS, IT WASN'T IN DR. HULSEY'S DATABASE, IT WAS ONLY SHIRLEY BROWN THAT COLLECTED THAT DATA?

[HORGER 39]

A. I TRULY DON'T KNOW WHETHER IT WAS IN DR. HULSEY'S DATABASE.
Q. AND YOU KNEW THAT SHIRLEY BROWN WAS THE PERSON AT THE MEDICAL UNIVERSITY WHO DEALT PRIMARILY WITH THE CITY POLICE WHEN THE POLICE WERE CALLED TO ARREST A PATIENT? YOU KNEW THAT?
A. YES.
Q. DID YOU IN ANY WAY SUPERVISE HOW IT WAS THAT SHE PROVIDED THAT INFORMATION?
A. TO THE CITY POLICE?
Q. YES.
A. NO.
Q. WAS THERE ANY PROTOCOL ESTABLISHED FOR HER IN TERMS OF HOW SHE WAS SUPPOSED TO DO THAT?
A. IN TERMS OF HOW?
Q. YES.
A. NOT TO MY KNOWLEDGE. IN TERMS OF SHOULD SHE DO SO, YES.

IN THE FIRST SIX MONTHS IN WHICH I WAS IN, I GUESS THE OVERSEER OR IN CHARGE OF THE POLICY, MEDICAL ASPECT, SHIRLEY WAS MY DESIGNEE TO TAKE CARE OF NOTIFYING CITY POLICE WHEN WE HAD SUCH A - AN OUTLIER FROM THE PROPER POLICY.

Q. SO SHE WAS DOING THAT BECAUSE YOU ASKED HER TO AND YOU CHOSE TO DELEGATE THAT AUTHORITY TO HER?

A. DID I DELEGATE IT? I'M NOT SURE I DELEGATED IT. IT WAS PART OF HER JOB AS THE CASE MANAGER TO ASSURE THAT WE ALL HAD

[HORGER 40]

COMPLIANCE WITH THE POLICIES AND PHILOSOPHIES OF THE MEDICAL UNIVERSITY HOSPITAL, THIS WAS PART OF HER CASE MANAGEMENT JOB.

Q. BUT AS A NURSE CASE MANAGER, YOU DON'T GET ANY PARTICULAR TRAINING IN HOW TO REPORT SOMEBODY TO THE POLICE, DO YOU?

A. I HOPE THAT NOT EVERYONE NEEDS TO KNOW.

Q. WERE YOU AWARE THAT SHIRLEY BROWN COLLECTED INFORMATION IN HER OFFICE IN ORDER TO PROVIDE THAT INFORMATION TO THE POLICE AND SOLICITOR'S OFFICE?

A. NO.

Q. DID YOU EVER LOOK IN HER OFFICE TO SEE WHAT KIND OF INFORMATION SHE WAS COLLECTING?

A. NO.

Q. WERE YOU AWARE THAT PEOPLE FROM - PEOPLE FROM THE SOLICITOR'S OFFICE CAME TO HER OFFICE AND SAT THERE AND REVIEWED INFORMATION AT THE MEDICAL UNIVERSITY?
A. I WAS UNAWARE OF IT UNTIL I HEARD IT IN THIS COURTROOM.
Q. WAS THERE ANYONE WHO WAS OVERSEEING HOW SHIRLEY BROWN UNDERTOOK THE DUTIES THAT WERE GIVEN TO HER UNDER THIS POLICY?
A. I THINK WE WERE - YES, I THINK DR. ROGER NEWMAN AND I BOTH WERE OVERSEEING THE FACT THAT SHIRLEY BROWN WAS DOING THE JOB WHICH SHE HAD BEEN ASSIGNED.
Q. AND YOU KNEW THAT SHE WAS HANDING OUT LETTERS FROM THE SOLICITOR TO YOUR PATIENT?
A. WHEN THE PATIENT HAD A POSITIVE DRUG SCREEN THAT WAS PART

[HORGER 41]

OF THE POLICY.
Q. IT BECAME PART OF THE POLICY THAT SHE HANDED OUT LETTERS FROM THE SOLICITOR?
A. YES.
Q. OKAY. IN YOUR COMPLETE HISTORY AS A DOCTOR, HAVE YOU EVER HAD A NURSE HANDING OUT LETTERS FROM LAW ENFORCEMENT TO YOUR PATIENTS IN ANY SITUATION OTHER THAN THIS?
A. NO.

Q. AND SHIRLEY BROWN DIDN'T COME TO YOU AND ASK YOU TO REVIEW HER DATA SHEET IN WHICH SHE COLLECTED INFORMATION SPECIFICALLY ABOUT WOMEN WHO TESTED POSITIVE FOR COCAINE UNDER THE POLICY, DID SHE?

A. IN OUR MONTHLY MEETINGS OR HOWEVER OFTEN WE WERE HAVING SUCH MEETINGS EARLY ON, WE DISCUSSED HOW MANY PATIENTS HAD BEEN POSITIVE, WHAT WAS THE SITUATION WITH THIS PATIENT, WAS THIS A REPEAT POSITIVE, WAS IT SOMEONE WHO DID NOT GET ANY SUBSEQUENT PRENATAL CARE OR SUBSTANCE ABUSE CARE OR WHATEVER. WE KEPT IT. WE DID HAVE THAT INFORMATION ON A RUNNING MONTHLY BASIS AND THIS DATA CAME FROM SHIRLEY BROWN WHO WAS THE RECORD KEEPER.

Q. SHE WAS THE RECORD KEEPER OF THE INFORMATION ABOUT WOMEN WHO TESTED POSITIVE FOR COCAINE?

A. THAT'S CORRECT.

Q. AND DID SHIRLEY BROWN ALSO UNDERTAKE, WITH YOUR KNOWLEDGE, TO OVERSEE WHETHER IN FACT THE RESIDENTS WHO WERE

[HORGER 42]

THE ONES WHO WERE ORDERING THE UDS SCREENS WERE DOING WHAT THEY WERE SUPPOSED TO DO?

A. ABSOLUTELY. THIS WAS PART OF HER - I FELT THAT IT WAS

PART OF HER JOB. THIS WAS A MEDICAL UNIVERSITY HOSPITAL POLICY, AND IF SOMEONE THROUGH OVERSIGHT, IGNORANCE OR STUBBORNNESS FAILED TO FOLLOW OUT A - FOLLOW THROUGH WITH THE POLICY TO DO THE APPROPRIATE TEST ORDERING, THEN I THINK IT WAS UP TO OUR CASE MANAGER FOR HIGH RISK OBSTETRICS, SHE WOULD BE THE FIRST PERSON TO NOTE THIS.

Q. SO -

A. SIMILAR TO ORDERING A TEST FOR SEIZURES ON AN OB PATIENT, IF SOMEONE DOESN'T CHECK IT OUT AND FINDS IT HAS NOT BEEN DONE, HOW DO WE TRAIN A RESIDENT THIS HAS TO BE DONE.

Q. AND HOW YOU CHOSE TO DO THAT WAS TO ASK SHIRLEY BROWN TO TAKE THAT ON?

A. I'M NOT AWARE THAT SHE WAS ASKED TO CHECK EVERY PATIENT'S RECORD AND FIND OUT IF THERE WAS AN INDICATOR FOR DRUG SCREEN AND HAD THE DRUG SCREEN BEEN DONE. I FEEL CONFIDENT THAT AS A CASE MANAGER FOR HIGH-RISK OBSTETRICS SHE WAS AWARE OF PRACTICALLY EVERY PRE-TERM LABOR PATIENT IN THE HOSPITAL, ALMOST CERTAINLY EVERY PATIENT WITH AN INTRAUTERINE FETAL DEATH AND ALMOST CERTAINLY EVERY PATIENT WITH ABRUPTIO PLACENTA. I THEN FEEL CONFIDENT THAT SHE ALSO WOULD HAVE SEEN TO IT THAT SOMEONE BY OVERSIGHT DID NOT GET A DRUG SCREEN,

THAT IT WAS DONE.

[HORGER 43]

Q. AND SHIRLEY TOOK A REAL INTEREST IN THIS AREA, SHE WAS VERY INTERESTED IN SAYING THAT THE MOTHERS WHO TESTED POSITIVE FOR COCAINE GOT - GOT SOME KIND OF REFERRAL, THAT SHE GOT SOME HELP, SHE WAS INTERESTED IN IT?

A. I FEEL SHE TOOK A REAL INTEREST IN EVERY JOB THAT SHE UNDERTOOK.

Q. BUT ONE OF THE THINGS SHE TOOK A PARTICULAR INTEREST IN WAS THIS COCAINE POLICY?

A. IT WAS PART OF HER JOB.

Q. AND SHE TOOK PARTICULAR INTEREST IN IT IN THE TIME PERIOD IMMEDIATELY BEFORE THE ADOPTING OF THE POLICY AS WELL, DID SHE NOT?

A. YES.

Q. AND THE ONLY ONE THAT COLLECTED ANY DATA ON COCAINE IN THE TIME PERIOD IMMEDIATELY PRIOR TO THE POLICY?

A. I DON'T KNOW THAT FOR A FACT.

Q. IN THE ARTICLE THAT YOU WROTE ABOUT THIS INTERAGENCY POLICY, YOU COMPARED COCAINE USE WITH THE GENERAL POPULATION ON THE BASE OF A NUMBER OF FACTORS, DID YOU NOT?

A. I COMPARED - WHAT WE COMPARED WAS PREGNANCY OUTCOME PARAMETERS IN PATIENTS WOULD HAD USED COCAINE VERSUS A GROUP

OF PATIENTS WHO HAD NO HISTORY OF COCAINE. WHAT WE RETROSPECTIVELY PULLED FROM DR. HULSEY'S DATABANK AS BEING THE GENERAL POPULATION OF THE OBSTETRIC PATIENTS AT THAT TIME.

Q. BUT, IN THAT - IN THAT COMPARISON OF THE PREGNANCY

[HORGER 44]

OUTCOME, YOU DIDN'T EVEN BOTHER TO REPORT THE NUMBER OF ABRUPTO PLACENTAS?

A. THE NUMBER OF ABRUPTO PLACENTAS?

Q. RIGHT. WASN'T THAT ONE OF THE PARAMETERS - IT WASN'T EVEN ONE OF THE PARAMETERS THAT WAS INCLUDED IN THAT ANALYSIS?

A. ALL RIGHT.

Q. YOU DON'T DISPUTE THAT?

A. NO.

Q. STILL YOU SAY IT WAS ABRUPTIONS THAT JUSTIFIED PUTTING IN THIS POLICY?

A. I DIDN'T SAY ABRUPTIONS JUSTIFIED PUTTING IN THIS POLICY. I SAID AN INCREASING NUMBER OF OUTCOME PARAMETERS THAT SUGGESTED COCAINE USE INDICATED PUTTING IN OR LED US TO PUT IN THIS POLICY. ABRUPTION MAY BE ONE OF THEM. THE INCIDENCE OF ABRUPTION IS EXTREMELY LOW IN THE GENERAL POPULATION. IT IS SO LOW THAT TO COME UP, I BELIEVE ANOTHER

ATTORNEY HERE USED SOME A QUESTION WITH DR. NEWMAN EARLIER, YOU'VE GOT TO HAVE A NUMBERS TO MAKE ANYTHING SIGNIFICANT. IF WE LOOK AT THE RATE OF ABRUPTIO PLACENTAS IN THE THREE THOUSAND PATIENTS THAT WE SEE OVER A PERIOD OF A YEAR, IT WOULD BE, OH, 20, 22 SOMETHING,OF THAT SORT. IF WE SEE IN THE - I THINK 119 PATIENTS IN THAT PARTICULAR REPORT THAT YOU HAVE THERE, AS I RECALL THERE WERE TWO OR THREE ABRUPTIO PLACENTAS. THOSE FIGURES ARE TOO SMALL TO MAKE ANY REAL STATISTICAL SIGNIFICANCE FROM THEM.

[HORGER 45]

Q. AND THEY'RE TOO SMALL -

MR. HOOD: I THINK THE COURT PLEASE, HE WAS IN THE MIDDLE.

THE COURT: I THOUGHT HE FINISHED.

THE WITNESS: I'M COMPLETE.

Q. (BY MS. DUNN, CONTINUING) AND ACTUALLY THE POPULATION THAT YOU HAD TO OBSERVE IN THE TIME PERIOD, YOU KNOW HAD TOO SMALL A NUMBER OF PLACENTAL ABRUPTIONS FOR YOU TO MAKE ANY DETERMINATION, ANY CONNECTION WITH COCAINE USE FOR YOUR PARTICULAR POPULATION?

A. THIS MAY BE TRUE, MS. DUNN. I REALLY DON'T RECALL HOW

MANY ABRUPTO PLACENTAS WERE PRESENT AT ANY GIVEN TIME THERE.
Q. AND, DR. HORGER, IT'S FAIR TO SAY THAT THE EVALUATION OF THE EFFECT OF COCAINE ON A PREGNANCY IS VERY HARD TO DO IN ANY PARTICULAR PREGNANCY? THAT'S FAIR, ISN'T IT?
A. THAT'S FAIR.
Q. IT'S ALSO FAIR TO SAY THAT MOST WOMEN WHO ABUSE COCAINE DURING THEIR PREGNANCY ALSO HAVE OTHER PROBLEMS THAT AFFECT THEIR PREGNANCY?
A. THAT IS A FAIR STATEMENT.
Q. SOME OF THEM HAVE POVERTY?
A. THAT'S TRUE.
Q. SOME OF THEM HAVE MALNUTRITION?
A. THAT'S TRUE.
Q. SOME OF THEM HAVE HOMELESSNESS?

[HORGER 46]

A. I DON'T KNOW THAT, BUT I WILL ACCEPT THAT.
Q. SOME OF THEM MAY BE IN AN ABUSIVE RELATIONSHIP?
A. THAT'S RIGHT.
Q. SOME OF THEM HAVE - MAY HAVE OTHER DRUG USE PROBLEMS?
A. YES.
Q. SOME OF MAY HAVE ALCOHOL PROBLEMS?
A. INTERESTINGLY THE DATA I HAVE SAYS THAT THE ALCOHOL USE IS NOT STATISTICALLY SIGNIFICANT IN COCAINE ABUSERS VERSUS

PATIENTS WHO ARE NOT USING COCAINE, BUT ALL OF THE OTHER FACTORS SAY YES.

Q. BUT I WAS ASKING IN RELATIONSHIP TO THE CARE OF A PARTICULAR PATIENT, IF THAT PARTICULAR PATIENT HAD PROBLEMS WITH ALCOHOL?

A. BUT LET ME GO BACK. ALTHOUGH I WILL ACCEPT THAT TRYING TO DETERMINE THAT COCAINE IS THE PARTICULAR POINT - PROBLEM THAT CAUSED THE DIFFICULTY, IN A PATIENT WHO IS RELUCTANT TO GET PRENATAL CARE OR FAILS TO GET PRENATAL CARE, IS PERHAPS MALNOURISHED, IS PERHAPS ANEMIC, PERHAPS HAS A SEXUALLY TRANSMITTED DISEASE, PERHAPS IS ANEMIC, YES, ALL OF THESE THINGS CAN AFFECT THE PREGNANCY. THAT'S WHY IT'S PARTICULARLY VALUABLE TO LOOK AT A STUDY SUCH AS REPORTED BY DOCTORS ORAL AND DICKSON FROM SAN DIEGO. IN 1987 THEY DID A MULTIVARIATE ANALYSIS OF ALL THE DATA. IT SHOWED THAT COCAINE ITSELF WAS THE FACTOR THAT WAS CAUSING THE PROBLEM WITH THE PREGNANCY, INDEPENDENT OF

[HORGER 47]

NUTRITIONAL STATUS, ANEMIA, SOCIOECONOMIC STATUS, ALCOHOL OR ANY OF A NUMBER OF OTHER THINGS. GOOD INFORMATION.

Q. GOOD INFORMATION, BUT IN THE CARE OF ANY PARTICULAR PRENATAL PATIENT IN ORDER TO FIGURE OUT WHAT THEY MAY REALLY NEED FOR THAT PATIENT'S PREGNANCY OUTCOME, YOU HAVE TO LOOK AT WHAT THAT PATIENT ACTUALLY HAS? THERE IS NOT A ONE-SHOE-FITS-ALL TREATMENT?

A. ALL RIGHT.

Q. FOR PRENATAL CARE; IS THAT FAIR?

A. I THINK YOU'RE PROBABLY CORRECT.

Q. DR. HORGER, I JUST WANT TO BE CLEAR. YOU HAD NO DOUBT IN OCTOBER OF 1989 THAT THERE HAD BEEN NO RECENT CHANGE IN THE CHILD ABUSE REPORTING STATUTE?

A. VERY HONESTLY, MS. DUNN, I WAS NOT AWARE OF EVER HAVING READ THE SOUTH CAROLINA CHILD ABUSE STATUTES OR LAWS UNTIL IT WAS SHOWN TO ME AT A MEETING IN EARLY OCTOBER 1989 WHEN IT WAS STATED VERY CLEARLY THAT ANY HEALTH CARE PROVIDER WHO HAS ANY REASON TO SUSPECT NOT - NOT FULL KNOWLEDGE, BUT TO SUSPECT ABUSE OF A CHILD MUST REPORT THIS TO EITHER THE LAW OR DSS.

Q. BUT, DR. HORGER -

A. I WAS UNAWARE OF IT.

Q. BUT, DR. HORGER, IT WAS YOUR UNDERSTANDING IN OCTOBER OF 1989 THAT THE CRIMES WERE BEING REPORTED WERE DRUG CRIMES? POSSESSION, DISTRIBUTION; ISN'T THAT TRUE?

A. YES.

* * *

[HORGER 56]

RESULT OF VARIOUS - I DON'T KNOW WHETHER TO CALL IT INSIGHTS, CLINICAL OBSERVATIONS OR JUST WHAT, THE DECISION WAS REACHED, IN CONJUNCTION WITH OTHERS THAT HAVE BEEN BROUGHT OUT SEVERAL TIMES HERE, THAT WE NEEDED TO GET STARTED TRYING TO DO SOMETHING. I WON'T FOR A MOMENT DEMEAN THE IDEA THAT EDUCATION AND REHABILITATION IS THE RIGHT WAY TO GO IN SUBSTANCE ABUSE INDIVIDUALS. OUR PROBLEM THAT WE FELT WAS THE FINITE PERIOD OF TIME WITH WHICH WE HAD TO DEAL WITH TRYING TO DO SOMETHING MORE FOR THE FETUSES. AND PERHAPS FOR THE CHILDREN THE NEONATES ALSO.

Q. WHEN SUBSTANCE ABUSE WAS VOLUNTARY, WAS IT WORKING?

A. WE FELT THAT IT WAS NOT WORKING AT ALL.

Q. NOW, I DIDN'T BRING YOUR CAREER UP TO TODAY. DOES DR. NEWMAN NOW HAVE THE JOB YOU HAD IN THE '89 AND '90 TIME PERIOD?

A. DR, NEWMAN HAS THE JOB THAT I WAS FORMERLY IN. I RESIGNED MY POSITION AS DIRECTOR OF A DIVISION I THINK IN MARCH OF 1990. THE - AND I DEPARTED THE MEDICAL UNIVERSITY IN JUNE OF - AT THE END OF JUNE 1990. MY REASON FOR

RESIGNING THE DIRECTORSHIP EARLY WAS BECAUSE OF SOME WORRY AS TO WHAT WOULD HAPPEN WITH OUR FELLOWSHIP PROGRAM WHICH HAD TO HAVE APPROVAL AND SO FORTH. I WANTED TO HAVE SOMEONE NEW IN THE DIRECTORSHIP BEFORE I WAS GONE AND SAID NOW I'M LEAVING IT WITH SOMEONE ELSE.

AND THEN I LEFT CHARLESTON IN JUNE OF 1990 AND MOVED

[HORGER 57]

TO COLUMBIA AND ASSUMED A POSITION AS PROFESSOR OF OBSTETRICS AND GYNECOLOGY AT THE UNIVERSITY OF SOUTH CAROLINA IN CONTRADISTINCTION TO THE MEDICAL UNIVERSITY, AND AM NOW CHAIRMAN OF THAT DEPARTMENT.

Q. IT'S A MEDICAL SCHOOL?

A. YES, SIR.

Q. IT'S THE COMPETING MEDICAL SCHOOL WITH OURS HERE IN CHARLESTON?

A. NO, WE THINK THIS ONE IS THE COMPETING MEDICAL SCHOOL TO THE ONE IN COLUMBIA.

Q. AND YOU'RE CHAIRMAN OF THE DEPARTMENT THERE?

A. THAT'S CORRECT.

Q. ALL RIGHT. NOW BACK TO THE POLICY. SO, THE POLICY IS THEN FORMULATED. AND HOW WAS IT IMPLEMENTED, DR. HORGER?

A. HOW WAS IT IMPLEMENTED? I'M NOT SURE WHERE I WANT TO GO WITH HOW WAS IT IMPLEMENTED.

IN THE BEGINNING THE POLICY, AS WE HAVE TALKED ABOUT ON A NUMBER OF OCCASIONS, WE, I GUESS - I CAME INTO THIS AFTER SOME STRUCTURE HAD ALREADY BEEN PLACED: WE HAVE GOT A PROBLEM. THAT WE ARE NOT COMPLYING WITH WHAT WE WERE TOLD WAS THE LAW, THAT WE WERE POSSIBLY BREAKING AT THE TIME. WE DID REALLY SEE THIS WAS - PERHAPS THIS ALSO MAY HELP US TO DO SOMETHING ABOUT STOPPING COCAINE ABUSE BY THE PREGNANT POPULATION.

IT WAS THEN IMPLEMENTED BY VARIOUS STEPS IN WHICH WE

* * *

[HORGER 59]

NOW, WE THEN CONTINUED WITH THE PROTOCOL LISTING THAT MS. DUNN ASKED ME ABOUT YESTERDAY. THE SIX PARAMETERS OR INDICATORS THAT WE FELT SHOULD BE USED. WE FELT STRONGLY THAT WE OUGHT TO USE THOSE INDICATORS IN ORDER TO ENCOMPASS ALL OBSTETRICS PATIENTS. I DID HAVE SOME WORRY THAT IF WE DID NOT HAVE THIS ORGANIZED IN SUCH A MANNER, SOMEONE MIGHT SAY I KNOW THIS - I KNOW MY PATIENT DOESN'T USE DRUGS, I'M GOING TO SKIP HER. WE FELT THAT ANYONE WHO HAD ANY INDICATOR THAT WAS ON THE LIST SHOULD BE SCREENED. CONSEQUENTLY WE FELT STRONGLY

THAT WE COULD INCLUDE BOTH PRIVATE PATIENTS AND WHAT WE - WHAT WE WOULD ENTITLE WARD SERVICE PATIENTS, AND WE COULD INCLUDE ASIANS, AFRO AMERICANS, CAUCASIANS OR ANYONE ELSE WITHOUT ANY ACCUSATION OF SELECTION.

Q. WAS THERE ANY?

A. TO MY KNOWLEDGE THERE HAS NEVER BEEN.

Q. AND WAS THE CRITERIA, IN YOUR OPINION, ADEQUATE? THAT IS THE LISTING OF THE FIRST FIVE OR SIX, AND THEN NINE CRITERIA TO DETERMINE THAT IS THE PERSON TO TEST?

A. AT THE TIME WE HAD DONE SO, YES, I FELT THAT IT WAS. I THOUGHT THAT WE HAD EVERYTHING COVERED. I THINK THAT THERE HAS BEEN SOME EVIDENCE, REPORTS AND WHATNOT IN THE PAST SIX OR EIGHT YEARS THAT MAY HAVE ADDED ONE OR TWO INDICATORS THAT HAD WE KNOWN ABOUT EARLY ON WE MAY HAVE PUT INTO THE LIST.

Q. YOU WERE ASKED TO READ A LETTER YESTERDAY. I DON'T KNOW IF IT WAS PUT IN EVIDENCE, BUT IT'S A LETTER TO MR. CONDON,

* * *

[HORGER 61]

MR. HOOD: LET HER MARK IT FIRST.

MS. DUNN: I DON'T THINK IT MATTERS WHICH ONE IT IS.

DEPUTY CLERK: PLAINTIFFS' EXHIBIT 44 IN EVIDENCE.
MR. HOOD: IT'S HIGHLIGHTED IF YOU WANT TO SUBSTITUTE AN UNHIGHLIGHTED ONE YOU CAN.
A. I WILL POINT OUT THIS WAS WRITTEN AFTER I HAD LEFT THE MEDICAL UNIVERSITY AND THE CHARLESTON AREA.
Q. YES, SIR.
A. THE HIGHLIGHTED PORTION OF THIS LETTER STATES THAT: HOWEVER, I UNDERSTAND THAT THERE HAS NOT BEEN ANY NEED FOR FURTHER ARREST IN THAT EACH PATIENT HAS GONE AHEAD WITH SUBSTANCE ABUSE COUNSELING.
Q. THANK YOU, DR. HORGER. AS THE POLICY WAS IMPLEMENTED AND FOLLOWED?
THE COURT: SHOW THAT TO MS. DUNN SO SHE WILL SEE WHAT YOU HAVE HIGHLIGHTED. AND IF SHE WANTS TO, YOU CAN GET A CLEAN COPY AND SUBSTITUTE. GO AHEAD WITH THE EXAMINATION.
MR. HOOD: SHE SAYS IT'S OKAY.
Q. (BY MR. HOOD, CONTINUING)WHILE YOU WERE THERE AND THE POLICY WAS BEING FOLLOWED, WHAT WAS YOUR OPINION AS TO THE SUCCESSFULNESS OF THE POLICY?
A. MY OPINION WAS -
MS. DUNN: OBJECTION, YOUR HONOR, UNLESS HE IS GOING TO LAY SOME BASIS FOR WHAT THIS OPINION IS COMING FROM. THIS

COULD BE VERY MISLEADING INFORMATION.

[HORGER 62]

THE COURT: I OVERRULE THE OBJECTION. I THINK HE HAS ALREADY MADE THE FOUNDATION AS TO HIS INVOLVEMENT WITH THE POLICY, FIRSTLY.

SECONDLY, I THINK YOU ASKED HIM THE VERY SAME QUESTION ON YOUR EXAMINATION. AND ASKED HIM A NUMBER OF FOLLOW-UP QUESTIONS IN THE MATTER. SO I'M GOING TO PERMIT HIM TO ANSWER THE QUESTION.

GO AHEAD.

A. MY OPINION WAS THAT WE WERE ENCOUNTERING FEWER OF THE COMPLICATIONS THAT WE HAD PREVIOUSLY BEEN ATTRIBUTING TO DRUG USE AND WERE - WERE HAVING REPORTS OF FEWER POSITIVE DRUG SCREENS IN THE SIX OR SEVEN MONTHS THAT I WAS HERE AFTER THE DRUG - AFTER THE DRUG POLICY WENT INTO EFFECT.

Q. NOW, WHAT WAS THE ROLE OF THE CHARLESTON COUNTY. SUBSTANCE ABUSE COMING UNDER THIS POLICY?

A. THEY WERE NOT INTIMATELY INVOLVED WITH ORGANIZING THE POLICY. THEY SAT IN ON THE FIRST FEW DISCUSSIONS OF THE POLICY. HOW MUCH FOLLOW-UP THEY GAVE US IN TERMS OF MEETING WITH US ON A MONTHLY BASIS, I REALLY DON'T RECALL. THEY WERE

- THE LEADERSHIP OF THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION CLINIC WAS INVOLVED THROUGH MR. FRANK JOHNSON IN STATING THAT, YES, THEY COULD HANDLE WHAT WE REFERRED TO THEM. THAT'S ABOUT AS FAR AS THAT WENT. TO MY RECOLLECTION.
NOW THEY ALSO AGREED TO KEEP US APPRISED OF THOSE INDIVIDUALS WHO FAILED TO KEEP THEIR SUBSTANCE ABUSE CLINIC

[HORGER 63]

APPOINTMENTS.
Q. AND THE COUNSELING OF THESE PATIENTS WAS DONE BY CHARLESTON COUNTY SUBSTANCE ABUSE?
A. YES.
Q. AND THE DECISION TO REFER A PATIENT TO CHARLESTON COUNTY SUBSTANCE ABUSE, WAS THAT A MEDICAL DECISION?
A. IT WAS A MEDICAL DECISION. IT WAS BASED ALMOST ENTIRELY - WELL, I GUESS IT WAS BASED ENTIRELY ON SOME ACTION AGAINST THE POLICY. THAT IS A POSITIVE URINE DRUG SCREEN.
Q. ALL RIGHT. AND THE - ONE OF THE CASE MANAGERS THAT WORKED ON THIS POLICY, WHOSE NAME HAS BEEN MENTIONED MANY TIMES BY THE PLAINTIFFS, HER NAME IS SHIRLEY BROWN. DID SHE WORK DIRECTLY UNDER YOUR SUPERVISION?

A. I THINK SHE WORKED UNDER MY SUPERVISION. SHE WORKED FOR THE HOSPITAL. PERHAPS I WORKED FOR THE HOSPITAL ALSO IN THAT IT'S CONTROLLED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. I WAS HER SUPERVISOR IN THIS REGARD. I WAS ALSO HER SUPERVISOR IN REGARD TO HIGH-RISK OBSTETRICS PATIENTS FOR WHICH SHE WAS THE CASE MANAGER.

Q. THAT'S DIFFERENT THAN THIS COCAINE POLICY?

A. THE HIGH-RISK MANAGEMENT? YES. YES. THAT INCLUDED A GREAT MANY PATIENTS WHO WERE NOT PART OF THE COCAINE POLICY.

Q. SO SHE HAD DUTIES BEYOND JUST THIS POLICY?

A. OH, YES.

Q. WOULD YOU DESCRIBE HER ROLE UNDER THE POLICY?

[HORGER 64]

HER ROLE UNDER THE POLICY WAS TO KEEP US APPRISED OF WHAT WAS GOING ON. I GUESS IF WE DESCRIBE A JOB DESCRIPTION FOR A CASE MANAGER, THAT I - I FEEL LIKE THAT'S SOMEONE WHO HAS THE RESPONSIBILITY FOR KEEPING THINGS IN ORDER REGARDING A PARTICULAR SUBSET OF - OF PROBLEMS. HER SUBSET WOULD HAVE BEEN HIGH-RISK OBSTETRICS.

SHE THEN WAS RESPONSIBLE FOR COORDINATING NURSING

POLICIES WITH MEDICAL - MEDICAL MANAGEMENT IN ORDER TO COME OUT WITH THE RIGHT DECISIONS OF WHAT SHOULD BE DONE AND WHEN.

I THINK THAT A THIRD PART WOULD PROBABLY BE TO ASSURE THAT WE WERE ALL COMPLYING WITH WHATEVER POLICIES, NOT THIS POLICY WITH A CAPITAL P, BUT WITH WHATEVER POLICIES AND PHILOSOPHIES WERE PRESENT AT THE MEDICAL UNIVERSITY HOSPITAL.

NOW IN REGARD TO THIS PARTICULAR SITUATION, I GUESS THE FEW JOB DESCRIPTIONS THAT I WOULD SAY MS. BROWN HAD, WAS TO - WE REPORTED THE POSITIVE URINE DRUG SCREENS TO HER. SHE WAS THE ONE WHO THEN WAS TO ARRANGE FOR MAKING SURE THAT WE GOT PROPER APPOINTMENTS TO PRENATAL CARE AND PROPER APPOINTMENTS TO SUBSTANCE ABUSE. WHEN THOSE APPOINTMENTS WERE NOT KEPT, THEY WERE SUPPOSED TO HAVE BEEN REPORTED TO HER. IN ACTUALITY, THE PRENATAL CARE APPOINTMENTS REALLY WERE KNOWN BY THOSE OF US WHO WORKED IN THE PRENATAL CARE HIGH-RISK CLINICS.

Q. DID YOU OBSERVE HER INTERACTION WITH PATIENTS?

A. ON A NUMBER OF OCCASIONS I OBSERVED HER INTERACTIONS. I WAS NOT THERE BY ANY MEANS EVERY TIME SHE MET WITH EVERY

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[HORGER 67]

Q. HAVEN'T THERE BEEN REPORTS TO THE MEDICAL LITERATURE WHAT ONE DOSE OR ONE USE OF COCAINE COULD DO TO THE BABY?

A. BACK IN THE EARLY MIDDLE OR LATE EIGHTIES WHEN WE WERE FIRST READING MORE AND MORE, AND LEARNING MORE AND MORE ABOUT THE PROBLEM, THERE WERE ANY NUMBER OF REPORTS THAT SAID THIS PATIENT HAD SUCH AND SUCH A CATASTROPHE, IMMEDIATELY FOLLOWING OR SHORTLY FOLLOWING HER ONLY USE OF COCAINE.

Q. YOU TALKED ABOUT COCAINE WRECKING PREGNANCIES. AFTER THE POLICY, DID THIS WRECKING SUBSIDE?

A. I THINK IT DECREASED CONSIDERABLY. THERE IS NO QUESTION BUT THAT WE STILL SEE PROBLEMS FROM COCAINE USE.

MR. HOOD: THANK YOU, DOCTOR.

<u>REDIRECT EXAMINATION</u>

BY MS. DUNN:

Q. DR. HORGER, WHEN YOU REPORTED TO THIS JURY AND TO THE COURT THAT BEFORE THE INTERAGENCY POLICY WAS ADOPTED IT WASN'T WORKING AT ALL, THAT INFORMATION WAS TOTALLY BASED UPON INFORMATION PROVIDED TO YOU BY SHIRLEY BROWN?

THE COURT: I'M NOT GOING TO PERMIT THAT. YOU WENT INTO THAT ON YOUR EXAMINATION. IT'S NOT NEW MATTER AND IT'S NOT THE SUBJECT OF RECROSS.

Q. (BY MS. DUNK, CONTINUING) IN ANSWERS TO THE QUESTIONS THAT MR. HOOD PUT TO YOU, YOU LISTED SEVERAL ORGANIZATIONS THAT YOU BELONGED TO AS PART OF YOUR PROFESSIONAL WORK; IS THAT CORRECT?

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[HORGER 80]

(12-18-96 CONTINUED TESTIMONY OF DR. HORGER.)

THE COURT: DOCTOR HORGER, I REMIND YOU THAT YOU'RE STILL UNDER OATH.

MR. WHERRY: YOUR HONOR, PERHAPS I WAS WRONG, BUT I THOUGHT THAT THE COURT RULING WAS WHEN WE CALLED AN ADVERSE WITNESS, THAT THEY WERE TO DO THEIR DIRECT AND THAT THERE WAS SOMEWHAT OF A LIMITATION ABOUT CALLING THEM BACK. I DON'T KNOW THE PURPOSE. I DON'T KNOW THE PURPOSE THE WITNESS IS BEING CALLED FOR, BUT I THINK HE HAS ALREADY BEEN DONE ON BOTH CROSS AND DIRECT.

THE COURT: WHAT I SAID WAS THIS. I SAID THAT IN VIEW OF FACT THAT YOU CALLED A PARTY TO THE ACTION REPRESENTED BY MR. HOOD, THAT I WAS NOT GOING TO LET HIM DELAY HIS

EXAMINATION OF DR. HORGER UNTIL HIS CASE BECAUSE IT JUST WOULD BE REPETITION.

MR. WHERRY: YES.

THE COURT: I WAS GOING TO REQUIRE HIM TO GO FORWARD. WITH THE EXAMINATION. BUT IF THE FACT THAT YOU CALLED DR. HORGER, RATHER THAN HIM BEING PRESENTED AS A WITNESS BY THE DEFENSE IN THE NORMAL ORDER OF PROOF, DISRUPTED THE DEFENDANTS' CASE, I WOULD LET HIM ASK SOME ADDITIONAL

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[HORGER 82]

BY MR. HOOD:

Q. DR. HORGER, DID YOU EVER HEAR ANYONE SAY THERE WAS AN EPIDEMIC OF COCAINE AMONG BLACK WOMEN OR THE BLACK COMMUNITY? THE USE OF COCAINE?

A. DID I EVER HEAR ANYONE SAY?

Q. THAT THERE WAS AN EPIDEMIC OF COCAINE USE AMONG PREGNANT BLACK WOMEN OR IN THE BLACK COMMUNITY?

A. I NEVER HEARD ANYONE MAKE THAT STATEMENT IN CONNECTION WITH THE WAY IN WHICH THIS POLICY OR PROTOCOL WAS DERIVED.

Q. DID YOU EVER HEAR ANYONE IN THAT SAME CONTEXT SAY THAT BLACK WOMEN SHOULD BE - ALL BLACK WOMEN SHOULD BE STERILIZED?

A. NO, I DID NOT.

Q. WAS THERE ANY INTENT TO DEVIATE - NO. WAS THERE ANY INTENT IN THE DEVELOPMENT OF THE POLICY TO DISCRIMINATE AGAINST BLACK WOMEN OR -

A. NONE WHATSOEVER.

Q. OR IN THE IMPLEMENTATION OF THE POLICY?

A. THERE WAS NEVER ANY INTENT. NONE.

Q. BIRTH CONTROL. AFTER A WOMEN HAS A BABY, IS IT DISCUSSED?

A. WHEN A WOMEN HAS HAD A BABY IS BIRTH CONTROL DISCUSSED?

Q. YES.

A. CERTAINLY SHOULD BE.

Q. AND DO YOU AND HAVE YOU THROUGHOUT YOUR CAREER AS A TEACHER TAUGHT THAT TO STUDENTS WHO ARE LEARNING TO BE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF MARTHA JESSUP

[JESSUP 6]

Q. THE AREAS THAT YOU PERFORM YOUR CLINICAL AND TEACHING FUNCTIONS IN THE FIELD OF NURSING, IS IT LIMITED TO A PARTICULAR AREA OR AREAS OF NURSING SPECIALIZATION?

A. MY AREA OF SPECIALTY IS WITH PARTICULAR ATTENTION TO WOMEN AND ALCOHOLISM AND OTHER DRUG DEPENDENCIES. WITH A SPECIAL EMPHASIS ON PERINATAL, WHICH TECHNICALLY MEANS THE PERIOD OF PREGNANCY THROUGH THE PERIOD OF THE FIRST SIX WEEKS AFTER BIRTH. HOWEVER, IT'S COME TO BE THE ENTIRE AREA OF PREGNANCY AND THE PARENTING OF YOUNG CHILDREN AND THAT IS MY PARTICULAR SPECIALTY AND EMPHASIS.

Q. PROFESSOR, ARE YOU LICENSED TO PRACTICE NURSING IN ANY JURISDICTION?

A. IN THE STATE OF CALIFORNIA.

Q. ARE YOU REGISTERED IN ANY OTHER JURISDICTION?

A. YES. I AM REGISTERED IN THE STATE OF NEW YORK AS WELL.

Q. NOW, FOR THE BENEFIT OF THE JURY, WOULD YOU GIVE THEM

SOME OF YOUR PROFESSIONAL EXPERIENCE. I NOTICED THAT YOU GRADUATED FROM COLLEGE IN 1972. IS THAT CORRECT? WITH YOUR BACCALAUREATE DEGREE?

A. YES.

Q. BEGINNING AT APPROXIMATELY THAT POINT IN TIME WOULD YOU GIVE US THE BENEFIT OF WHAT POSITIONS YOU HAVE HAD IN THE FIELD OF NURSING?

A. YES. COMMENCING AT THAT PERIOD OF TIME AFTER GRADUATION I WAS A PUBLIC HEALTH NURSE IN THE SOUTH BRONX IN NEW YORK FOR

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[JESSUP 8]

AND AT THAT POINT IN TIME OF COURSE WE DIDN'T KNOW AS MUCH AS WE KNOW ABOUT IT NOW, BUT WE WERE AND I WAS THE DIRECTOR OF THOSE CLINICAL TRIALS, WHICH MEANS THE CLINICAL RESEARCH PROJECT THAT EVALUATED RISK FACTORS FOR PRE-TERM LABOR AND PRE-TERM DELIVERY. IN THAT CAPACITY I WORKED WITH ALL KIND OF DIFFERENT PATIENTS WHO HAD A VARIETY OF RISK FACTORS, INCLUDING WOMEN WHO HAD DRUG AND ALCOHOL RELATED PROBLEMS. I DID THAT FOR TWO YEARS.

AND AT THAT POINT I THEN MOVED MUCH MORE SPECIFICALLY INTO THE ARENA BECAUSE BY THIS TIME I HAD HAD MY

MASTER'S DEGREE CONFERRED. AND BY THIS TIME AT THAT TIME IN APPROXIMATELY 1981, '82, I BEGAN TO BE MUCH MORE INVOLVED IN WORKING DIRECTLY WITH POPULATIONS OF WOMEN WHO WERE PREGNANT AND DRUG AND ALCOHOL DEPENDENT. OVER THE NEXT PERIOD OF EIGHT TO TEN YEARS I WORKED IN A VARIETY OF TREATMENT SETTINGS WITH ALL KINDS OF WOMEN WHO WERE DRUG AND ALCOHOL DEPENDENT. I WORKED IN METHADONE MAINTENANCE PROGRAMS WITH PREGNANT ADDICTED WOMEN IN THOSE PROGRAMS. ON THOSE PROGRAMS FOR HEROIN DEPENDENT WOMEN. I WORKED IN RESIDENTIAL TREATMENT PROGRAMS WHERE WOMEN WERE THERE WITH THOSE CHILDREN BECAUSE WE HAD THOSE AND DO HAVE THOSE IN CALIFORNIA. I HAVE WORKED IN OUTPATIENT DRUG AND ALCOHOL TREATMENT SETTINGS WHERE YOU HAVE HEARD THAT DESCRIBED WHERE CLIENTS WILL COME AND BE NOT OVERNIGHT, BUT WILL COME FOR COUNSELING.

DURING THIS PERIOD OF TIME ALSO I DID ASSESSMENTS 0F

[JESSUP 9]

THE PROBLEM OF PERINATAL ADDICTION. THAT IS THE USE OF ALCOHOL AND OTHER DRUG DEPENDENCY BY PREGNANT OR PARENTING OF YOUNG CHILDREN WOMEN. I DID A NEEDS ASSESSMENT FOR LOS

ANGELES COUNTY, SAN FRANCISCO AND SANTA CLARA COUNTY, WHICH IS SAN JOSE, CALIFORNIA. THESE ARE THE THREE LARGEST URBAN AREAS IN CALIFORNIA. AND I WAS THE PRIMARY INVESTIGATOR AND CONSULTANT TO DESCRIBE THE PROBLEM IN THE EARLY TO MID EIGHTIES IN THOSE THREE CITIES OF THIS PARTICULAR PROBLEM.

AND I SUBMITTED THOSE REPORTS TO PUBLIC HEALTH DEPARTMENTS. AND AT THAT PERIOD OF TIME THOSE REPORTS WERE THEN, I THINK, VERY IMPORTANT IN LEADING TO THE DEVELOPMENT OF COUNCILS OF CITIZENS AND MEDICAL PERSONNEL IN EACH OF THOSE AREAS OF CALIFORNIA. WHICH WERE PERINATAL SUBSTANCE ABUSE COUNCILS. AND THESE WERE GROUPS THAT WERE TO ADDRESS THIS PROBLEM IN THEIR COMMUNITIES IN CALIFORNIA.

SINCE THAT PERIOD OF TIME, SINCE THE MID-'80S, I HAVE ALSO BEEN VERY ACTIVE TEACHING THE STANDARDS OF PRACTICE, MOSTLY TO NURSES, BUT MOST RECENTLY ALSO TO PHYSICIANS AND ATTORNEYS AND JUDGES, REGARDING THE APPROPRIATE CARE AND MANAGEMENT OF MEDICAL AND HEALTH AND LEGAL ISSUES FOR PREGNANT DRUG AND ALCOHOL DEPENDENT WOMEN.

I HAVE ALSO BEEN AN INVESTIGATOR AND DONE PRIMARY RESEARCH IN THE AREA OF WHAT WE CALL DUAL DIAGNOSIS

DISORDERS. AND THAT IS WHEN AN INDIVIDUAL HAS A PRIMARY MENTAL HEALTH PROBLEM IN ADDITION TO THEIR ALCOHOL OR OTHER

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[JESSUP 11]

AND WORKING WITH THEM, CONSULTING ON CASES TO MAKE SURE THAT EVERYBODY DID THE RIGHT THING IN TERMS OF SETTING UP THE PROGRAMS, GETTING THE PROGRAMS GOING, MAKING SURE THEY WERE TAKING CARE OF THE CLIENTS THE RIGHT WAY.

Q. AND HAVE YOU HELD OTHER SIMILAR POSITIONS TO THAT IN THE PAST?

A. YES, I HAVE.

Q. I CAN'T FIND MY -- THE SLIP OF PAPER, PROFESSOR, BUT ARE YOU PRESENTLY INVOLVED WITH THE UNITED STATES GOVERNMENT IN A PROJECT CONCERNING SUBSTANCE ABUSE?

A. YES. RECENTLY I WROTE A DOCUMENT WHICH WAS CALLED THE CASE MANAGEMENT TREATISE FOR PREGNANT DRUG AND ALCOHOL DEPENDENT WOMEN. AND THAT DOCUMENT HAS RECENTLY BEEN REQUESTED TO BE USED AS THE NATIONAL MODEL FOR CASE MANAGEMENT ON THESE WOMEN BY THE CENTER FOR SUBSTANCE ABUSE TREATMENT, WHICH IS PART OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES FOR THE FEDERAL GOVERNMENT.

Q. WHEN YOU SAY THESE WOMEN, TO WHAT DO YOU REFER?
A. I REFER TO WOMEN WHO HAVE DRUG AND ALCOHOL DEPENDENCY AND WERE PREGNANT.
Q. PROFESSOR, HAVE YOU WON ANY HONORS OR HAVE YOU RECEIVED ANY AWARD IN YOUR FIELD OF SPECIALTIES?
A. YES, I HAVE. I RECEIVED AN AWARD FOR MY WORK WORKING WITH CHEMICALLY DEPENDENT, ANOTHER WORD FOR ALCOHOL AND DRUG DEPENDENT, HEALTH PROFESSIONALS, WHICH WAS A LIFETIME SERVICE

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[JESSUP 15]

THAT GROUP. THEY HAVE TO READ IT AND APPROVE IT BEFORE IT'S PUBLISHED. AND IT'S A VERY RIGOROUS AND CAREFUL EXAMINATION OF WHAT YOU HAVE DONE. AND THAT'S WHAT A REFEREED JOURNAL IS.
Q WHAT IS THE APPROVAL PROCESS? DO THEY SAY, YEAH, I LIKE THAT OR WHAT ARE THE CRITERIA FOR AN ARTICLE BEING APPROVED BY A REFEREED JOURNAL?
A. THE PROCESS IS THAT YOU SUBMIT THAT, PEOPLE READ IT, ESPECIALLY MEMBERS OF THE REVIEW BOARD OF THE JOURNAL WHO HAVE SOME EXPERTISE IN WHATEVER THE ARTICLE HAPPENS TO BE ABOUT. THEY ASK QUESTIONS, THEY PROBE, THEY LOOK AT YOUR RESEARCH

DESIGN, HOW YOU PUT IT TOGETHER, WAS IT WORTHY, AND THEY BASICALLY CRITICIZE, HOPEFULLY POSITIVELY AND CONSTRUCTIVELY, WHAT YOU HAVE DONE.

Q. DOCTOR, HAVE YOU PUBLISHED ANY REFEREED JOURNALS?

A. YES.

Q. APPROXIMATELY HOW MANY TIMES?

A. TEN.

Q. DOCTOR, SO MUCH FOR ARTICLES. HAVE YOU WRITTEN BOOKS?

A. YES, I HAVE.

HOW MANY BOOKS HAVE YOU WRITTEN? NOT CHAPTERS IN BOOKS, BOOKS?

A. ONE.

Q. AND WHAT WAS THE TITLE OF THAT BOOK, DOCTOR?

A. THAT -- THE TITLE OF THAT BOOK IS DRUG DEPENDENCY AND PREGNANCY MANAGING WITHDRAWAL. AND THE ENTIRE BOOK IS ABOUT

[JESSUP 16]

CHAPTER BY CHAPTER, IT IS ABOUT HOW YOU MANAGE WITHDRAWAL FROM DRUGS AND ALCOHOL IN A WOMAN WHO IS PREGNANT.

Q. HAVE YOU COAUTHORED BOOKS?

A. YES.

Q. HOW MANY?

A. ONE.

Q. AND WHAT -- WHO WAS YOUR CO-AUTHOR?

A. LORI SILVERMAN.

Q. AND WHAT WAS THE SUBSTANCE OF THAT -- I DIDN'T MEAN TO

ASK THAT. WHAT WAS THE SUBJECT MATTER OF THAT BOOK?
A. THIS IS THE CASE MANAGEMENT MODELS BOOK THAT HAS RECENTLY BEEN PUBLISHED AND RECENTLY PICKED UP BY THE FEDERAL GOVERNMENT FOR USE IN THEIR DOCUMENTS THAT THEY PUT OUT. THEY PUT OUT A WHOLE SERIES CALLED THE TREATMENT AND APPROVEMENT PROTOCOL SERIES, WHICH IS SUPPOSED TO BE THE GOLD STANDARD AS APPROVED BY THE FIELD AND BY THE FEDERAL GOVERNMENT FOR WORKING WITH THIS POPULATION.
Q. DOCTOR, HAVE YOU -- I'M SORRY, NOT DOCTOR.
MS. SHOWERS: WITH ALL DUE RESPECT, THIS WITNESS IS NOT A DOCTOR.
MR. WHERRY: I KNOW I MISSPOKE, AND I WITHDREW THAT AND I CHANGED IT, AND I APOLOGIZE FOR IT.
THE COURT: OKAY.
Q. (BY MR. WHERRY, CONTINUING) PROFESSOR, HAVE YOU WRITTEN ANY CHAPTERS IN BOOKS?

[JESSUP 17]

A. YES, I HAVE.
Q. APPROXIMATELY HOW MANY?
A. THREE. FOUR.
Q. AND WHAT WAS THE GENERAL SUBJECT MATTER OF THOSE THREE OR FOUR CHAPTERS?
A. THE SUBJECT MATTER WAS, AGAIN, APPROPRIATE MANAGEMENT OF

THE MEDICAL AND PREGNANCY OR OBSTETRIC-RELATED PROBLEMS FOR THESE WOMEN, WITH A SPECIAL FOCUS ON HOW TO ENGAGE THESE WOMEN SO THAT THEY STAY IN PRENATAL CARE AND GET INTO TREATMENT. AND HOW PROFESSIONALS, NURSES AND PHYSICIANS CAN HAVE A ROLE THAT IS POSITIVE AND THERAPEUTIC. IN OTHER WORDS, HELPFUL FOR THAT INDIVIDUAL.

Q. PROFESSOR, HAVE YOU WRITTEN ANY MONOGRAPHS?

A. YES.

Q. WHAT IS A MONOGRAPH?

A. A MONOGRAPH IS SHORTER THAN A BOOK, LONGER THAN A PAMPHLET, EIGHT BY ELEVEN I'D SAY, IF YOU WILL, ON ANY TOPIC ESSENTIALLY.

Q. AND, PROFESSOR, HAVE YOU BEEN ACTIVE IN THE PUBLICATION OR CONTRIBUTION TO VARIOUS NEWS LETTERS IN THE GENRE? IN THE AREA?

A. YES, I HAVE BEEN, BECAUSE IN CALIFORNIA WE HAVE GONE THROUGH A PERIOD OF INTENSE PUBLIC FOCUS AND CAREFUL EXAMINATION OF ISSUES. AND I HAVE WRITTEN AGAIN ON THE STANDARDS OF TREATMENT AND HOW TO RELATE TO DRUG AND ALCOHOL

* * *

[JESSUP 21]

Q. AND WOULD YOU BE GOOD ENOUGH TO TELL THE JURY, AGAIN IN

SUMMARY, THE KIND OF THINGS THAT YOU LOOKED AT, AND WITHHOLD THE OPINIONS AT THIS POINT, BUT JUST THE KIND OF THINGS THAT YOU LOOKED AT, AND THEN I'LL HAVE SOME MORE QUESTIONS.

A. UMM-HMM. I HAVE LOOKED AT THE MEDICAL RECORDS OF THE PLAINTIFFS'.

Q. ALL OF THEM?

A. YES.

Q. OKAY.

A. WHEN THEY CAME TO THE MEDICAL UNIVERSITY. AND LOOKED AT THE DOCUMENTATION OF THE EXPERIENCES THAT THEY HAD THERE. I ALSO EXAMINED THE MEDICAL RECORDS OF ANOTHER GROUP --

Q. EXCUSE ME, PROFESSOR. WHAT DOCUMENTATION OF THE EXPERIENCES THAT THEY HAD THERE, WHAT DO YOU MEAN BY THAT?

A. STAFF NOTES.

Q. I'M SORRY?

A. STAFF NOTES.

Q. STAFF OF?

A. OF MUSC.

Q. FINE. THANK YOU.

A. YES. I ALSO LOOKED AT ANOTHER GROUP OF PATIENTS WHO WERE NOT THE PLAINTIFFS, BUT A SEPARATE GROUP WHO WERE AT THE MEDICAL UNIVERSITY WITH, IN THEORY, THE SAME PROBLEM AS THE PLAINTIFFS. IN OTHER WORDS, WOMEN WHO

MS. SHOWERS: WE OBJECT TO ANY EVIDENCE OF MEDICAL

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[JESSUP 34]

TESTIMONY IS GOING TO BE SO THAT I CAN BETTER FOLLOW IT THROUGH.

WE'RE GOING TO HEAR IT, AND THEN POSSIBLY AT THE END OF HER TESTIMONY I'LL RECONSIDER SOME OF THESE QUESTIONS. BUT IN THE MEANTIME I'M GOING TO PERMIT YOU TO HEAR HER TESTIMONY AT LEAST AT THE PRESENT TIME, AND THEN IF SOME OF IT SHOULD BE TAKEN AWAY FROM YOUR CONSIDERATION BECAUSE OF OUR RULES OF EVIDENCE, THEN WE'LL DISCUSS THAT. OTHERWISE YOU CAN CONSIDER IT AND GIVE IT SUCH WEIGHT AS YOU THINK IT MAY RECEIVE.

YOU MAY CONTINUE.

MR. WHERRY: THANK YOU, SIR.

Q. (BY MR. WHERRY, CONTINUING) PROFESSOR, WITH THIS FIRST OPINION THAT YOU HAVE RENDERED, YOU INDICATED THAT THE PROGRAM IN YOUR OPINION WAS PUNITIVE. WHAT DO YOU MEAN BY PUNITIVE?

A. IN MY WORK AND IN THE BEST INVESTMENT OF TRYING TO GET THROUGH TO WOMEN WHO ARE DRUG AND ALCOHOL DEPENDENT, WE WORK VERY HARD TO KEEP WOMEN IN PRENATAL CARE. WOMEN WHO HAVE THESE PROBLEMS IN PRENATAL CARE, WE WORK VERY HARD TO DEVELOP TRUST. WE WORK VERY HARD TO DEVELOP WHAT I HAVE BEEN CALLING A THERAPEUTIC ALLIANCE.

Q. EXCUSE ME. WHY IS THAT IMPORTANT? WHY IS TRUST AND THERAPEUTIC ALLIANCE IMPORTANT?
A. I WILL GET TO THAT.
Q. OKAY.
A. WE AVOID ANY LANGUAGE --

* * *

[JESSUP 39]

YES.
MS. SHOWERS: OBJECT TO LEADING.
MR. WHERRY: IT'S PRELIMINARY, JUDGE.
THE COURT: GO AHEAD.
MR. WHERRY: THANK YOU, SIR.
(BY MR. WHERRY, CONTINUING) WOULD YOU EXPLAIN WHAT YOU MEANT BY THAT BY IT BEING HARMFUL? HOW WAS IT HARMFUL?
A. I THINK IT WAS HARMFUL IN THAT IT IMMEDIATELY, UPON THE WOMEN TESTING POSITIVE IN THEIR URINE SAMPLE FOR COCAINE, THEY WERE PRESENTED ESSENTIALLY WITH A VERY THREATENING MESSAGE. THEY - IT WAS HARMFUL IN TERMS OF ESTABLISHING FEAR. AND I COME TO THAT CONCLUSION BY DOCUMENTATION OF EVENTS AND PATIENTS' REACTIONS TO THAT PRESENTATION OF THAT POLICY TO THEM.
AND I THINK IT WAS HARMFUL IN AS MUCH IF THEY'RE GOING TO RUN AWAY OR BE AFRAID, THEY'RE NOT GOING TO COME BACK

FOR PRENATAL CARE, AND WITHOUT THEM IN PRENATAL CARE AND WITHOUT THEM IN TREATMENT FOR THEIR ALCOHOL OR OTHER DRUG PROBLEM, WE CAN'T DO ANYTHING TO IMPROVE THESE OUTCOMES IN THE WOMEN OR IN THEIR BABIES. AND SO IN THAT REGARD IT WAS HARMFUL.

Q. PROFESSOR, I FORGET YOUR EXACT WORDS, BUT I THINK WHEN -- SOMETHING IN THE JARGON WHEN THEY WERE IDENTIFIED, IDENTIFIED AND FIRST CONFRONTED, THERE WAS A THREATENING MESSAGE GIVEN. WAS THAT SUBSTANTIALLY WHAT YOUR WORDS WERE?

* * *

[JESSUP 40]

A. YES.

Q. WHAT WAS THE THREATENING MESSAGE THAT YOU MAKE REFERENCE TO AND WHAT WAS THE THREAT?

A. BY MY REVIEW OF THESE RECORDS, I CAN SEE THE WAYS IN WHICH THE PLAINTIFFS WERE SHOWN THE POLICY AS IT WAS WRITTEN ON A PIECE OF PAPER WHICH SAID TO THEM, YOU HAVE TESTED POSITIVE. IF YOU TEST POSITIVE AGAIN YOU WILL BE ARRESTED. AND THEY WERE TOLD THAT THEY HAD TO SIGN THIS. AND THIS WAS WITHOUT THE BENEFIT OF IN DEPTH EVALUATION OF THEIR PROBLEM. WITHOUT -- AND UNDERSTAND I'M LOOKING AT THE DOCUMENTATION OF

THESE EVENTS, SO I SEE NO DOCUMENTATION OF IN DEPTH EVALUATION. AND IN THAT REGARD I THINK THAT THEY WERE PRESENTED THIS INFORMATION AND IT WAS THREATENING TO THEM.

Q. WHY IS THAT BAD?

A. IT'S BAD BECAUSE IT SETS UP A DYNAMIC THAT CHANGES THE THERAPEUTIC RELATIONSHIP IN THIS CASE BETWEEN THE NURSE AND THE PATIENT. THE DUTY OF THE NURSE IS TO PRESERVE AND RESTORE HEALTH. WE HAVE ETHICAL OBLIGATIONS TO DO THAT AS NURSES. AND I THINK THE IMMEDIATE INJECTION OF LEGAL THREAT IMMEDIATELY CHANGES THE NATURE OF THAT RELATIONSHIP THAT A NURSE HAS A WITH A PATIENT. AND I THINK FOR A NURSE TO HAVE THAT ROLE IT SETS UP A VERY DEADLY DYNAMIC THAT CAN ACTUALLY KEEP PEOPLE AWAY FROM SOURCES OF HELP.

MR. WHERRY: YOUR HONOR, I WOULD LIKE TO SHOW THE WITNESS JOINT EXHIBIT NUMBER 6. I DON'T KNOW WHETHER THE

[JESSUP 41]

JOINT EXHIBITS HAVE BEEN RECEIVED INTO EVIDENCE YET OR NOT. BUT WE BOTH AGREE THAT THEY SHOULD BE. SO MAY I SHOW THIS WITNESS?

THE COURT: CERTAINLY.

Q. (BY MR. WHERRY, CONTINUING) LET ME SHOW YOU WHAT HAS BEEN MARKED JOINT EXHIBIT NUMBER 6, AND ASK YOU WHETHER YOU RECOGNIZE THAT DOCUMENT HAVING SEEN IT BEFORE?

A. YES, I HAVE.

Q. AND IS THAT ONE OF THE THREATENING DOCUMENTS THAT YOU TALKED ABOUT?

A. YES.

Q. WHAT ABOUT THAT DOCUMENT -- WELL, WHAT ABOUT THAT DOCUMENT IS THREATENING? WHAT LANGUAGE IN THERE IS THREATENING? WOULD YOU READ IT FOR THE JURY.

A. YOU WOULD LIKE ME TO READ THE ENTIRE THING?

Q. NO, THE THREATENING LANGUAGE.

A. OKAY. THEY'RE SPEAKING ABOUT MAKING A REFERRAL TO SUBSTANCE ABUSE COUNSELING. THIS REFERRAL WILL GIVE -- THIS REFERRAL WILL GIVE YOU THE OPPORTUNITY TO REHABILITATE YOURSELF FOR THE GOOD OF YOURSELF AND YOUR CHILD. THAT IS NOT THREATENING.

THE NEXT SECTION I BELIEVE IS. A REFERRAL WILL ALSO BE MADE TO THE CHARLESTON COUNTY DEPARTMENT OF SOCIAL SERVICES UNDER SOUTH CAROLINA CHILD PROTECTION LAW. DSS WILL DETERMINE WHETHER THE BEST INTEREST OF YOUR CHILD REQUIRES THE REMOVAL

OF THAT CHILD FROM YOUR CUSTODY DURING YOUR REHABILITATION.

AND I WOULD EMPHASIZE THE FOLLOWING SECTION, A THREATENING: IF YOU FAIL TO COMPLETE SUBSTANCE ABUSE COUNSELING, FAIL TO COOPERATE WITH THE DEPARTMENT OF SOCIAL SERVICES IN THE PLACEMENT OF YOUR CHILD AND SERVICES TO PROTECT THAT CHILD, OR IF YOU FAIL TO MAINTAIN CLEAN URINE SPECIMENS DURING YOUR SUBSTANCE ABUSE REHABILITATION, YOU WILL, UNDERLINED, BE ARRESTED BY THE POLICE AND PROSECUTED BY THE OFFICE OF THE SOLICITOR.

TO ME THIS IS AN EXTRAORDINARY DEPARTURE FROM A TRADITIONAL RELATIONSHIP THAT A NURSE EVALUATING A WOMAN WHO HAS COME TO A MEDICAL THERAPEUTIC FACILITY FOR HELP SHOULD BE DOING. IT IS A DRAMATIC DEPARTURE FROM ANYTHING THAT IS CONSISTENT WITH ANY TRADITIONS OF HELP.

Q. AND ARE THERE CERTAIN THINGS, CERTAIN MINIMUM REQUIREMENTS FOR EFFECTIVE AND POSITIVE NURSING THAT ARE GENERALLY ACCEPTED STANDARDS THROUGHOUT THE COUNTRY?

A. VERY DEFINITELY.

Q. AND IS THIS LETTER BEING PRESENTED BY A NURSE, IN THE CIRCUMSTANCES AS YOU CAME TO UNDERSTAND IT AT MUSC, CONSISTENT

WITH A MINIMUM STANDARD REQUIRED FOR EFFECTIVE AND APPROPRIATE NURSING?

A. ABSOLUTELY NOT.

Q. MAY I SHOW YOU JOINT EXHIBIT NUMBER 7?

MS. SHOWERS: YOUR HONOR, WE OBJECT.

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[JESSUP 47]

THE COURT: COUNSELING PEOPLE THAT ARE INVOLVED WITH DRUGS?

MR. WHERRY: NO, SIR. SHE IS A NURSE TREATING SUBSTANCE-ABUSING PREGNANT WOMEN AND ATTENDING TO THEM POSTPARTUM WITH THEIR CHILDREN, I THINK SHE SAID UP TO SIX WEEKS POSTPARTUM, AND BEING INVOLVED IN THE THERAPEUTIC SETTING, WHICH IS EXACTLY WHAT THE AVOWED POLICY WAS AT MUSC. AND THERE WAS NOT A NURSE AT MUSC THAT WAS DOING TOXICOLOGY, AND SHE CAN'T DO TOXICOLOGY. THAT'S NOT WHAT IT IS ABOUT. IT WAS ABOUT THE WAY THEY HANDLED AND TREATED AND MAINTAINED AND WE SAY COERCED AND INAPPROPRIATELY DEALT WITH THE SUBSTANCE-ABUSING PREGNANT WOMEN, BOTH ANTEPARTUM AND POSTPARTUM. AND THAT'S ALL THIS WOMEN HAS DONE.

THE COURT: OKAY. I'LL SEE WHERE SHE IS GOING. GO

AHEAD.

MR. WHERRY: THANK YOU, SIR.

THE COURT: I THINK IT WAS WHETHER THIS POLICY IS GOING TO ACCOMPLISH THE PROTECTION OF THE FETUS.

MR. WHERRY: YES, SIR.

Q. (BY MR. WHERRY, CONTINUING) DO YOU HAVE OPINION, TO A REASONABLE DEGREE OF SCIENTIFIC PROBABILITY, AS TO WHETHER OR NOT THE INTERAGENCY POLICY, AS YOU CAME TO LEARN IT, WOULD ACCOMPLISH FETAL PROTECTION?

A. YES, I HAVE AN OPINION.

Q. AND WHAT IS THAT OPINION?

[JESSUP 48]

A. MY OPINION IS THAT THE POLICY AS IT WAS DESIGNED BY STAFF OF THE MUSC, AND THAT IMPLEMENTED BY STAFF OF MUSC, COULD NOT PROMOTE FETAL PROTECTION.

Q. WHY?

A. IT COULD NOT PROMOTE FETAL PROTECTION FOR SEVERAL REASONS. ONE WAS THAT IT WAS LOOKING AT ONE DRUG, SPECIFICALLY COCAINE, WHEN WE KNOW THAT ALCOHOL, TOBACCO, HEROIN, METHAMPHETAMINES AND OTHER SUBSTANCES ALSO CAUSE PROBLEMS IN THE FETUS AND IN THE NEWBORN. WHEN YOU HAVE A POLICY THAT SPECIFICALLY FOCUSES ON ONE DRUG, YOU CANNOT ACCOMPLISH FETAL PROTECTION ACROSS THE BOARD.

ADDITIONALLY, AND I HAVE STATED PREVIOUS TO THIS MOMENT, I BELIEVE THAT IT DETERRED WOMEN AND FRIGHTENED THEM AND SCARED THEM AWAY FROM THE CURRENT --

MS. SHOWERS: YOUR HONOR, THERE IS NO EVIDENCE OF THIS AND NOTHING TO BASE IT ON.

THE COURT: SAY WHAT?

MS. SHOWERS: THERE HAS BEEN NO EVIDENCE PRESENTED.

THE COURT: I'M GOING TO PERMIT HER TO TESTIFY. GO AHEAD.

Q. (BY MR. WHERRY, CONTINUING) CONTINUE WITH YOUR ANSWER.

A. SECONDLY, I THINK THAT IT WAS HARMFUL BECAUSE, AGAIN, IT WAS FRIGHTENING LANGUAGE. IT WAS A RADICAL DEPARTURE FROM WHAT PATIENTS ARE USED TO WHEN THEY COME INTO THE HOSPITAL TO GET HELP. AND IT ALTERED THE RELATIONSHIP PERMANENTLY BETWEEN

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[JESSUP 54]

GIVE THE TESTIMONY PROPER CONSIDERATION. I'M GOING TO OVERRULE THE OBJECTION WITH THOSE COMMENTS.

YOU MAY PROCEED.

MR. WHERRY: THANK YOU, SIR.

THE COURT: DO YOU WANT THE QUESTION READ BACK. SHE WILL BE GLAD TO READ IT BACK.

MR. WHERRY: SEE IF THE WITNESS RECALLS IT.

THE WITNESS: NO.

(QUESTION READ BACK AS FOLLOWS:)

NOW, WITH RESPECT TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, AND THE ACTIONS OF NURSE SHIRLEY BROWN INSOFAR AS THEY ARE APPLICABLE TO THE TEN PLAINTIFFS, AND FROM THE PERSPECTIVE OF MOTIVATION AND HISTORY, DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THERE WAS ANY POTENTIAL FOR THE INTERAGENCY POLICY BEING SUCCESSFUL FOR FETAL PROTECTION AND THE APPROPRIATE CARE AND TREATMENT OF THE SUBSTANCE-ABUSING PREGNANT WOMEN?

THE COURT: OKAY.

Q. (BY MR. WHERRY, CONTINUING) DO YOU HAVE AN OPINION?

A. YES, I DO HAVE AN OPINION.

Q. WHAT IS THAT OPINION?

A. MY OPINION IS THAT THE POLICY AS CONSTRUCTED AND WRITTEN DOWN BY MUSC COULD NOT PROMOTE FETAL PROTECTION.

Q. WHY?

A. IT COULD NOT PROMOTE FETAL PROTECTION BECAUSE IT

[JESSUP 55]

INITIALLY, BECAUSE OF THE REPORTING MECHANISMS TO THE DEPARTMENT OF SOCIAL SERVICES AND TO LAW ENFORCEMENT, IT COULD

NOT PROMOTE FETAL PROTECTION BECAUSE IT CHANGED THE RELATIONSHIP BETWEEN THE PATIENT AND THE CAREGIVERS, IT CREATED FEAR IN THE POPULATION AND HAD THE IMPACT OF FRIGHTENING THE WOMEN, MAKING THEM FEARFUL AND HAVING CONCERNS ABOUT COMING IN FOR CARE IN THE FUTURE.

MS. SHOWERS: YOUR HONOR, I OBJECT AND MOVE TO STRIKE. IT LACKS FOUNDATION.

THE COURT: I'LL PERMIT IT.

Q. (BY MR. WHERRY, CONTINUING) PROFESSOR, LET ME RETURN BACK TO SOME QUESTIONS I WAS ASKING SEVERAL HOURS AGO. IN THE DOCUMENTS THAT YOU CONSIDERED IN FORMING THE OPINIONS THAT YOU HAVE FORMED, SOME OF WHICH YOU TESTIFIED TO SOME ARE YET TO COME, WAS ONE OF THE THINGS THAT YOU REVIEWED WHAT HAS BECOME TO BE KNOWN AS THE INTERAGENCY POLICY?

A. YES.

Q. AND WHAT IS YOUR UNDERSTANDING, THAT IS THE UNDERSTANDING THAT YOU BASE YOUR OPINIONS ON AS TO WHAT THE INTERAGENCY POLICY WAS THAT WAS IMPLEMENTED AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. MY UNDERSTANDING --

THE COURT: IS IT A WRITTEN DOCUMENT.

MR. WHERRY: YES, SIR, THERE ARE.

THE COURT: SAY WHAT?

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[JESSUP 79]

A. SPECIFICALLY THE TREATMENT OF ALCOHOL AND OTHER DRUG DEPENDENT WOMEN WHO ARE PREGNANT OR PARENTING YOUNG CHILDREN.

Q. NOW, DOCTOR - I'M SORRY. PROFESSOR, WOULD YOU DESCRIBE FOR THE JURY, PLEASE, WHAT WAS AVAILABLE IN THE LITERATURE WITH RESPECT TO THE TREATMENT OF SUBSTANCE ABUSING PREGNANT WOMEN IN THE LATE PART OF THE EIGHTIES. NINETEEN HUNDRED AND EIGHTY-EIGHT AND EIGHTY-NINE?

A. THERE WAS A GREAT DEAL OF INFORMATION WHICH REALLY SPANNED THE PREVIOUS 15 YEARS, SPECIFICALLY DESCRIBING TECHNIQUES FOR CREATING PROGRAMS FOR THIS POPULATION THAT WERE HOSPITAL BASED, THAT WOULD ALLOW FOR APPROPRIATE AND GOOD IDENTIFICATION OF THESE WOMEN IN THE HOSPITAL, THAT WOULD ALLOW FOR THEM TO COME BACK TO THE HOSPITAL FOR PRENATAL CARE AND DRUG TREATMENT, EITHER AT THAT FACILITY OR OUTSIDE OF THE FACILITY.

THERE WAS MUCH RESEARCH DESCRIBING THE WAYS IN WHICH NURSES AND PHYSICIANS AND SOCIAL WORKERS AND OTHER HEALTH CARE PROVIDERS SHOULD RELATE TO ALCOHOL AND DRUG DEPENDENT WOMEN

SUCH AS TO CAUSE THEM TO WANT TO COME BACK.

THERE WAS ALSO A GREAT DEAL OF INFORMATION ABOUT THE EFFECTS OF ALCOHOL AND DRUG USE BY PREGNANT WOMEN, ALTHOUGH WE WOULD CONSIDER THAT PERIOD OF TIME A PRELIMINARY PHASE OF THOSE FINDINGS.

Q. PROFESSOR, WAS THERE A SPECTRUM OF ALTERNATIVES AVAILABLE AT THAT POINT IN TIME FOR THE TREATMENT AND CARE OF

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[JESSUP 89]

A. MY OPINION IS IT WAS NOT EFFECTIVE BECAUSE -

THE COURT: SHE CAN EXPRESS THE BASIS, BUT UNLESS YOU QUALIFIED UNDER RULE 703, IT DOES APPEAR TO BE HEARSAY. AND YOU HAVEN'T MADE -

MR. WHERRY: IT MAY NOT BE ADMISSIBLE, BUT I THINK SHE IS ENTITLED TO RELY UPON THINGS THAT WOULDN'T ORDINARILY BE ADMISSIBLE IN FORMING OPINIONS.

THE COURT: THAT'S WHAT THAT DEALS WITH, BUT YOU HAVE NOT TOUCHED ON IT, AND THEREFORE I HAVE TO RULE ON THE HEARSAY WHICH DID.

Q. (BY MR. WHERRY, CONTINUING) DESCRIBE WHAT THE OPINIONS ARE THAT YOU HAD WITH RESPECT TO THE POLICY?

A. I THOUGHT IT WAS INEFFECTIVE AND DO THINK IT WAS INEFFECTIVE BECAUSE WOMEN LEFT THE HOSPITAL AFTER THEY HAD HEARD THE POLICY DESCRIBED, AFTER THEY WERE INFORMED THAT THEY COULD BE ARRESTED IF THEY DID NOT COMPLY WITH THE POLICY. AND I ALSO BELIEVE THAT IT DID NOT RESULT IN WOMEN GETTING THE HELP THAT THEY NEEDED.

Q. WHY?

A. THEY WERE NOT REFERRED TO PROGRAMS, IN MY UNDERSTANDING, THAT WERE SPECIFIC AND APPROPRIATE FOR PREGNANT OR POSTPARTUM WOMEN. THEY SPECIFICALLY, WHEN THEY WERE ASKED FOR PRENATAL - WHEN THEY WERE ASKED IF THEY WOULD ATTEND AND SOME OF THE WOMEN SAID THAT, YES, THEY WOULD ATTEND, THEY WERE NOT GIVEN THE RESOURCES -

[JESSUP 90]

MS. SHOWERS: I OBJECT TO HEARSAY.

THE COURT: I COULD NOT HEAR YOU.

MS. SHOWERS: SHE IS QUESTIONING PEOPLE. I DON'T KNOW WHO SHE IS TALKING ABOUT, PLAINTIFFS OR PATIENTS. IT'S ALL HEARSAY.

THE COURT: WELL, I HAVE ALREADY SUSTAINED THE OBJECTION ON THE GROUNDS OF HEARSAY. I HAVE SUGGESTED THAT

YOU COULD GET IT IN UNDER RULE 703, BUT YOU APPARENTLY DON'T WANT TO TRY THAT, AND SO I SUSTAIN THE OBJECTION ON THE GROUNDS THAT IT'S HEARSAY.

MR. WHERRY: ACTUALLY, SIR, I THOUGHT SHE WAS COMPLYING WITH RULE 703, AND I OBVIOUSLY DON'T UNDERSTAND THAT RULE.

THE COURT: THAT RULE SAYS THAT EVEN THOUGH SOMETHING IS HEARSAY AND NOT ADMISSIBLE, IF IT'S THE TYPE MATERIAL THAT A WITNESS SUCH AS THIS REASONABLY RELIES ON IN EXPRESSING OPINIONS, AND THEN THEY CAN RELY ON IT EVEN THOUGH IT'S NOT ADMISSIBLE BECAUSE IT'S HEARSAY.

MR. WHERRY: I THOUGHT SHE TESTIFIED TO THAT LAST TIME SHE WAS ON THE STAND AS TO WHAT SHE RELIED UPON. AND PERHAPS I'M WRONG, AND I'LL BE GLAD TO ASK HER AGAIN. AND I BELIEVE THAT I ASKED THAT AND THEN YOU INDICATED THAT YOU WANTED ME TO STOP BECAUSE YOU WANTED

THE COURT: MAYBE YOU DID.

MR. WHERRY: YOU WANTED -

[JESSUP 91]

THE COURT: OKAY.

Q. (BY MR. WHERRY, CONTINUING) BUT, PROFESSOR, WHAT DID YOU

RELY UPON? WHAT THINGS DID YOU LOOK AT? WHAT DID YOU CONSIDER IN FORMING THE OPINIONS THAT YOU FORMED WITH RESPECT TO THIS POLICY?

A. FOR ONE THING, AS A MEMBER OF THE FEDERAL PANEL ON THE BEST WAY TO DEAL WITH DRUG AND ALCOHOL DEPENDENT WOMEN, WE REVIEWED A NUMBER OF MATERIALS. ONE OF THE THINGS THAT WE LOOKED AT WAS AN ARTICLE THAT WAS WRITTEN BY SHIRLEY BROWN AND DR. HORGER DESCRIBING THE PROBLEM AT MUSC AND WHAT THEY HAD ATTEMPTED TO DO ABOUT IT.

Q. LET ME STOP YOU HERE. IS THAT THE KIND OF THING REASONABLY RELIED UPON BY EXPERTS IN YOUR FIELD TO FORM OPINIONS WITH RESPECT TO THE AREA THAT WE'RE DEALING WITH, THE ADEQUACY OF PARTICULAR METHODS OF TREATING PREGNANT, SUBSTANCE-ABUSING WOMEN?

A. GENERALLY SPEAKING IT IS.

Q. WHAT ELSE DID YOU CONSIDER?

A. WHAT ELSE I CONSIDERED WERE DESCRIPTIONS OF THE POLICY INCLUDING THE VERY POLICY ITSELF, WHICH I READ.

Q. IS THAT THE KIND OF THING REASONABLY RELIED UPON BY EXPERTS IN YOUR FIELD IN ORDER TO FORM AN OPINION AS TO THE ADEQUACY OF TREATMENT PROGRAMS FOR PREGNANT, SUBSTANCE-ABUSING WOMEN?

A. YES.

[JESSUP 92]

WHAT ELSE DID YOU CONSIDER?
A. I ALSO READ A DESCRIPTION OF THE MODEL THAT WAS WRITTEN BY CHARLES CONDON, WHICH WAS A NARRATIVE DESCRIPTION OF THE PROGRAM AND OF THE POLICY.
Q. AND IS THAT THE KIND OF THING ORDINARILY AND REASONABLY RELIED UPON EXPERTS IN YOUR FIELD IN ORDER TO FORM OPINIONS WITH RESPECT TO THE ADEQUACY FOR TREATMENT PROGRAMS FOR PREGNANT, SUBSTANCE-ABUSING WOMEN?
A. YES.
Q. WHAT ELSE DID YOU CONSIDER?
A. I ALSO CONSIDERED, I WOULD SAY, APPROXIMATELY 25 TO 35 SEPARATE RESEARCH PAPERS, WHICH I CAN CITE IF YOU WOULD LIKE ME TO, ABOUT THE VALUE OF PUNITIVE INTERVENTIONS VERSUS THOSE THAT ARE EXPLICITLY TAILORED TO FACILITATE WOMEN INTO TREATMENT THAT GIVES THEM TREATMENT RESOURCES AND THAT TREATMENT IS APPROPRIATE.
Q. THESE ARTICLES AND DOCUMENTS THAT YOU CONSIDERED, ARE THEY THE KIND OF THING REASONABLY RELIED UPON BY EXPERTS IN ORDER TO FORM OPINIONS AS TO ADEQUACY OF TREATMENT PROGRAMS FOR PREGNANT SUBSTANCE-ABUSING WOMEN?
YES.
Q. WHAT ELSE DID YOU CONSIDER?

A. I ALSO CONSIDERED INFORMATION THAT WAS PRESENTED TO ME IN TERMS OF THE IMPACT ON THE PATIENTS, ON THE PLAINTIFFS. AND ALSO -

[JESSUP 93]

Q. WHERE DID THAT INFORMATION COME FROM?
A. THAT CAME FROM THEIR MEDICAL RECORDS.
Q. ARE THE MEDICAL RECORDS THE KINDS OF THINGS REASONABLY RELIED UPON BY EXPERTS IN YOUR FIELD TO FORM OPINIONS AS TO ADEQUACY OF TREATMENT PROGRAMS FOR PREGNANT SUBSTANCE-ABUSING WOMEN?
A. YES.
Q. WHAT ELSE DID YOU CONSIDER, IF ANYTHING?
A. I ALSO CONSIDERED MEDICAL RECORDS OF OTHER PATIENTS UNDER SIMILAR CIRCUMSTANCES WHO CAME TO MUSC SEEKING PRENATAL CARE. AND THAT WAS A GROUP OF WOMEN WHO CAME TO THE PRENATAL CLINIC AT MUSC DURING THE PERIOD WHICH HAS BEEN REFERRED TO AS PRE-POLICY. THAT MEANS PRIOR TO THE PERIOD OF LATE SEPTEMBER 1989.
AND I ALSO LOOKED AT -
Q. LET ME STOP YOU THERE. WERE THOSE THE KIND OF THINGS CONSIDERED BY EXPERTS IN YOUR FIELD AND REASONABLY RELIED UPON

IN ORDER TO FORM OPINIONS AS TO THE ADEQUACY OF TREATMENT PROGRAMS FOR PREGNANT, SUBSTANCE-ABUSING WOMEN?
A. I BELIEVE SO.
Q. WHAT ELSE DID YOU CONSIDER?
A. I ALSO LOOKED AT A GROUP OF MEDICAL RECORDS OF WHITE WOMEN WHO CAME TO MUSC FOR PRENATAL CARE AND WHO ALSO TESTED POSITIVE FOR COCAINE.
Q. IS THAT THE KIND OF THINGS REASONABLY RELIED UPON BY

[JESSUP 94]

EXPERTS IN YOUR FIELD IN ORDER TO FORM OPINIONS AS TO ADEQUACY OF TREATMENT PROGRAMS FOR PREGNANT, SUBSTANCE-ABUSING WOMEN?
A. I BELIEVE SO.
WHAT ELSE DID YOU CONSIDER, IF ANYTHING?
A. THAT WOULD BE JUST ABOUT IT.
Q. OKAY. NOW, DOCTOR, LET'S GO BACK TO THE OPINIONS THAT YOU HAD. I THINK YOU WERE GIVING US AN OPINION WITH RESPECT TO THE EFFECTIVENESS OF THE INTERAGENCY POLICY WITH RESPECT TO GETTING WOMEN INTO APPROPRIATE TREATMENT PROGRAMS WHO HAD ABUSED SUBSTANCES DURING THEIR PREGNANCY; IS THAT RIGHT?
A. YES.
Q. WOULD YOU CONTINUE WITH THE OPINIONS, PLEASE?
A. YES. AFTER REVIEWING THE PLAINTIFF'S MEDICAL RECORD AND

LOOKING AT THE WAY IN WHICH THE POLICY WAS IMPLEMENTED, IN OTHER WORDS THE WAY IN WHICH THE PLAINTIFFS WERE APPROACHED AND THE CIRCUMSTANCES THAT OCCURRED TO THEM, THINGS THAT HAPPENED TO THEM, WHAT THEY DID AS A RESULT OF HEARING ABOUT THE POLICY OR HAVING THE POLICY IMPLEMENTED UPON THEM, SO TO SPEAK, IT LED ME TO CONCLUDE THAT IT WAS NOT EFFECTIVE.

Q. WHY?

A. IN SOME CASES THE WOMEN, AND IN THIS CASE NOW I'M SPECIFICALLY REFERRING TO PLAINTIFFS, STATED THAT THEY WERE READY FOR TREATMENT, THAT THEY WANTED TREATMENT, THAT THEY WERE WILLING TO GO TO TREATMENT. AND EVEN IN SPITE OF THAT, THEY WERE ARRESTED AND REMOVED TO THE COUNTY JAIL

[JESSUP 95]

FACILITY.

Q. DOCTOR, ARE THERE EFFECTIVE WAYS IN THE MAINSTREAM OF SUBSTANCE ABUSE COUNSELING TO ENCOURAGE TREATMENT?

A. YES.

Q. DESCRIBE FOR THE JURY WHAT THOSE WAYS OF ENCOURAGING TREATMENT ARE?

A. YOU DO THAT IN THE FACILITY BY PROVIDING A COMPASSIONATE STATEMENT TO YOUR PATIENT.

Q. WHAT DOES THAT MEAN?

A. IT MEANS THAT YOU SAY WE ARE HERE TO HELP YOU, WHAT YOU TELL US IS CONFIDENTIAL, WE WILL USE THAT TO GET YOU TO THE RIGHT PROGRAM AND WE WILL NOT REPORT YOU TO ANY AUTHORITIES, SO THAT THERE WILL NOT BE LEGAL CONSEQUENCES TO YOU SHOULD YOU CONFIDE IN US ABOUT YOUR PROBLEM.

Q. WHY IS THAT IMPORTANT?

A. IT'S IMPORTANT BECAUSE IF YOU THREATEN OR CONFRONT - AND BY THREATEN I MEAN HOLD OUT THE POSSIBILITY OF INCARCERATION, THIS DETERS WOMEN FROM SEEKING HELP. AND INDEED THERE IS RESEARCH TO SUPPORT THAT THOSE KINDS OF APPROACHES CREATE EXACTLY THAT. THEY CREATE A FEAR AND THE WOMEN WILL NOT COME BACK IN JUST FOR EVEN PRENATAL CARE, MUCH LESS AVAIL THEMSELVES OF ANY KIND OF TREATMENT PROGRAM.

Q. DOCTOR, IS - IS THE MANNER IN WHICH THAT IS DONE SIGNIFICANT?

A. YES, I BELIEVE THAT IT IS.

[JESSUP 96]

Q. DESCRIBE WHY THAT IS IMPORTANT.

A. IT'S IMPORTANT BECAUSE THIS GROUP OF WOMEN, DRUG AND ALCOHOL DEPENDENT, PREGNANT AND POSTPARTUM WOMEN ARE FEARFUL OF THE CONSEQUENCES THAT THEY MAY FACE. THEY ARE ALSO, I

BELIEVE, CAN BE INTIMIDATED BY STATEMENTS THAT ARE PUNITIVE AND CONFRONTATIVE. AND THEY ARE INTIMIDATED AWAY FROM THE SOURCES OF HELP WHERE THEY NEED, THE EXACT PLACE WHERE THEY NEED TO BE.

Q. AND JUST SO I DON'T LEAVE AN AREA BEFORE I SHOULD, HAVE YOU DESCRIBED FOR US EVERYTHING THAT YOU HAVE AN OPINION WITH RESPECT TO ABOUT HOW IT SHOULD HAVE BEEN DONE?

A. NOT COMPLETELY.

Q. THEN CONTINUE.

A. I BELIEVE THAT THERE HAS TO BE A CONTINUUM OF HELP FROM THE POINT OF WHICH THE PATIENT COMES IN FOR PRENATAL CARE TO THE POINT THAT THEY SUCCESSFULLY COMPLETE A DRUG OR ALCOHOL TREATMENT PROGRAM. AND THAT CONTINUUM COMMENCES WITH OFFERING THEM TREATMENT THAT IS APPROPRIATE FOR THEM THAT ADDRESSES ISSUES OF CHILD CARE AND TRANSPORTATION. THESE ARE NOT EXTRA PERKS THAT, YOU KNOW, WE SHOULD JUST HAND OFF TO THIS POPULATION, THEY'RE ABSOLUTELY CRITICAL PIECES OF THE KIND OF TREATMENT THAT WE OFFER.

Q. WHY? WHY ARE THEY CRITICAL?

A. BECAUSE WE KNOW THAT FOR WOMEN WHO ARE DRUG AND ALCOHOL DEPENDENT, PARTICULARLY IF THEY HAVE CHILDREN, TRANSPORTATION

AND CHILD CARE ARE TWO BARRIERS WHICH PREVENT THEM FROM PARTICIPATING IN A CONSISTENT WAY IN TREATMENT.

Q. WAIT BEFORE YOU ANSWER MY NEXT QUESTION.

DID YOU CONSIDER OR DID YOU REVIEW RECOMMENDATIONS OF MEDICAL GROUPS AND SOCIETIES WITH RESPECT TO THE PROBLEM OF SUBSTANCE ABUSE IN PREGNANCY IN FORMING THE OPINIONS THAT YOU FORMED?

MS. SHOWERS: I OBJECT, YOUR HONOR, ON THE GROUND OF HEARSAY 401, 403, AND LACK OF FOUNDATION.

MR. WHERRY: I WOULD LIKE TO BE HEARD.

THE COURT: WOULD YOU REPEAT THE QUESTION, I LISTENED TO IT BUT - DID SHE REVIEW WHAT? I'M NOT SURE I UNDERSTAND IT.

MR. WHERRY: REPORTS AND RECOMMENDATIONS OF LEADING MEDICAL GROUPS AND ASSOCIATIONS WITH RESPECT TO SUBSTANCE ABUSE IN PREGNANCY IN FORMING THE OPINIONS THAT SHE HAS FORMED.

AND I WOULD LIKE TO CITE ALSTON VERSUS TALLADEGA COUNTY. I THINK THAT THE STANDARDS AND NORMS THAT EXIST ARE VERY APPROPRIATE AND RELEVANT CONSIDERATION.

THE COURT: YOU HAVE LOST ME. THESE REPORTS AND

RECOMMENDATIONS, WHAT ARE THEY?
MR. WHERRY: OF LEADING MEDICAL GROUPS. I'M GOING TO NAME ONE THAT IS NOT ONE, SO I DON'T PREJUDICE ANY, THE AMERICAN MEDICAL ASSOCIATION.

* * *

[JESSUP 115]

ANSWER THAT DURING THE BREAK, BECAUSE I THINK IT WOULD SAVE A LOT OF TIME IF YOU CAN IDENTIFY IT NOW AND NOT HAVE TO IDENTIFY IT ON CROSS-EXAMINATION.
MS. SHOWERS: THANK YOU.
THE COURT: LET'S GIVE HER THE SIX ARTICLES SHE RELIED ON AND LET'S LET MS. JESSUP TELL HER WHERE THEY'RE FOOTNOTED IN HER WRITING, AND IF THEY'RE NOT FOOTNOTED WE MIGHT COME BACK AND ENTERTAIN ANOTHER OBJECTION.
MS. SHOWERS: THANK YOU.
(WHEREUPON, A BREAK WAS TAKEN OFF THE RECORD.)
THE COURT: ALL RIGHT, SIR.
Q. (BY MR. WHERRY, CONTINUING) PROFESSOR JESSUP, DID YOU FORM AN OPINION AS TO WHAT THE NORMS ARE BASED UPON YOUR REVIEW OF THE DOCUMENTATION OF LEADING MEDICAL GROUPS AND ASSOCIATIONS WITH RESPECT TO THE TREATMENT OF SUBSTANCE-ABUSING PREGNANT WOMEN?
A. YES, I HAVE.

Q. AND WHAT IS YOUR OPINION AS TO WHAT THOSE NORMS ARE?
A. BASED ON WHAT SEVERAL OF THESE ORGANIZATIONS HAVE STATED, AND THESE ORGANIZATIONS HAVE TO DO WITH MATERNAL AND CHILD AND INFANT HEALTH, THE COMPONENTS OF AN EFFECTIVE PROGRAM INCLUDE OUTREACH AND CASE FINDING ASSESSMENT, IN DEPTH INTERVIEW AND REFERRAL FOR TREATMENT TO AN APPROPRIATE PROGRAM THAT WOULD BEST SERVE WOMEN AND CHILDREN. THEY DO NOT INCLUDE AND A PROGRAM SHOULD NOT INCLUDE ANYTHING THAT INTENDS TO PUNISH OR

[JESSUP 116]

PROVIDE FOR ARRESTS OR INCARCERATION OR ANY OTHER LEGAL INTERVENTION THAT WOULD POSSIBLY FRIGHTEN WOMEN AWAY AND DETER THEM FROM GETTING PRENATAL CARE AND THE TREATMENT THAT THEY NEED.
Q. DOCTOR, DO YOU HAVE AN OPINION AS TO THE ACCEPTANCE OF THOSE STANDARD OR NORMS?
A. IT'S MY BELIEF -- OH.
MS. SHOWERS: OBJECTION, YOUR HONOR. I OBJECT TO THE QUESTION AS IMPROPER FOUNDATION.
THE COURT: GO AHEAD. WHAT WAS THE QUESTION?
Q. (BY MR. WHERRY, CONTINUING) THE QUESTION WAS WHETHER SHE HAD AN OPINION AS TO THE ACCEPTANCE OF THESE STANDARDS OR

NORMS? WHETHER THEY'RE GENERALLY --
THE COURT: I SUSTAIN THE OBJECTION. I DON'T KNOW THAT THE ACCEPTANCE OF THEM IS RELEVANT. SHE IS HERE EXPRESSING AN OPINION AS AN EXPERT WITNESS. IF SHE RELIES ON THEM THAT'S ONE THING, BUT WHETHER OTHER PEOPLE RELY ON THEM OR NOT, I DON'T KNOW THAT THAT IS RELEVANT. AND SO I SUSTAIN THE OBJECTION.
Q. (BY MR. WHERRY, CONTINUING) COMPARE FOR US, PLEASE, PROFESSOR, THOSE STANDARDS AND NORMS THAT YOU JUST PROVIDED TO US WITH THE INTERAGENCY POLICY?
THE COURT: LET ME BACK UP JUST A MINUTE. I APOLOGIZE FOR INTERRUPTING YOU. WHEN YOU ASK ABOUT THE ACCEPTANCE OF THESE NORMS BY OTHER PERSONS, I ASSUMED THAT YOU

[JESSUP 117]

WERE TALKING ABOUT PEOPLE OTHER THAN ANY OF THE DEFENDANTS?
MR. WHERRY: YES, SIR. YES.
THE COURT: BECAUSE IF THE DEFENDANTS HAVE ACCEPTED THESE NORMS IN THE PAST, THEN IT MAY BE RELEVANT. OTHERWISE I SUSTAIN THE OBJECTION.
Q. (BY MR. WHERRY, CONTINUING) COMPARE FOR US, PLEASE, THE STANDARDS AND NORMS THAT YOU SET FORTH WITH THE INTERAGENCY

POLICY AS YOU UNDERSTAND IT BASED UPON THE THINGS THAT YOU CONSIDERED IN FORMING YOUR OPINIONS?

A. WELL, THESE STANDARDS AND NORMS, FIRST, ARE ALL PUBLISHED AND DELIBERATED UPON BY THE AMERICAN ACADEMY OF PEDIATRICIANS; THE AMERICAN ASSOCIATION OF PUBLIC HEALTH; THE AMERICAN NURSE'S ASSOCIATION; THE AMERICAN MEDICAL ASSOCIATION; AMERICAN SOCIETY ON OBSTETRICIANS AND MEDICINE; AND THE AMERICAN PERINATAL ASSOCIATION AND THE MARCH OF DIMES.

AND THE COMPARISON IS THAT IN THOSE GROUPS STANDARDS WHICH HAVE BEEN EMBRACED BY THE FEDERAL GUIDELINES AND RECOMMENDATIONS FOR TREATMENT, I MIGHT ADD, IN THOSE STANDARDS IT SAYS SPECIFICALLY THAT ANYTHING THAT IS CONSIDERED A LEGAL INTERVENTION SUCH AS AN ARREST OR INCARCERATION OR SINGLING OUT ANY GROUP FOR DRUG TESTING IS VERY PROBLEMATIC IN TERMS OF GETTING TO THE GOAL THAT YOU WANT, WHICH IS HEALTHY BABIES AND HEALTHY WOMEN.

AND BY CONTRAST I WOULD SAY THAT THE POLICY, THE INTERAGENCY POLICY THAT WAS ADAPTED AND IMPLEMENTED AT MUSC

[JESSUP 118]

CERTAINLY HAS THOSE ELEMENTS IN IT.

Q. WHAT ELEMENTS?

A. THE ELEMENTS OF ARRESTS AND INCARCERATION AS WELL AS BRINGING IN LEGAL AUTHORITIES. NOT ONLY THAT, BUT INFORMING THE PATIENTS OF THAT, WHICH COMES ACROSS AS ESSENTIALLY A LEGAL THREAT IF THEY DO NOT COMPLY WITH PRENATAL CARE AND SUBSTANCE ABUSE.

Q. I THINK YOU JUST MADE A COMMENT ON FEDERAL STANDARDS.

A. YES.

Q. WHERE DO THEY COME FROM?

A. THE CENTER FOR SUBSTANCE ABUSE TREATMENT IS THE BODY WITHIN THE FEDERAL GOVERNMENT THAT SETS STANDARDS FOR POPULATIONS OF PEOPLE WHETHER THEY ARE -

MS. SHOWERS: YOUR HONOR, I OBJECT AS BEYOND THE SCOPE. I DON'T BELIEVE THAT THAT WAS ONE OF THE LISTED ASSOCIATIONS, AND 703 HAS NOT BEEN ESTABLISHED.

THE COURT: WAS IT?

MR. WHERRY: NO, IT WAS NOT. AND I'M MOVING ON TO A NEW AREA.

THE COURT: OKAY.

MR. WHERRY: I MEAN, I DON'T WANT TO MISLEAD YOU. THE QUESTION WAS IN A WHOLE NEW AREA. I WASN'T DEALING WITH THE NORMS ANYMORE.

THE COURT: WELL, LET'S ASK HER ANOTHER QUESTION THEN.

* * *

[JESSUP 125]

DID NOT ATTEMPT TO UNDERTAKE SUBSTANCE ABUSE TREATMENT, CORRECT?

A. YES, THAT'S CORRECT.

Q. AND YOU HAVE NO KNOWLEDGE OF THE ADEQUACY OF THE SUBSTANCE ABUSE TREATMENT AVAILABLE IN CHARLESTON IN 1989, DO YOU, MS. JESSUP?

A. I HAVE AN IMPRESSION OF IT, YES.

Q. BUT YOU HAVE NO PERSONAL KNOWLEDGE OF THAT, DO YOU?

A. CAN YOU DEFINE PERSONAL KNOWLEDGE?

Q. YOU PERSONALLY HAVE NOT DONE ANY STUDIES OR ANY PERSONAL INVESTIGATION TO DETERMINE THE ADEQUACY OF SUBSTANCE ABUSE TREATMENT FACILITIES IN CHARLESTON, SOUTH CAROLINA, IN 1989, CORRECT?

A. I HAVE NOT BEEN TO THE FACILITY AND I SIC NOT INTERVIEWED ANYONE HERE, BUT I HAVE AN IMPRESSION AS TO WHAT THOSE SERVICES WERE AT THAT TIME.

Q. BUT NOT FROM FIRSTHAND KNOWLEDGE, CORRECT?

A. IF THAT BY - IF YOU MEAN BY THAT RESEARCH THAT I CONDUCTED MYSELF OR BY VISITING IT, NO, THAT IS CORRECT.

Q. THANK YOU. YOU HAVE SEEN THE MARCH OF DIMES VIDEO SMOKING, DRINKING AND DRUGS; IS THAT RIGHT?
A. YES, I HAVE.
Q. AND YOU AGREE WITH ME THAT THAT VIDEO IS BENEFICIAL FOR PREGNANT WOMEN TO VIEW?
A. IF IT IS DONE IN THE CONTEXT OF COUNSELING AND REFERRAL

[JESSUP 126]

FOR TREATMENT I WOULD SAY YES, IT IS.
Q. SO, YES, IT IS BENEFICIAL?
A. YES, I WOULD SAY IT IS.
Q. YOU YOURSELF DO NOT KNOW WHO WAS INVOLVED IN FORMULATING THE POLICY AT MUSC?
A. I UNDERSTAND THAT IT WAS A COMBINATION OF INDIVIDUALS INSIDE THE MEDICAL UNIVERSITY AND OUTSIDE, AND ALSO I HEARD TESTIMONY TO ANSWER SOME OF THAT.
Q. AND YOU ARE NOT AWARE THAT THE VAST MAJORITY OF WOMEN WHO CAME UNDER THE PURVIEW OF THE INTERAGENCY POLICY WERE NEVER ARRESTED, WERE YOU?
A. I AM AWARE THAT A SIGNIFICANT NUMBER OF THEM WERE. AND SINCE I DON'T KNOW WHAT THE TOTAL NUMBER IS, WHO CAME UNDER THE POLICY -
Q. SO OUT OF 253 WOMEN WHO TESTED POSITIVE, YOU WERE NOT

AWARE THAT ONLY 28 OR 30 WOMEN WERE ARRESTED, WERE YOU?
A. I'M NOT FAMILIAR WITH THOSE NUMBERS BEING ACCURATE OR TRUE.
Q IN ASSESSING THE EFFECTIVENESS OF THE POLICY, DID YOU REVIEW THE SUBSTANCE ABUSE RECORD OF THE PLAINTIFFS'?
A. NO, I DID NOT.
Q. SO, YOU DID NOT CONSIDER THEIR SUCCESS AT SUBSTANCE ABUSE TREATMENT WHEN YOU EVALUATED THE EFFECTIVENESS OF THIS POLICY, DID YOU?
A. I LOOKED AT THE EFFECTIVENESS OF THE IMMEDIATE

[JESSUP 127]

INTERVENTION THAT WAS OCCURRING AT THE TIME THAT THE WOMAN WAS IN THE HOSPITAL AND TESTED POSITIVE.
Q. MS. JESSUP, YOU DID NOT CONSIDER THE SUCCESS OF THE PLAINTIFFS' IN EVALUATING THE EFFECTIVENESS OF THIS POLICY, DID YOU?
A. I WAS NOT LOOKING AT THAT PART OF IT.
Q. AND YOU AGREE WITH ME THAT SHIRLEY BROWN'S OBJECTIVES IN CARRYING OUT THIS POLICY WAS TO COMPLY WITH THE POLICY AS THE HOSPITAL HAD SET DOWN, CORRECT?
A. REPEAT THAT.

MR. WHERRY: OBJECTION. COMPETENCE. BEYOND THE SCOPE. SHE CAN'T POSSIBLE SIC TELL THAT.

THE COURT: GO AHEAD.

MS. SHOWERS: SHE HAS EVALUATED THE RECORD.

THE COURT: SHE ASKED YOU TO REPEAT THE QUESTION.

MS. SHOWERS: SURE.

Q. (BY MS. SHOWERS, CONTINUING) YOU AGREE WITH ME THAT SHIRLEY BROWN'S OBJECTIVES WERE TO COMPLY WITH THE INTERAGENCY POLICY AS ESTABLISHED BY THE HOSPITAL, CORRECT?

MR. WHERRY: I OBJECT.

THE COURT: I OVERRULE THE OBJECTION.

A. COULD YOU REPEAT IT AGAIN, PLEASE.

Q. (BY MS. SHOWERS, CONTINUING) SURE.

YOU AGREE WITH ME THAT SHIRLEY BROWN'S OBJECTIVES WERE TO COMPLY WITH THE INTERAGENCY POLICY AS ESTABLISHED BY

[JESSUP 128]

THE HOSPITAL?

A. I DON'T KNOW WHAT HER OBJECTIVES WERE.

Q. COULD YOU TURN TO PAGE 28, PLEASE. AT LINE 8. CAN YOU TELL ME WHAT YOU UNDERSTOOD HER OBJECTIVES TO BE AND HER

ROLE.

AND YOUR ANSWER WAS: I UNDERSTOOD HER OBJECTIVES TO BE TO COMPLY WITH THE INTERAGENCY POLICY.

WAS THAT YOUR ANSWER?

A. YES, THAT WAS MY ANSWER.

Q. THANK YOU. YOU HAVE NEVER SEEN SHIRLEY BROWN INTERACT WITH A PATIENT AT MUSC, HAVE YOU?

A. NO, I HAVE NOT.

Q. AND SHIRLEY BROWN'S PRIMARY JOB RESPONSIBILITY WAS NOT TO CARRY OUT THIS POLICY, SHE HAD MANY, MANY OTHER DUTIES, DIDN'T SHE?

MR. WHERRY: OBJECTION, SCOPE. THIS WITNESS HAS NEVER MET SHIRLEY BROWN.

THE COURT: I'LL PERMIT IT.

A. COULD YOU REPEAT THE QUESTION, PLEASE.

Q. SURE. YOU AGREE WITH ME THAT MS. BROWN'S PRIMARY JOB RESPONSIBILITY WAS NOT TO CARRY OUT THIS POLICY, SHE HAD MANY, MANY OTHER DUTIES AND RESPONSIBILITIES AT THE MEDICAL UNIVERSITY?

A. I KNOW THAT SHE HAD MANY OTHER DUTIES, YES.

Q. AND SHE DID NOT UNDERTAKE TO PROVIDE SUBSTANCE ABUSE

TREATMENT TO THESE WOMEN, CORRECT?
A. I WOULD SAY THAT SHE DID NOT UNDERTAKE TO DO THAT, YES.
Q. AND YOU HAVE NOT REVIEWED THE SOUTH CAROLINA CHILD ABUSE REPORTING STATUTE, HAVE YOU, MS. JESSUP?
A. I AM AWARE, I BELIEVE, OF WHAT IT SAYS, BUT I HAVEN'T READ IT IN ITS TOTALITY.
Q. AND YOU'RE LICENSED IN CALIFORNIA, NOT SOUTH CAROLINA?
A. THAT IS CORRECT.
Q. AND YOU HAVE NEVER WORKED AS A NURSE IN A STATE THAT HAS A LAW WHICH REQUIRES REPORTING OF A POSITIVE URINE DRUG SCREEN OF A PREGNANT WOMEN AS SUSPECTED CHILD ABUSE AND NEGLECT, HAVE YOU?
A. ACTUALLY, THE CALIFORNIA LAW RECENTLY CHANGED AND DURING A GOOD PART OF MY CLINICAL PRACTICE THAT WAS A FEATURE OF THE LAW THAT WAS CHANGED IN 1991.
Q. SO NOW IN CALIFORNIA YOU MUST REPORT A POSITIVE URINE DRUG SCREEN OF A PREGNANT WOMAN?
A. NO, THE LAW STATES THAT YOU WILL NOT REPORT TO CHILD WELFARE SERVICES A SUBSTANCE-EXPOSED BABY ON THE BASIS OF ONE POSITIVE TOXICOLOGY DRUG SCREEN ALONE.
Q. MY QUESTION WAS SIMPLY: YOU HAVE NEVER WORKED AS A NURSE

IN A STATE WHICH HAS A LAW WHICH REQUIRES A REPORTING OF A POSITIVE URINE DRUG SCREEN OF PREGNANT WOMEN AS SUSPECTED CHILD ABUSE AND NEGLECT?

[JESSUP 130]

A. OF A PREGNANT WOMAN?
Q YES.
NO, I HAVE NOT.
MS. SHOWERS: COULD I HAVE A MOMENT, YOUR HONOR.
MS. SHOWERS: NOTHING FURTHER.
MR. WHERRY: JUST TWO QUESTIONS ON REDIRECT.

REDIRECT EXAMINATION

BY MR. WHERRY:
Q. YOU INDICATED THAT YOU HAD NOT WORKED ON THE OB SERVICE SINCE '81, I THINK, IN YOUR DEPOSITION. I THINK YOU WANTED TO ADD SOMETHING TO THAT?
A. YES, I DID. THANK YOU.
Q. WHAT WAS THAT?
A. I HAVE NOT WORKED IN LABOR AND DELIVERY SINCE THAT PERIOD OF TIME, BUT WITH THE POSSIBLE EXCEPTION OF ABOUT TWO YEARS I HAVE CONSISTENTLY CONSULTED ON CASES OF PREGNANT WOMEN COMING INTO LABOR AND DELIVERY BECAUSE I HAVE ALWAYS BEEN AFFILIATED WITH THE MEDICAL UNIVERSITY THROUGH THE NURSING SCHOOL. AND

ALSO RECENTLY THIS FALL THAT DUTY HAS BEEN ADDED TO MY ROSTER FOR THE FAMILY NURSE PRACTITIONER PROGRAM AND THE WOMEN'S HEALTH, PRIMARY CARE NURSE PRACTITIONER PROGRAM. I'M NOW DOING MORE PATIENT HEALTH CARE CONSULTATIONS.

Q. YOU INDICATED THAT ALTHOUGH YOU DID NOT PERSONALLY GO AND SEE THE AVAILABLE SUBSTANCE ABUSE TREATMENT IN CHARLESTON DURING THE INTERAGENCY POLICY PERIOD, THAT YOU HAD AN

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[JESSUP 134]

PUBLISHED?

A. THAT ARTICLE WAS PUBLISHED IN THE JOURNAL OF THE SOUTH CAROLINA MEDICAL ASSOCIATION. AND IT WAS ENTITLED COCAINE IN PREGNANCY, CONFRONTING THE PROBLEM, I BELIEVE WAS THE TITLE. AND IT WAS A DESCRIPTION OF THE INTERAGENCY POLICY AND WHAT HAD BEEN ACCOMPLISHED IN THE, I BELIEVE TWO-AND-A-HALF-YEAR BEGINNING PERIOD OF THE POLICY.

Q. WHAT WAS THE IMPRESSION THAT YOU FORMED?

THE COURT: ARE YOU FAMILIAR WITH THOSE DOCUMENTS?

MS. SHOWERS: WE'RE LOOKING FOR THEM, BUT, YES, SIR.

THE COURT: DO THEY EXIST?

MS. SHOWERS: YES, SIR.

THE COURT: DID THEY DEAL WITH THE SUBJECT MATTER THAT SHE STATED?
MS. SHOWERS: THAT'S WHAT I'M CHECKING FOR.
THE COURT: OKAY, YOU MAY PROCEED.
Q. (BY MR. WHERRY, CONTINUING) TELL US WHAT THE IMPRESSION IS OR THE IMPRESSION THAT YOU HAD CONCERNING SUBSTANCE ABUSE TREATMENT AVAILABILITY IN THE CHARLESTON AREA IN THE TIME PERIOD IN QUESTION?
A. WELL, BECAUSE THERE WAS ONE PROGRAM THAT WAS REFERRED TO, I FELT THAT WAS NOT GOING TO GIVE THE WOMEN THE FULL VARIETY OF SERVICES THAT THEY NEEDED. AND ADDITIONALLY BECAUSE THERE WERE -- THERE WAS NOT CHILD CARE.
THE COURT: THE ANSWER IS NOT IN RESPONSE TO THE

[JESSUP 135]

QUESTION.
THE WITNESS: WOULD YOU REPEAT THE QUESTION.
Q. (BY MR. WHERRY, CONTINUING) WHAT WAS THE IMPRESSION THAT YOU HAD OF THE ADEQUACY OF HEALTH CARE -- OF SUBSTANCE ABUSE TREATMENT IN CHARLESTON IN THE TIME PERIOD IN QUESTION?
A. I FELT THAT IT WAS INADEQUATE.
MR. WHERRY: I HAVE NO FURTHER QUESTIONS.
THE COURT: ANY RECROSS?

MS. SHOWERS: YES, SIR.

RECROSS EXAMINATION

BY MS. SHOWERS:

Q THE BASIS OF THAT OPINION IS THAT YOU DID NOT BASE THAT UPON ANY OF THE TESTIMONY OF THE SUBSTANCE ABUSE PROFESSIONALS THAT HAVE TESTIFIED IN THIS CASE HAVE YOU, MS. JESSUP?

A. NO, I HAVE NOT.

Q. AND YOUR PRIMARY JOB FOCUS IS EDUCATION ON SUBSTANCE ABUSE, IT'S NOT OBSTETRICS, CORRECT?

A. I WOULD SAY THAT IT'S BOTH.

Q BUT IN TERMS OF WORKING IN A PRIMARY OBSTETRICAL UNIT, YOU DON'T WORK IN A PRIMARY OBSTETRICAL UNIT, CORRECT?

A. I CONSULT ON PATIENTS IN A PRIMARY OBSTETRIC UNIT, I'M NOT A STAFF NURSE IN A PRIMARY OBSTETRIC UNIT, THAT'S RIGHT.

Q. YOU PRIMARILY EDUCATE ON SUBSTANCE ABUSE TREATMENT, CORRECT?

A. I SEE PATIENTS AND EVALUATE THEM WITH STUDENTS AND THEIR

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF FRANKLIN JOHNSON

[JOHNSON 719]

AFFILIATE FOR THE ANDERSON AREA MEDICAL CENTER. PRIOR TO THAT I EXECUTIVE DIRECTOR FOR THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION FOR A PERIOD BEGINNING IN 1980 THROUGH APRIL OF '82. EXCUSE ME '92.

Q. AND THAT'S HERE IN CHARLESTON, THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION?

A. CORRECT.

Q. AND CAN YOU TELL THE JURY WHERE YOU DID YOUR TRAINING OR WHERE YOU WERE EDUCATED?

A. I HAVE AN UNDERGRADUATE DEGREE AT THE UNIVERSITY OF SOUTH CAROLINA. AND A MASTER'S DEGREE FROM GOLDEN GATE UNIVERSITY OUT OF SAN FRANCISCO.

Q. MR. JOHNSON, AS EXECUTIVE DIRECTOR OF CHARLESTON COUNTY SUBSTANCE ABUSE, DID YOU BECOME INVOLVED WITH THE INTERAGENCY POLICY IN 1989?

A. YES.

Q. CAN YOU TELL THE JURY WHAT YOUR INVOLVEMENT WAS?

A. I WAS INVITED WITH I THINK OTHERS IN THE COMMUNITY. AS

THE DIRECTOR OF THE COMMISSION, I WAS INVITED TO A MEETING AT THE MEDICAL UNIVERSITY WHERE THE POLICY WAS EXPLAINED AND PROPOSED. AND THOSE OF US WHO HAD AGENCIES LIKE THE SUBSTANCE ABUSE COMMISSION WERE ASKED IF WE WOULD BE WILLING TO PARTICIPATE WITH THAT.

Q. AND WERE YOU WILLING TO PARTICIPATE WITH THE PLAN, MR. JOHNSON?

[JOHNSON 720]

A. YES.

Q. AND AT THAT MEETING DID YOU EXPRESS ANY OPINIONS ABOUT THE AVAILABILITY OF SUBSTANCE ABUSE TREATMENT?

A. I THINK THAT I OFFERED THE AGENCY, TO THE EXTENT THAT OUR RESOURCES WERE THERE, WE WERE CERTAINLY AVAILABLE. WE WERE AVAILABLE TO THE COMMUNITY. THIS PROJECT AND OTHER PATIENTS AT THE MEDICAL UNIVERSITY CERTAINLY HAD ACCESS TO THE COMMISSION. SO, YES, WE WERE WILLING TO SUPPORT THAT.

Q. FROM YOUR ATTENDANCE AT THE MEETING AT THE MEDICAL UNIVERSITY AND YOUR INVOLVEMENT IN THE INTERAGENCY POLICY, WHAT WAS YOUR IMPRESSION OF THE GOAL OF THE POLICY?

A. THE WAY THAT - MY OVERALL RECOLLECTION OF THAT WAS THAT

THE EFFORTS PRIOR - PRIOR EFFORTS TO ENCOURAGE WOMEN TO SEEK HELP EARLIER, AND IN TERMS OF DEALING WITH THEIR ADDICTION HAVE - HAD NOT BEEN SUCCESSFUL TO THE - AT LEAST TO THE EXTENT THAT PEOPLE WERE HOPING. AND THIS AS A LAST RESORT WAS OFFERED AS A METHOD TO INTERVENE IN THE ADDICTION PROCESS AND GET SOMEONE'S ATTENTION AT A POINT WHERE MAYBE USING THAT AS A LEVERAGE, USING THE ISSUE OF THAT INTERVENTION AS LEVERAGE TO MAKE THEM SEEK TREATMENT THAT THEY WOULD NOT HAVE SOUGHT OTHERWISE.

THE PROCESS OF ADDICTION IS SUCH THAT DENIAL IS ONE OF THE KEY FEATURES, ONE OF THE KEY SYMPTOMS. AND A PERSON LEFT TO THEIR OWN RESOURCES, AS MANY OF US MIGHT HAVE WITNESSED, RARELY ADMIT ADDICTION. THEY WILL SACRIFICE A LOT

[JOHNSON 721]

OF THINGS PRIOR TO ADMITTING THAT. SO THIS WAS THE WAY TO INTERVENE, HOPEFULLY GET SOME WOMEN SOME HELP IN THAT ADDICTION PROCESS BEFORE IT CAUSED EVEN GREATER HARM TO THEM AND OTHERS.

Q. YOU MENTIONED LEVERAGING. COULD YOU EXPLAIN WHAT YOU MEANT BY LEVERAGING TO THE JURY?

A. AGAIN, IN THE EXPERIENCE THAT I HAVE HAD, AND PRIOR TO BEING AT THE CHARLESTON COMMISSION, I HAD WORKED IN THE ADDICTION FIELD AS AN - IN AN ADMINISTRATIVE CAPACITY FOR A NUMBER OF YEARS PRIOR TO THAT. IT'S NOT COMMON, I WON'T SAY IT NEVER HAPPENS, BUT IT'S NOT COMMON FOR SOMEONE ON THEIR OWN PERFECT FREEWILL TO COME IN AND SAY I HAVE AN ADDICTION AND I NEED SOME HELP. USUALLY IT'S A FAMILY MEMBER, A PHYSICIAN OR A JUDGE OR AN EMPLOYER. VERY FREQUENTLY AN EMPLOYER. A PERSON WILL HOLD THE JOB LONGER THAN THEY WILL HOLD ONTO A FAMILY AND A HOUSE.

SO BY INTERVENING INTO THAT, BY SAYING TO SOMEONE EITHER YOU GET - EITHER YOU ADDRESS THIS ADDICTION, EITHER YOU GET SOME HELP OR YOUR JOB IS AT JEOPARDY, EITHER YOU GET SOME HELP OR THE MARRIAGE IS OVER, OR YOU GET SOME HELP OR YOUR HEALTH IS GOING TO SUFFER OR YOU GO TO JAIL, THOSE ARE INTERVENING TECHNIQUES THAT SOMETIMES IT TAKES TO GETS SOMEBODY'S ATTENTION, OTHERWISE THEY WILL NOT LOOK AT IT CLOSELY ENOUGH THEMSELVES TO BREAK THROUGH THAT DENIAL AND UNDERSTAND THE LEVEL OF THAT PROBLEM.

Q. AS DIRECTOR AT CHARLESTON COUNTY SUBSTANCE ABUSE, DID YOU EXPRESS ANY OBJECTION AT THE MEETINGS AS TO COOPERATION WITH THE POLICY?
A. NO.
Q. AND CAN YOU DESCRIBE THE QUALIFICATIONS OF YOUR STAFF AT THE TIME AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION?
A. THE STAFF WAS AS QUALIFIED AS WE WERE ABLE TO BE AND REQUIRED TO BE. THE COUNSELORS WERE CERTIFIED ADDICTION COUNSELORS BY THE STATE ALCOHOL AND DRUG COMMISSION. MANY OF THEM WERE - POSSESSED A LOT OF EXPERIENCE IN THE FIELD. HAD BEEN IN THE FIELD TEN OR MORE YEARS. ALL OF THEM, TO MY KNOWLEDGE AND OBSERVATIONS, HAD A COMPASSION TOWARD THE ADDICT, TOWARDS THE ALCOHOLIC. PERSONS WORKING IN THAT FIELD HAVE A HARD TIME STAYING IN THERE A LONG TIME JUST FOR THE MONEY. YOU DON'T DO IT FOR THE MONEY, YOU DO IT BECAUSE YOU CARE ABOUT THE PEOPLE SEEKING THE TREATMENT. SO ALL OF THEM WERE QUALIFIED IN TERMS OF THEIR CERTIFICATIONS. AND EVEN MORE IMPORTANTLY ALL OF THEY WERE QUALIFIED IN TERMS OF THEIR COMPASSION FOR THE WORK.
Q. MR. JOHNSON, WHEN YOU WERE AT THE MEETINGS AT THE MEDICAL

UNIVERSITY ABOUT THE POLICY, DID YOU EVER HEAR ANY RACIALLY DEROGATORY COMMENTS MADE?
A. NO.
MS. SHOWERS: ONE MOMENT, PLEASE. I HAVE NOTHING FURTHER THANK YOU.

[JOHNSON 723]

THE COURT: OKAY.
CROSS-EXAMINATION
BY MS. PALTROW:
Q. MR. JOHNSON, YOU SAID THAT YOU HAD A MASTER'S DEGREE. CAN YOU TELL US WHAT THAT IS IN?
A. PUBLIC ADMINISTRATION.
Q. SO YOU DON'T HAVE ANY DEGREES IN SUBSTANCE ABUSE COUNSELING DO YOU?
A. THAT'S CORRECT.
Q. AND YOU HAVE NO PARTICULAR TRAINING IN SUBSTANCE ABUSE COUNSELING, DO YOU?
A. THAT'S CORRECT.
Q. AND YOU HAVE DONE NO RESEARCH ON SUBSTANCE ABUSE COUNSELING, HAVE YOU?
A. THAT'S CORRECT.
Q. AND YOU HAVE DONE NO RESEARCH ON SUBSTANCE ABUSE REFERRALS, HAVE YOU?
A. IN THE SENSE OF THE RESEARCH THAT YOU'RE TALKING ABOUT, THAT'S CORRECT.
Q. AND -
A. IF YOU MEAN WRITTEN AND DOCUMENTED SCIENTIFIC OTHER THAN

JUST OBSERVATIONS THROUGH THE YEARS, THAT'S CORRECT.

Q. JUST FROM YOUR OBSERVATIONS AND YOUR WORK, WHAT YOU THINK, RIGHT?

A. RIGHT. TWENTY YEARS IN WORKING AROUND OTHERS AND

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF THERESA JOSEPH

[JOSEPH 16]

Q. TWO DAYS, AGAIN?
A. YES
Q. DO YOU REMEMBER THE MONTHS IN 1992?
A. NO.
Q. HOW ABOUT IN 1991?
A. NO.
Q HAVE YOU EVER BEEN CHARGED, ARRESTED OR CONVICTED OF ANY OTHER CRIMES?
A. NO, I DON'T RECALL. NO.
MR. OBERDIER: CAN I JUST CLARIFY? WHAT WAS YOUR FINAL ANSWER? "NO", OR "I DON'T RECALL"?
A. OH, YES. YES.
MR. OBERDIER: OR "YES"?
A. YES.
Q. WHEN WAS THAT?
A. 1991.
Q. OKAY. WHAT WAS THE CHARGE?
A. DISTRIBUTION OF COCAINE TO A MINOR.
Q. WERE YOUR CONVICTED?
A. YES.
Q WHAT WAS YOUR SENTENCE?
A. NO, I WASN'T, I DON'T THINK. NO.
Q. NO CONVICTION?

A. NO.

[JOSEPH 17]

Q. DID YOU ENTER INTO PRETRIAL INTERVENTION?
A. NO.
Q. YOU HAD NO CONVICTION AND YOU DIDN'T ENTER INTO PRETRIAL INTERVENTION? WHAT HAPPENED TO THAT CHARGE?
A. DROPPED.
Q. THE CHARGE WAS DROPPED?
A. YES.
Q. DID YOU HAVE TO DO ANYTHING IN ORDER TO GET THE CHARGE DROPPED?
A. YES.
Q. WHAT WAS THAT?
A. I HAD TO ENTER INTO A DRUG TREATMENT PROGRAM
Q. AND DID YOU DO THAT?
A. YES.
Q. AND YOU WERE SUCCESSFUL WITH IT?
MR. OBERDIER: OBJECTION.
A. YES.
Q. WHERE DID YOU ENTER INTO THE DRUG TREATMENT?
A. CHARLESTON COUNTY SUBSTANCE ABUSE.
Q. AND WHEN DID YOU ENTER INTO TREATMENT?
A. '92.
Q. AND WHO WAS YOUR COUNSELOR?
A. ED JOHNSON.
Q. HOW LONG DID YOU SEE MR. JOHNSON?
A. SINCE '92.

[JOSEPH 18]

Q. DO YOU STILL CONTINUE TO SEE HIM?
A. YES
Q. HOW FREQUENTLY?
A. ONCE A WEEK.
Q. IS THIS PART OF THE METHADONE PROGRAM?
A. YES.
Q. AND HOW LONG DOES THAT LAST? THE TREATMENT PROGRAM?
A. I DON'T KNOW.
Q. OKAY. DO YOU GO TO ANY OTHER SUPPORT GROUPS, OTHER THAN THE CHARLESTON COUNTY SUBSTANCE ABUSE PROGRAM?
A. NO.
Q. HAS THE CHARLESTON COUNTY SUBSTANCE ABUSE PROGRAM HELPED YOU?
MR. OBERDIER: OBJECTION.
A. YES.
Q. HAS THE TREATMENT BEEN EFFECTIVE IN HELPING YOU TO GET OFF DRUGS?
MR. OBERDIER: OBJECTION.
A. WELL, WITH THAT AND ME WANTING TO.
Q. OKAY. BUT THEY HAVE HELPED YOU?
A. SOMEWHAT.
Q. SOMEWHAT? CAN YOU EXPLAIN TO ME WHAT YOU MEAN BY "SOMEWHAT"?
A. I MOSTLY DID IT MYSELF, YOU KNOW; BOTH, THEM AND

[JOSEPH 19]

ME.
Q. COULD YOU HAVE DONE IT WITHOUT THEM?
MR. OBERDIER: OBJECTION.
A. YES.
Q. DID YOU LIKE THE TREATMENT?
A. NO.
Q. IF YOU COULD HAVE DONE IT, GOTTEN OFF DRUGS WITHOUT THE CHARLESTON SUBSTANCE ABUSE PROGRAM, WHY DIDN'T YOU DO IT PRIOR TO 1992?
MR. OBERDIER: OBJECTION.
A. CAN I EXPLAIN?
Q. SURE.
A WELL, AT THAT TIME, YOU - KNOW, I NEEDED, YOU KNOW, SOME FAMILY SUPPORT AND, YOU KNOW, I KNEW THAT THAT PROBABLY WOULD HAVE HELPED, YOU KNOW, DO IT AND, YOU KNOW, I TRIED TO, YOU KNOW, SEEK THAT SUPPORT AND, YOU KNOW, THEY JUST TURNED ME AWAY. YOU KNOW, AT TIMES WHEN I REALLY WANTED TO GET OFF AND, YOU KNOW, I WANTED TO BE WITH FAMILY, WITH MY SISTER AND ALL, AND I TRIED CALLING HER AND EXPLAINING THAT I WAS ON THE STREET, I WAS ON DRUGS AND ALL AND I WANTED TO BE WITH THEM, YOU KNOW, AND I KNEW THEY COULD HAVE HELPED ME BUT, YOU KNOW, THEY JUST WOULDN'T LET ME - YOU KNOW, THEY WOULDN'T HELP. THEY WOULDN'T OFFER ANY HELP AND THAT'S WHERE I WANTED TO BE.

Q. SO YOU WANTED YOUR FAMILY TO HELP YOU?

[JOSEPH 20]

A YES.
Q. BUT THEY WEREN'T ABLE TO HELP YOU?
A. NO.
Q. AND HAVE THEY BEEN ABLE TO HELP YOU SINCE 1992?
A. YES; SOMEWHAT, YES.
Q. HAS THAT BEEN A FACTOR IN YOUR SUCCESSFUL TREATMENT?
A. IT'S BEEN SOME HELP.
Q. AND WOULD YOU SAY CHARLESTON COUNTY SUBSTANCE ABUSE WAS A FACTOR IN YOUR GETTING SUCCESSFUL TREATMENT?
A. IT WAS SOME HELP, TOO, ALONG WITH ME AND MY FAMILY.
Q. OKAY. HOW LONG HAVE YOU BEEN USING DRUGS, THERESA?
A. THIS TIME?
Q. NO, FROM THE BEGINNING?
A. THE FIRST TIME I USED THEM FOR ABOUT TWO YEARS BEFORE I CAME TO CHARLESTON.
Q. THAT WOULD BE 1979?
A. YES.
Q. HOW OLD WERE YOU IN 1979? TWENTY-ONE? IS THAT CORRECT?
A. YES. OKAY, YES. YES.
Q. SO YOU WERE TWENTY-ONE YEARS OLD WHEN YOU FIRST

USED DRUGS? IS THAT CORRECT?

* * *

[JOSEPH 35]

A. YES.
Q. AND DID THAT CONTINUE UNTIL 1992?
A. YES.
Q. DURING THAT TIME PERIOD DID YOU TAKE ANY OTHER DRUGS?

MR. OBERDIER: I'M SORRY. IS THAT THE PERIOD FROM '89 TO '92?

MS. SHOWERS: YES.

A. I THINK I WANT A BREAK FOR A LITTLE WHILE.

MR. OBERDIER: DO YOU WANT TO GIVE HER AN ANSWER TO THE LAST QUESTION?

Q. JUST ANSWER THIS QUESTION AND THEN WE WILL TAKE A BREAK?
A. OKAY. CAN YOU REPEAT IT?
Q. DID YOU TAKE ANY OTHER DRUGS BETWEEN 1989 AND 1992?
A. BESIDES ...?
Q. THE COCAINE AND THE HEROIN?
A. NO. NO.

MR. OBERDIER: OKAY, LET'S TAKE A BREAK.

(THE DEPOSITION RECESSED AT 3:50 O'CLOCK, P. M. AND RECONVENED AT 4:00 O'CLOCK, P. M.)

Q. OKAY, THERESA, YOU TESTIFIED THAT – AND PLEASE CORRECT ME IF I'M WRONG. I'M JUST TRYING TO GET US BACK

TO WHERE WE WERE – BETWEEN 1989 AND 1992 YOU WERE USING A

[JOSEPH 36]

MIXTURE OF COCAINE AND HEROINE AND YOU WERE USING TWO BAGS OF EACH PER DAY, TWENTY DOLLARS' WORTH OF COCAINE AND TWENTY-FIVE DOLLARS' WORTH OF HEROINE TWICE A DAY? IS THAT CORRECT?

A. YES.

Q. AND HOW DID YOU USE THAT?

A. INTRAVENOUSLY.

Q. INTRAVENOUSLY?

A. YES.

Q. DOES THE MIXTURE EFFECT THE POTENCY OF THE DRUGS? I MEAN, WHY DO YOU MIX THE TWO?

A. WELL, IN A WAY, IT WAS A FEELING LIKE, YOU KNOW, LIKE THE WAY – THE PILLS I WAS TAKING, YOU KNOW, IT WAS LIKE A DOWN HEAD AND THEN THE COCAINE JUST MADE IT, YOU KNOW, LIKE UP HEAD. IT MADE IT KIND OF LEVEL, YOU KNOW.

Q. A SORT OF A MELLOW IN BETWEEN?

A. YES, RIGHT.

Q. OKAY. HOW LONG DOES THAT LAST FOR, LET'S SAY THE TWENTY COCAINE AND THE TWENTY-FIVE OF HEROIN? HOW LONG DO THE EFFECTS LAST?

A. I DON'T KNOW. IT DEPENDS.

Q. JUST BALL PARK? I MEAN, IF IT WOULD VARY? AN

HOUR, TWO HOURS, THREE HOURS?
A. I DON'T KNOW. SOMETIMES IN CAN LAST MOST OF THE DAY.

* * *

[JOSEPH 58]

A. YES AND NO.
Q. OKAY. COULD YOU EXPLAIN THE "YES AND NO"?
A. WELL, THERE IS NOT REALLY ANY PROOF THAT IT CAN HURT YOUR BABY. YOU KNOW, IT'S A CHANCE THAT IT CAN PROBABLY CAN, YOU KNOW, BUT IT'S REALLY NO PROOF, ACTUAL PROOF THAT IT CAN. YOU KNOW, I WAS HOPING THAT IT WOULDN'T, YOU KNOW. I KNEW, YES, MAYBE THERE IS A CHANCE THAT, YOU KNOW, IT COULD HAVE HURT THEM BUT, YOU KNOW, THEN YOU KNOW, I THOUGHT IT WAS MORE OF A CHANCE THAT IT - YOU KNOW, I WAS JUST HOPING THAT IT WOULDN'T, YOU KNOW, DO THAT TO HIM.
Q. DID YOU THINK . . . ?
A. AND I WAS JUST SCARED.
Q. DID YOU THINK THAT YOUR BABY HAD A RIGHT TO BE BORN DRUG FREE?
A. YES.
Q. YET YOU DIDN'T GET PRENATAL CARE?
MR. OBERDIER: OBJECTION.
A. I WAS SCARED.

Q. YOU WERE SCARED? DID YOU CONTINUE TO USE DRUGS DURING YOUR PREGNANCY?
A. YES.
Q. WHEN DID YOU FIRST SEEK MEDICAL TREATMENT WITH YOUR PREGNANCY IN 1991?
A. I CAN'T REALLY REMEMBER TOO MUCH, YOU KNOW,

[JOSEPH 59]

EXACTLY THE FIRST TIME THAT I WENT. I DO REMEMBER THAT I WENT. I BELIEVE ONCE FROM THE COUNTY JAIL. I WENT TO THE HOSPITAL.
Q. YOU WERE IN THE COUNTY JAIL ALREADY?
A. YES.
Q. WHAT WERE YOU IN THE COUNTY JAIL FOR?
A. PROSTITUTION.
Q. WAS THIS BEFORE OR AFTER YOU KNEW ABOUT YOUR HIV STATUS?
A. I BELIEVE IT WAS BEFORE.
Q. WHEN YOU WENT TO THE JAIL DID YOU TELL THEM THAT YOU WERE PREGNANT, WHEN YOU WERE ARRESTED?
A. YES.
Q. IS THAT WHY THEY TOOK YOU TO THE MEDICAL UNIVERSITY FOR TREATMENT?
A. NO. I WASN'T FEELING WELL.

Q. OKAY. CAN YOU TELL ME ABOUT THAT?
A. I JUST HAD A LITTLE FALSE LABOR, I GUESS.
Q. SO YOU TOLD THE GUARDS YOU THOUGHT YOU WERE IN LABOR?
A. YES.
Q. AND WHAT DID THEY DO?
A. TOOK ME TO THE MEDICAL UNIVERSITY.
Q. ARE THERE ANY MEDICAL FACILITIES AT THE CHARLESTON COUNTY JAIL?

* * *

[JOSEPH 124]

Q. YOU TOLD ME THAT YOU DID SEE THE CRACK BABY PUBLIC SERVICE ANNOUNCEMENT? IS THAT CORRECT?
A. YES.
Q. BUT THAT YOU DO NOT REMEMBER SEEING THE MUSC VIDEO? IS THAT CORRECT?
A. CORRECT.
Q. YOU DID SIGN A CONSENT FORM ON ADMISSION TO THE MEDICAL UNIVERSITY? IS THAT CORRECT?
A. YES.
Q. AND WHEN THE MEDICAL PERSONNEL AT MUSC ASKED YOU ABOUT DRUG USE, YOU VOLUNTARILY TOLD THEM THAT YOU WERE USING COCAINE AND HEROIN? IS THAT CORRECT?
MR. OBERDIER: OBJECTION.
A. I DON'T REMEMBER. I COULD HAVE.

Q. AND WHILE YOU WERE PREGNANT YOU USED DRUGS THAT YOU KNEW WERE ILLEGAL? IS THAT CORRECT?

MR. OBERDIER: OBJECTION.

A. YES.

Q. WHILE PREGNANT YOU POSSESSED DRUGS THAT YOU KNEW WERE ILLEGAL? IS THAT CORRECT?

A. YES.

Q. AND YOU ALSO KNEW THAT TAKING ILLEGAL DRUGS WHILE PREGNANT COULD HARM YOUR UNBORN CHILDREN? IS THAT CORRECT?

A. YES AND NO. I DON'T KNOW. NO.

[JOSEPH 125]

Q. WELL, WE HAVE HAD YES AND NO, AND NO. IT'S GETTING LATE FOR ALL OF US.

A. NO. I'LL JUST SAY "NO" TO THAT.

Q. SO THE USE OF ILLEGAL DRUGS DURING PREGNANCY DOES NOT HARM THE BABY?

MR. OBERDIER: OBJECTION.

A. I DON'T KNOW.

Q. YOU DON'T KNOW?

A. NO.

Q. SO, IS THIS THE ANSWER "I DON'T KNOW" OR "NO"

A. I DON'T KNOW.

Q. AND FROM SEEING THE PUBLIC SERVICE ANNOUNCEMENT, YOU KNEW THAT IF YOU WERE CAUGHT USING OR POSSESSION ILLEGAL DRUGS DURING YOUR PREGNANCY, YOU WOULD BE SUBJECT

TO PROSECUTION?
MR. OBERDIER: OBJECTION.
Q. IS THAT CORRECT?
MR. OBERDIER: OBJECTION.
A. YES.
Q. AND YOU MADE THE INDEPENDENT DECISION TO CARRY THIS CHILD TO TERM, THIS PREGNANCY WITH ALVIN? IS THAT CORRECT?
A. YES.
Q. YOU TOLD ME IT WAS YOUR UNDERSTANDING THAT THE PUBLIC SERVICE ANNOUNCEMENT APPLIED TO ALL OF THE

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[JOSEPH 129]

Q. DO YOU KNOW WHO DOCTOR BIVINS IS?
A. THE NAME SOUNDS FAMILIAR. I PROBABLY READ IT SOMEWHERE, BUT I DON'T - YOU KNOW, I DON'T KNOW.
Q. TO THE BEST OF YOUR RECOLLECTION, DID HE EVER TREAT YOU?
A. I DON'T KNOW.
Q. DO YOU KNOW WHO DOCTOR DELBENE IS?
A. NO.
Q. TO THE BEST OF YOUR RECOLLECTION, HAVE YOU EVER BEEN TREATED BY HIM?
A. I DON'T KNOW.
Q. I THINK I ASKED YOU THIS, BUT WERE YOU EVER

OFFERED THE OPPORTUNITY TO ATTEND TREATMENT INSTEAD OF BEING PROSECUTED?
A. EXCUSE ME? COULD YOU REPEAT THAT?
Q. WERE YOU EVER OFFERED THE OPPORTUNITY TO ATTEND SUBSTANCE ABUSE TREATMENT INSTEAD OF BEING PROSECUTED?
A. WAS I OFFERED THAT?
Q. YES?
A. YES. I THINK SO, YES. YES.
Q. WHEN WAS THAT? DO YOU REMEMBER?
A. I BELIEVE MRS. BROWN TALKED TO ME ABOUT THAT.
Q. THAT FIRST VISIT?
A. AT ONE TIME OR ANOTHER, YES.
Q. AND THE REASON WHY YOU DIDN'T UNDERGO SUBSTANCE

[JOSEPH 130]

ABUSE TREATMENT AT THAT TIME WAS . . . ?
A. I WAS SCARED. I DIDN'T WANT TO GO TO JAIL I DIDN'T TRUST ANYBODY, YOU KNOW.
Q. I'M JUST GOING TO TAKE A MINUTE HERE AND MAKE SURE WE HAVE COVERED EVERYTHING AND I WILL BE RIGHT BACK.
A. OKAY.
(THE DEPOSITION WENT OFF THE RECORD FOR A BRIEF PERIOD.)
Q. JUST A FEW MORE QUESTIONS AND WE WILL WRAP THIS

UP. AT ANYTIME DURING YOUR TREATMENT AT THE MEDICAL UNIVERSITY IN 1991 . . . ? - ARE YOU WITH ME?

A. YES.

Q. OKAY. . . . DID ANYONE OTHER THAN SHIRLEY BROWN TALK TO YOU ABOUT DRUG TREATMENT?

A. I DON'T RECALL.

Q. OKAY. MAYBE I SHOULD MAKE THAT MORE GENERAL. DID ANYONE OTHER THAN SHIRLEY BROWN TALK TO YOU ABOUT THE CONTENTS OF THE PUBLIC SERVICE ANNOUNCEMENT AND WHAT WE CALL THE INTER-AGENCY POLICY?

A. YES. DID ANYONE ELSE TALK TO ME ABOUT IT?

Q. YES?

A. I DON'T RECALL. I DON'T RECALL.

Q. OKAY. AND ALVIN, YOUR SON, HOW IS HE DOING NOW?

MR. OBERDIER: OBJECTION.

Q. DOES HE HAVE ANY HEALTH PROBLEMS?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF HERBERT KEBLER

[KEBLER 838]

A. CORRECT.
Q. A DIRECTOR OF THE DIVISION OF SUBSTANCE ABUSE, NEW YORK STATE PSYCHIATRIC INSTITUTE?
A. CORRECT.
Q. AND EXECUTIVE VICE PRESIDENT AND MEDICAL DIRECTOR ON THE CENTER OF ADDICTION AND SUBSTANCE ABUSE?
A. CORRECT.
Q. AND, DOCTOR, YOU'RE A MEMBER OF A NUMBER PROFESSIONAL ORGANIZATIONS AS WELL?
A. THAT'S CORRECT.
Q. AND HAVE YOU DONE LECTURES AND PRESENTATION ON SUBSTANCE ABUSE TREATMENT?
A. I PROBABLY HAVE GIVEN OVER A THOUSAND OR 1500 LECTURES AT MOST MEDICAL SCHOOLS ACROSS THE UNITED STATES. AND I CHAIR THE SCIENTIFIC ADVISORY BOARD OF A NUMBER OF ORGANIZATIONS, INCLUDING DARE, WHICH TRIES TO EDUCATE OUR STUDENTS AT MANY OF THE RESEARCH INSTITUTES AND UNIVERSITIES. AND I'M ALSO A FELLOW IN THE AMERICAN PSYCHIATRIC ASSOCIATION; THE AMERICAN

COLLEGE OF PSYCHIATRISTS; AMERICAN COLLEGE OF NEUROPSYCHIATRISTS, PHARMACOLOGISTS, ETCETERA.

Q. HAVE YOU BEEN AWARDED HONORS IN YOUR CAREER, DOCTOR?

A. YES, I HAVE RECEIVED THE HIGHEST AWARD FOR RESEARCH FROM THE AMERICAN PSYCHIATRIC ASSOCIATION. THE NATHAN EDDY AWARD FROM THE COLLEGE, ON PROBLEMS OF DRUG DEPENDENCE. AND RECENTLY INDUCTED AS A MEMBER OF THE INSTITUTE OF MEDICINE OF

[KEBLER 839]

THE NATIONAL ACADEMY OF SCIENCE.

Q. AND, DOCTOR, I HAVE GOT YOUR CV HERE DATED JULY 1995, AND IT'S 26 PAGES CONTAINING ARTICLES AND PUBLICATIONS BY YOU; IS THAT CORRECT?

A. THAT'S CORRECT. I HAVE WRITTEN CLOSE TO TWO HUNDRED PAPERS, ARTICLES, CHAPTERS. AND I'M THE COEDITOR OF THE AMERICAN PSYCHIATRIC ASSOCIATION TEXTBOOK ON SUBSTANCE ABUSE TREATMENT.

Q. AND ARE THESE PEER REVIEWED JOURNALS, DOCTOR?

A. PROBABLY 90 PERCENT OR SO ARE.

Q. DOCTOR, AT OUR REQUEST HAVE YOU REVIEWED THE INTERAGENCY POLICY AT ISSUE IN THIS CASE?

A. YES, I HAVE.

Q. AND HAVE YOU FORMULATED OPINIONS ABOUT THE INTERAGENCY

POLICY?
A. YES, I HAVE.
Q. CAN YOU EXPLAIN TO THE JURY THE DIFFERENCE - EXPLAIN TO THE JURY WHAT COERCIVE TREATMENT IS?
A. COERCIVE TREATMENT.
Q. COERCIVE TREATMENT.
A. WE HAVE A SAYING IN THE FIELD OF DRUG ABUSE THAT DRUG USE IS A PREVENTABLE DISORDER AND DRUG ADDICTION IS A TREATABLE DISEASE, SO THAT WE BELIEVE THAT WE KNOW HOW, NOT AS WELL AS WE WOULD LIKE OR OFTEN AS WE WOULD LIKE TO TREAT DRUG ADDICTION, BUT MUCH OF THE TIME IT CAN BE SUCCESSFULLY

[KEBLER 840]

TREATED. HOWEVER, THE NATURE OF THE DISORDER IS SUCH THAT GIVEN THE PLEASURABLE EFFECTS OF THE DRUGS THAT WE'RE DEALING WITH, AND THE FACT THAT THEY CHANGE THE REWARD SYSTEM OF THE BRAIN, OFTEN INDIVIDUALS ARE NOT INITIALLY WILLING TO COME INTO TREATMENT VOLUNTARILY. THEY OFTEN DON'T WANT TO GIVE UP THE FEELINGS THAT THE DRUGS CAN PRODUCE.
SO OVER THE PAST 30 YEARS THERE HAVE BEEN A NUMBER OF INSTANCES WHERE INDIVIDUALS HAVE BEEN COERCED INTO TREATMENT. NOT - IN MANY WAYS PROBABLY MOST ADDICTS ARE

COERCED INTO TREATMENT. THE ISSUE IS ONLY WHO IS DOING THE COERCING. WE OFTEN THING OF COERCIVE TREATMENT AS PRIMARILY SOMETHING DONE BY THE CRIMINAL JUSTICE SYSTEM, BUT PROBABLY THE VAST MAJORITY OF ADDICTS THAT I TREAT ARE THERE BECAUSE AN EMPLOYER HAS SAID GET TREATMENT OR I'M GOING TO FIRE YOU. A SPOUSE HAS SAID GET TREATMENT OR I'M GOING TO LEAVE YOU. OR A JUDGE HAS SAID GET TREATMENT OR YOU WILL GO TO JAIL. SO THAT PROBABLY THE LARGE MAJORITY OF PATIENTS COME INTO TREATMENT THROUGH SOME SORT OF COERCIVE INTENT.

Q. DOES COERCIVE TREATMENT MEAN FORCED TREATMENT OR MANDATORY TREATMENT?

A. WELL, THE LANGUAGE HERE IS A LITTLE SLIPPERY. I DISTINGUISH BETWEEN COERCED TREATMENT AND MANDATORY TREATMENT. MANDATORY TREATMENT IS WHEN SOMEONE SAYS YOU MUST HAVE TREATMENT. COERCIVE TREATMENT SAYS YOU HAVE A CHOICE. YOU HAVE TO HAVE TREATMENT OR CHOOSE THE ALTERNATIVE. THE

[KEBLER 841]

CONTINGENCY.

SO IN THE CASE OF THE EMPLOYEE, COERCIVE TREATMENT WOULD SAY YOU HAVE TO HAVE TREATMENT OR YOU'LL BE FIRED. OR

THE SPOUSE WHO SAYS YOU HAVE TO HAVE TREATMENT OR I'LL LEAVE YOU. SO, THE TREATMENT IS COERCED BECAUSE YOU HAVE A COERCION THERE, BUT THEY DO HAVE THE OPTION OF TAKING THE ALTERNATIVE, SAYING I DIDN'T LIKE THAT JOB ANYWAY, YOU KNOW, I'M GOING TO LEAVE THAT JOB. SO, WHEREAS MANDATORY TREATMENT YOU MUST GO INTO THAT TREATMENT. YOU HAVE NO CHOICE. SO, THAT'S AT LEAST HOW I USE THE TERM.

Q. FROM YOUR REVIEW OF THE INTERAGENCY POLICY, WAS IT MANDATORY TREATMENT OR COERCIVE TREATMENT?

A. IT'S MY UNDERSTANDING THAT THIS WAS COERCED TREATMENT.

Q. AND CAN YOU EXPLAIN TO THE JURY WHAT IS MEANT BY THE CONCEPT OF HITTING ROCK BOTTOM?

A. WELL TRADITIONALLY THIS AROSE OUT OF THE ALCOHOLISM LITERATURE. AND THE IDEA WAS THAT YOU COULD NOT REALLY TREAT THE ALCOHOLIC OR THE ADDICT UNTIL THEY HAD HIT BOTTOM UNTIL THEY SUFFERED THE CONSEQUENCES OF THE PROBLEM, WHETHER THAT BE THE LIVER DISEASE, THE LOSS OF THE JOB, THE LOSS OF HEALTH, THE LOSS OF FAMILY.

MODERN THINKING IS THAT YOU DON'T WAIT FOR THE ADDICT TO HIT BOTTOM, YOU RAISE THE BOTTOM. THAT IS, YOU TRY AND CONFRONT THE INDIVIDUAL WITH THE CONSEQUENCES OF THEIR

25 BEHAVIOR IF THEY CONTINUE USING IT. THE REASON YOU DO THAT

[KEBLER 842]

1 IS, IT'S A LOT EASIER TO TREAT AN INDIVIDUAL WHO STILL HAS A
2 JOB RATHER THAN ONE WHO HAS LOST IT. IT'S EASIER TO TREAT AN
3 INDIVIDUAL WHO HAS A FAMILY RATHER THAN ONE THAT HAS LOST A
4 FAMILY. SO THAT RATHER THAN WAIT UNTIL ALL OF THOSE
5 DISASTROUS THINGS HAVE OCCURRED AND THEN HAVE THE INDIVIDUAL
6 TREATMENT, WHAT YOU TRY AND DO IS PRESENT THE INDIVIDUAL WITH
7 A CONTINGENCY, YES, YOU CAN KEEP YOUR JOB, BUT IF YOU GET
8 TREATMENT.
9 Q. AND, DOCTOR, IF A PERSON WHO ABUSES DRUGS IS NOT WILLING
10 TO GO INTO TREATMENT VOLUNTARILY, IS THERE ANY EVIDENCE THAT
11 INVOLUNTARY OR COERCED TREATMENT CAN BE EFFECTIVE?
12 A. YES. THERE IS A SUBSTANTIAL AMOUNT OF RESEARCH SHOWING
13 THAT INVOLUNTARY TREATMENT IS ABOUT AS EFFECTIVE. IT DOESN'T
14 MEAN THAT IT'S IDENTICALLY EFFECTIVE, PROBABLY GIVE OR TAKE 10
15 PERCENT ON EITHER SIDE. SOMETIMES IT MIGHT BE SOMEWHAT MORE
16 EFFECTIVE, SOMETIMES SOMEWHAT LESS EFFECTIVE.
17 THE LITERATURE IS NOT AS STRONG AS WE WOULD LIKE.

PARTIALLY BECAUSE THE CRIMINAL JUSTICE SYSTEM IN GENERAL DOESN'T LIKE THAT KIND OF RESEARCH. RELATIVELY FEW JUDGES ARE WILLING TO SAY, WELL, WE'LL LET THE LUCK OF THE DRAW DECIDE WHETHER YOU GET PUT INTO TREATMENT OR GET PUT INTO A TREATMENT GROUP. MOST OF THE TIME THE COURT SYSTEM SAYS WE WANT YOU NOW, WE WANT THAT INDIVIDUAL IN TREATMENT.

SO IT'S HARD TO DO THE KIND OF CONTROLLED STUDIES THAT ONE WOULD LIKE. BUT, IN GENERAL THE PREPONDERANCE OF

[KEBLER 843]

STUDIES THAT I HAVE SEEN SUGGEST THAT INVOLUNTARY TREATMENT WORKS ABOUT AS WELL AS VOLUNTARY TREATMENT. ONE OF THE CRITICAL THINGS IN SUCCESSFUL TREATMENT IS HOW LONG TO STAY THERE.

AGAIN, THERE IS REASONABLY GOOD DATA THAT THE LONGER YOU'RE IN TREATMENT THE BETTER OFF YOU ARE. THIS IS A DIFFICULT DISORDER TO TREAT. AND THE LONGER YOU CAN KEEP THE PERSON IN THAT TREATMENT, THE GREATER THE LIKELIHOOD YOU'RE GOING TO HAVE SUCCESS. AND CERTAINLY ONE OF THE THINGS COERCED TREATMENT DOES IS KEEP THAT INDIVIDUAL IN TREATMENT LONGER.

THE COURT: MS. SHOWERS, I'M GOING TO RECESS HERE. LET'S RECESS, LADIES AND GENTLEMEN, FOR LUNCH. WE'LL BE IN RECESS UNTIL 2:30.

(WHEREUPON, A LUNCH BREAK WAS TAKEN.)

THE COURT: GO AHEAD.

MS. SHOWERS: THANK YOU, YOUR HONOR.

Q. (BY MS. SHOWERS, CONTINUING) DOCTOR KEBLER, JUST SO WE'RE CLEAR ON THE DISTINCTIONS AND DIFFERENT TYPES OF TREATMENT FOR SUBSTANCE ABUSE, CAN YOU DRAW THAT OUT FOR THE JURY WHAT YOU TALKED ABOUT THIS MORNING, OF HOW COERCIVE TREATMENT BREAKS DOWN FROM THE -

A. YOU HAVE THERE ARE A NUMBER OF WAYS YOU CAN MAKE THE DISTINCTION. ONE WAY IS VOLUNTARY TREATMENT AND INVOLUNTARY. AND THEN UNDER INVOLUNTARY TREATMENT YOU WOULD HAVE A COUPLE

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[KEBLER 845]

THAT'S APPROPRIATE.

THE COURT: I DON'T SEE WHY SHE CAN'T STAND OVER HERE AND LOOK AT WHAT IS GOING ON AS LONG AS SHE IS NOT DISTURBING THE JURY.

MR. HOOD: YES.

THE COURT: GO AHEAD.

A. AS I UNDERSTAND THE MUSC POLICY, IT WOULD FALL IN THE

REALM OF COERCED RATHER THAN MANDATORY. THAT IS THAT THE WOMEN WERE GIVEN THE CHOICE OF THE OPTIONS, TREATMENT OR.

Q. AND, DOCTOR, FROM YOUR REVIEW OF THIS POLICY, DID VOLUNTARY TREATMENT WORK WITH THESE WOMEN?

A. AS I UNDERSTAND IT, FROM READING A VARIETY OF DOCUMENTS THAT I WENT OVER BEFORE MY DEPOSITION --

MS. PALTROW: OBJECTION, YOUR HONOR, BASED ON -- HE IS GOING TO BASE THIS ON HEARSAY.

THE COURT: OKAY. YOU WILL HAVE TO LAY A PROPER FOUNDATION.

Q. (BY MS. SHOWERS, CONTINUING) DID YOU REVIEW MATERIALS ABOUT THE SUCCESS OF THE INTERAGENCY POLICY?

A. YES, I DID.

Q. DID YOU REVIEW ANY MATERIALS ABOUT THE EXPERIENCE BEFORE THE INTERAGENCY POLICY AND THE SUCCESS OF GETTING WOMEN INTO TREATMENT VOLUNTARILY?

MS. PALTROW: YOUR HONOR.

THE COURT: YES, MA'AM.

* * *

[KEBLER 847]

Q. (BY MS. SHOWERS, CONTINUING) WHAT DID YOU REVIEW, DOCTOR, IN FORMULATING THAT OPINION?

A. THESE WERE VARIOUS DEPOSITIONS PERTAINING TO THE CASE

WHICH STATED THAT INDIVIDUALS, PRIOR TO THE IMPLEMENTATION OF THE POLICY --

MS. PALTROW: OBJECTION, YOUR HONOR. THIS IS BASED ON HEARSAY WHAT HE READ IN DEPOSITIONS.

THE COURT: I SUSTAIN THE OBJECTION UNTIL A PROPER FOUNDATION IS LAID FOR IT.

Q. (BY MS. SHOWERS, CONTINUING) DOCTOR, THE INFORMATION THAT YOU REVIEWED IN FORMULATING YOUR OPINION, YOU REFERRED TO AS DEPOSITION. WAS THERE ANYTHING ELSE?

A. THERE WERE PAPERS THAT HAD BEEN PREPARED BY DIFFERENT INDIVIDUALS CONCERNING THE EXPERIENCE IN THE PRENATAL CLINICS AT MUSC.

Q. AND THOSE DOCUMENTS AND THOSE MATERIALS, ARE THEY THE TYPES OF DOCUMENTS AND MATERIALS THAT EXPERTS IN YOUR FIELD NORMALLY RELY UPON IN FORMULATING OPINIONS SUCH AS THIS?

A. THEY WOULD NOT HAVE THE RIGOR OF A SCIENTIFIC ARTICLE, IF THAT'S WHAT YOU MEAN, NO.

Q. BUT IN FORMULATING OPINIONS, WOULD EXPERTS SUCH AS YOURSELF REASONABLY RELY ON THAT INFORMATION?

MS. PALTROW: OBJECT, YOUR HONOR. ASKED AND ANSWERED.

THE COURT: I'LL PERMIT IT.

[KEBLER 848]

A. RESTATE THE QUESTION, PLEASE.
Q. SURE. WOULD THE MATERIALS THAT YOU REVIEWED BY THE TYPE OF MATERIALS THAT EXPERTS IN YOUR FIELD WOULD REASONABLY RELY UPON IN FORMULATING OPINIONS SUCH AS THIS?
A. NO. THERE IS NOT A SYSTEMATIC ACCOUNTING OF PATIENTS. THE INDICATION WAS THAT --
MS. PALTROW: OBJECTION, YOUR HONOR, IF HE GOES FURTHER HE IS GOING TO SAY WHAT THE INDICATION WAS.
THE COURT: I'VE SIC RULE THE OBJECTION.
A. THAT INDIVIDUALS SIMPLY OFFERED TREATMENT DID NOT CEASE THEIR COCAINE USE, MOST DID NOT GO TO TREATMENT.
THE COURT: I SUSTAIN THE OBJECTION AS TO THAT.
THE WITNESS: OKAY.
THE COURT: HE CANNOT PUBLISH WHAT WAS IN THOSE DOCUMENTS. AND -- BECAUSE THEY ARE HEARSAY. BUT, AND FOR HIM TO RELY ON THEM, THEY HAVE TO BE QUALIFIED IN SUCH A WAY FOR HIM TO RELY ON THEM SINCE THEY'RE NOT ADMISSIBLE.
YOU MAY PROCEED.
MS. SHOWERS: THANK YOU, YOUR HONOR.
Q. (BY MS. SHOWERS, CONTINUING) DOCTOR, IN YOUR EXPERIENCE

IN THE OFFICE OF THE DRUG CZAR, WERE YOU INVOLVED IN THE DEVELOPMENT OF DRUG POLICY?
A. YES.
Q. AND WHAT AREAS OF CONCERN WERE THERE DURING YOUR TIME PERIOD IN THE OFFICE OF THE DRUG CZAR?

* * *

[KEBLER 852]

DATA. AND THE ADVISORY COMMITTEES NOTES SAID THAT BECAUSE OF THAT YOU NEED TO EXPLORE WHAT HIS UNDERLYING DATA IS BY WAY OF DISCOVERY.

NOW IF YOU HAVE DISCOVERED THAT ANYTHING HE HAS RELIED UPON IS UNRELIABLE, THEN WE NEED TO FLESH THAT OUT NOW AND FIND OUT ABOUT IT.

MS. PALTROW: YES, SIR.

THE COURT: IS THERE ANY SUCH THING?

MS. PALTROW: THAT WHAT HE IS RELYING ON IS UNRELIABLE?

THE COURT: HE IS NOT DISCUSSING THE TRUTH OF THESE DOCUMENTS. HE IS RELYING ON THEM AS RULE 703 PERMITS HIM TO RELY ON THEM. SOMETHING AN EXPERT IN HIS FIELD REASONABLY RELIES UPON TO EXPRESS THE OPINIONS SUCH AS HE IS EXPRESSING IN THIS COURT.

NOW IF THEY'RE NOT REASONABLY RELIED UPON, I'LL BE

GLAD TO DISCUSS THAT ISSUE AND DEBATE IT.

MS. PALTROW: I WON'T RAISE THAT NOW, YOUR HONOR.

THE COURT: OKAY.

Q. (BY MS. SHOWERS, CONTINUING) BACK TO THE PREVALENCE OF COCAINE DURING THE TIME PERIOD, DR. KEBLER, WHAT TIME PERIOD ARE YOU TALKING ABOUT?

A. THE TIME PERIOD OF THE LATTER PART OF THE 1980'S.

Q. GO AHEAD WITH YOUR ANSWER ABOUT THE PREVALENCE OF COCAINE.

[KEBLER 853]

A. PERHAPS WHAT I SHOULD DO IS LAY THE STAGE FOR HOW WE GET THERE. HOW DO WE KNOW WHAT IS GOING ON ARE THREE MAJOR DATA SOURCES. ONE, THE HOUSEHOLD SURVEYS WHICH GATHERS DATA ABOUT DRUG USE, PEOPLE WHO LIVE IN HOUSEHOLD. THE HS SURVEYS WHICH LOOK AT DRUG USE AMONG COLLEGE STUDENTS. AND THE EMERGENCY ROOM DATA WHICH LOOKED AT THE AMOUNT OF DRUG USE AMONG PEOPLE COMING TO EMERGENCY ROOMS, THE REASONS THEY COME TO THE EMERGENCY ROOMS AS FAR AS ILLICIT DRUGS ARE CONCERNED.

ALL OF THOSE SURVEYS INDICATED THAT DURING THE 1980'S, THERE WAS A SHARP RISE IN COCAINE USE. BY THE

MID-80'S, FOR EXAMPLE, THE HOUSEHOLD SURVEY INDICATED THAT SIX MILLION AMERICANS WERE USING COCAINE DURING THE PAST 30 DAYS.
THERE WERE -
Q. HOW MANY DID YOU SAY?
A. SIX MILLION AMERICANS WERE USING COCAINE CURRENTLY.
CURRENTLY DEFINED IN THE PAST 30 DAYS. THERE WAS A MAJOR CONCERN SINCE MANY OF THESE WERE WOMEN, THAT MANY OF THEM WERE TAKING COCAINE DURING PREGNANCY, THAT THERE WOULD BE A MAJOR PROBLEM WITH IMPAIRED NEWBORNS. AND THAT'S WHY WE MADE PREGNANT ADDICTS ONE OF OUR THREE MAJOR CONCERNS.
AND SPECIFICALLY IT WAS - OR PRIMARILY IT WAS INDIVIDUALS WHO WERE ADDICTED TO COCAINE. AND THE FORM OF IT CALLED CRACK. BOTH OF IT - BOTH OF THEM WERE VERY MUCH ON OUR RADAR SCREEN DURING THAT TIME.
Q. AND WHAT WAS THE STRATEGY DEVELOPED IN YOUR OFFICE TO

* * *

[KEBLER 859]

AND HERE IN CHARLESTON?
A. YES. ONE - IN 1992, FOR EXAMPLE A PAPER ON USER ACCOUNTABILITY WAS ISSUED BY THE OFFICE OF NATIONAL DRUG CONTROL POLICY. AND IN THE AREA OF THE PREGNANT ADDICTS TWO PROGRAMS WERE CITED.

MS. PALTROW: OBJECTION, YOUR HONOR. IT'S HEARSAY.

THE COURT: I CAN'T TELL THAT IT'S NOT HEARSAY. I SUSTAIN THE OBJECTION.

MS. SHOWERS: DOCTOR.

THE COURT: IF HE HAS OPINIONS TO EXPRESS THAT ARE RELEVANT TO THIS CASE, LET'S GET TO THEM. AND IF HE HAS TO EXPLAIN THEM, LET'S EXPLAIN THEM. BUT IT'S HARD FOR ME TO TELL WHAT'S RELEVANT WHEN THE EXPLANATION COMES BEFORE THE OPINION.

MS. SHOWERS: YES, SIR.

Q. (BY MS. SHOWERS) HAVE YOU REVIEWED THE INTERAGENCY POLICY, THE ONE DEVELOPED BY THE MUSC, THE SOLICITOR'S OFFICE AND THE CHARLESTON CITY POLICE DEPARTMENT?

A. YES, I HAVE.

Q. AND HAVE YOU REACHED OPINIONS ABOUT THAT POLICY, TO REASONABLE DEGREE OF MEDICAL CERTAINTY, MOST PROBABLY?

A. YES. I FEEL THAT THE POLICY WAS A REASONABLE RESPONSE TO THE PROBLEM OF COCAINE-ABUSING PREGNANT WOMEN AT THAT PERIOD OF TIME.

MS. SHOWERS: CAN I HAVE A MOMENT, YOUR HONOR.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF ELLEN KNIGHT

[KNIGHT 121]

A. I JUST WAS - I WALKED IN.
Q. WERE YOU REFERRED TO MUSC BY ANYONE?
A. I DON'T RECALL BEING REFERRED.
Q. OKAY. WHEN YOU CAME TO MUSC, WERE YOU RECEIVING PRENATAL CARE THERE?
A. YES, SIR.
Q. DURING YOUR PRENATAL CARE, WHAT, IF ANYTHING, WAS TOLD TO YOU ABOUT SUBSTANCE ABUSE AND YOUR PREGNANCY?
A. NOTHING AT ALL WAS TOLD TO ME ABOUT SUBSTANCE ABUSE AND PREGNANCY.
Q. DURING YOUR PRENATAL CARE, DID YOU EVER MEET NURSE BROWN?
A. YES, I DID.
Q. DURING YOUR PRENATAL CARE, DID NURSE BROWN EVER CONSULT OR COUNSEL YOU ABOUT PRENATAL CARE AND SUBSTANCE ABUSE?
A. NO, SIR. BUT I WOULD LIKE TO SAY SOMETHING. I DIDN'T MEET HER DURING MY PRENATAL CARE. I MET HER AT THE TIME MY SON WAS BORN.
Q. SO DURING THE PRENATAL CARE -
A. I NEVER SEEN HER.
Q. YOU NEVER MET HER?

A. NO, SIR.
Q. DURING YOUR PRENATAL CARE, WERE YOU SHOWN THE VIDEOTAPE THAT YOU SAW IN THE PROGRAM TODAY?
A. NO, SIR.
Q. DURING YOUR PRENATAL CARE, WERE YOU GIVEN ANY LETTER FROM

[KNIGHT 122]

THE PHYSICIANS AT MUSC CONCERNING SUBSTANCE ABUSE AND PREGNANCY?
A. NO. NEVER WAS.
Q. DURING YOUR PRENATAL CARE, DID ANYONE EVER TELL YOU ABOUT THE RESULTS OF A URINE SCREEN?
A. NO, SIR.
Q. DO YOU REMEMBER THE DATE OF BIRTH OF YOUR BABY?
A. YES, SIR.
Q. WHAT WAS THAT?
A. NOVEMBER 9TH - NOVEMBER 7, 1989.
Q. AND HOW WAS THAT BABY DELIVERED, NATURAL CHILDBIRTH OR CESAREAN SECTION?
A. NATURAL CHILDBIRTH.
Q. OKAY. AFTER THE BABY WAS BORN - BY THE WAY, WHAT WAS THE BABY'S NAME? OR WHAT IS THE BABY'S NAME?
A. BRANDON.
Q. BRIAN?
A. BRANDON.
Q. AFTER BRANDON WAS BORN, DID YOU HAVE OCCASION TO HAVE A CONVERSATION WITH NURSE BROWN?
MS. SHOWERS: OBJECT TO THE LEADING OF THE WITNESS,

YOUR HONOR.

MR. WHERRY: IT'S PRELIMINARY.

THE COURT: GO AHEAD.

Q. (BY MR. WHERRY, CONTINUING) AFTER BRANDON'S BIRTH DID

[KNIGHT 123]

YOU HAVE AN OCCASION TO HAVE A CONVERSATION WITH NURSE BROWN?

A. YES, SIR.

Q. WHAT DID SHE TELL YOU?

A. WELL, I INFORMED HER THAT THERE WAS ANOTHER GIRL IN THE ROOM WITH ME AND SHE HAD HER BABY, AND I HAD NOT BEEN ABLE TO SEE MY SON. AND I WAS ASKING HER WHY WAS I NOT ABLE TO SEE MY SON.

Q. LET ME STOP YOU THERE FOR A MOMENT HOW LONG AFTER BRANDON'S BIRTH WAS THIS?

A. PROBABLY HOURS.

Q. OKAY. AND WHAT WAS HER RESPONSE TO YOU?

A. THAT THEY WERE RUNNING TESTS ON BRANDON.

Q. WHAT HAPPENED NEXT?

A. WELL SOME TIME WENT BY AND I JUST KEPT ASKING COULD I SEE HIM. AND I WAS DETAIN FROM SEEING HIM.

Q. BY WHOM?

A. SHIRLEY BROWN AND SOME OTHER DOCTORS MAYBE OR NURSES.

Q. OKAY. WHAT HAPPENED NEXT?

A. SHIRLEY BROWN CAME INTO MY ROOM AND ASKED ME - NO. SHE

CAME INTO MY ROOM AND TOLD ME THAT BRANDON HAD TESTED POSITIVE FOR COCAINE AND SHE NEEDED MY CONSENT TO DO FURTHER TESTS ON MY SON.

Q. NOW, AT THAT POINT IN TIME WHEN SHE TOLD YOU THAT, DESCRIBE FOR THE JURY, PLEASE, YOUR PHYSICAL CONDITION? NOT YOUR MENTAL CONDITION YET, BUT YOUR PHYSICAL CONDITION?

[KNIGHT 124]

A. WELL, I WAS VERY UPSET AT THIS TIME I WAS CONCERNED ABOUT THE FURTHER TESTING THAT THEY NEEDED TO DO, IF ANYTHING WAS WRONG WITH BRANDON. I SIGNED THIS FORM WITHOUT READING IT BECAUSE I JUST WANTED THEM TO DO WHATEVER THEY HAD TO DO IN HIS BENEFIT.

Q. WHAT WERE YOU CONCERNED ABOUT?

A. WELL, THEY TOLD ME THAT HE HAD TESTED POSITIVE FOR DRUGS, SO I WAS JUST CONCERNED THAT ANYTHING THAT THEY COULD DO TO HELP HIM IF HE WAS HAVING A PROBLEM TO DO IT.

Q. WHAT HAPPENED NEXT?

A. WELL SOME MORE HOURS WENT BY. AND I DIDN'T GET TO SEE BRANDON THAT DAY. THE NEXT MORNING I SAW SHIRLEY BROWN. SHE CAME TO MY ROOM. AND I HAD ASKED AGAIN ABOUT SEEING MY SON.

AND SHE TOLD ME THAT I WOULD BE LEAVING THE HOSPITAL SOON, THAT I WAS BEING RELEASED. SO THAT I WOULD GET TO SEE HIM AT THAT TIME.

Q. DID THAT HAPPEN?

A. NO.

Q. WHAT HAPPENED?

A. THEY TOLD ME I WAS GOING TO BE RELEASED. SO I CALLED MY OTHER SONS TO COME AND BRING ME SOME CLOTHES, BECAUSE WHEN I WENT GOT TO HOSPITAL I WENT IN MY PAJAMAS. SO SINCE I WAS BEING RELEASED I CALLED THEM TO BRING ME SOME CLOTHES. BY THE TIME THEY ARRIVED, SHIRLEY BROWN ENTERED MY ROOM AND SAID THAT I NEEDED TO COME INTO ANOTHER ROOM TO SIGN SOME FORMS.

[KNIGHT 125]

Q. LET ME STOP YOU HERE. ARE YOUR TWO OTHER SONS AT THE HOSPITAL THEN

A. (WITNESS NODS HEAD.) YES.

Q. LET THE RECORD REFLECT THAT SHE NODDED HER HEAD YES.

AND WHAT HAPPENED, MS. KNIGHT?

A. THEY WERE STANDING OUTSIDE - OUTSIDE MY ROOM. AND I WENT WITH SHIRLEY AND SOMEBODY ELSE TO A LITTLE OFFICE WHERE I WAS ARRESTED.

Q. WHO ARRESTED YOU?

A. I DON'T KNOW WHO THEY WERE.

Q. HOW MANY PEOPLE?

A. ABOUT THREE.
Q. HOW DID THEY ARREST YOU? WHAT DID THEY DO TO YOU?
A. THEY READ ME MY RIGHTS. AND THEN THEY HANDCUFFED ME.
AND I ASKED THEM COULD I PUT ON MY CLOTHES, BECAUSE MY SON WAS
STANDING OUTSIDE THE DOOR WITH MY CLOTHES. AND THEY TOLD ME
NO.
Q. WHAT WERE YOU WEARING?
A. I DON'T REMEMBER. I THINK I HAD ON PAJAMA.
Q. WHAT WAS YOUR PHYSICAL CONDITION AT THAT TIME?
A. I WAS BLEEDING HEAVY. I NEVER HAD A CHILD NATURAL
CHILDBIRTH. MY OTHER TWO SONS WERE BORN CESAREAN.
Q. WERE YOU OR WERE YOU NOT RECEIVING ANY MEDICATION TO HELP
CONTROL THAT BLEEDING?
A. NO, SIR.

[KNIGHT 126]

Q. WERE YOU HANDCUFFED IN FRONT OF YOU OR BEHIND YOU?
A. IN FRONT.
Q. WERE YOU PLACED IN SHACKLES?
A. I DON'T RECALL.
Q. WERE YOU TAKEN FROM THE HOSPITAL THEN?
A. YES, SIR.
Q. HOW?
A. IN A WHEELCHAIR WITH HANDCUFFS ON.
Q. WAS A SHEET PLACED OVER YOU?
A. YES.

Q. WHEN YOU WERE TAKEN OUT IN THE WHEELCHAIR HANDCUFFED WITH THE SHEET OVER YOU, WHERE WERE YOUR SONS?
A. IN THE HALL.
Q. FROM WHAT YOU COULD DETERMINE, COULD THEY SEE YOU?
A. THEY SAW ME AND THEY SAW THE HANDCUFFS, BECAUSE THE SHEET DIDN'T GET THROWN OVER ON ME UNTIL WE PASSED THE NURSE STATION. AND THERE WAS A NURSE THERE THAT KNEW MY PARENTS.
Q. SO WHEN YOU WENT FROM THE ROOM TO THE AREA OF THE NURSE STATION, YOU HAD NO SHEET?
A. NO, SIR.
Q. AND WERE YOUR SONS IN THAT AREA?
A. YES, SIR.
MS. SHOWERS: YOUR HONOR, I OBJECT TO THE CONTINUED LEADING OF THE WITNESS.
THE COURT: YOU'RE LEADING HER.

[KNIGHT 127]

Q. (BY MR. WHERRY, CONTINUING) HOW DID YOU GET FROM THAT AREA OUTSIDE THE HOSPITAL?
A. I REMEMBER BEING WHEELED DOWN A HALLWAY. IT SEEMS LIKE IT CAME THROUGH THE CHILDREN'S - NEAR THE CHILDREN'S HOSPITAL. AND I EXITED THE HOSPITAL THROUGH THE ASHLEY AVENUE ENTRANCE, WHICHEVER ENTRANCE THAT IS. I DON'T KNOW IF THAT'S THE FRONT OR THE BACK OF THE HOSPITAL.

Q. DESCRIBE, IF YOU WILL, YOUR EMOTIONAL CONDITION AT THAT TIME?
A. I WAS IN SHOCK.
Q. WHAT DO YOU MEAN BY THAT?
A. I COULDN'T FOCUS ON ANYTHING. I COULDN'T THINK ABOUT IT.
Q. SORRY?
A. I COULDN'T FOCUS ON ANYTHING. I COULDN'T THINK AT THAT TIME. I REALLY COULDN'T BELIEVE WHAT WAS HAPPENING.
Q. WHERE WERE YOU TAKEN FROM THE HOSPITAL?
A. TO THE CITY JAIL ON LOCKWOOD.
Q. DESCRIBE THAT JAIL.
A. I HAD NEVER BEEN IN A JAIL BEFORE. IT WAS A VERY SMALL CELL. IT WAS IN NOVEMBER OF '89, SO IT WAS VERY COLD. I DIDN'T HAVE A COAT. I HAD A LITTLE STEEL, METAL TOILET ON THE FLOOR THAT WAS NOT SANITARY, IT WAS FILLED WITH OTHER PEOPLES' WASTE.
Q. HOW MANY PEOPLE WERE IN THE CELL WITH YOU?
A. NOBODY.

* * *

[KNIGHT 130]

WITH?
A. WELL, THEY WERE ALL SUPPOSED TO BE FEMALES.
Q. WHAT, IF ANY, FURNITURE WAS IN THE CELL?
A. THERE WERE COTS. AND TOILETS. AND A TABLE. A BIG

TABLE.
Q. APPROXIMATELY HOW MANY COTS WERE IN THE CELL?
A. ABOUT 30, I GUESS. I DON'T KNOW.
Q. THE TOILETS THAT YOU MENTIONED, DESCRIBE WHETHER OR NOT THERE WERE ANY PRIVACY PARTITIONS FOR THOSE TOILETS?
A. NO, SIR.
Q. WERE THERE OR WERE THERE NOT CHAIRS FOR THE TABLE?
A. IT WAS LIKE A PICNIC BENCH TYPE TABLE.
Q. DID THERE COME A TIME AT WHICH YOU WENT TO COURT TO HAVE BAIL SET?
A. YES, SIR.
Q. WHAT HAPPENED THEN?
A. I WAS TAKEN BEFORE A JUDGE. AND, UMM, I HAD TO WAIT A LONG TIME. I DON'T KNOW HOW LONG BEFORE MY CASE CAME UP. I DON'T REMEMBER WHAT WAS SAID, BUT I JUST REMEMBER THAT MY BAIL WAS SET.
Q. WHAT WAS YOUR BAIL?
A. TEN THOUSAND DOLLARS.
MS. SHOWERS: YOUR HONOR, I WOULD LIKE TO OBJECT AGAIN TO THE RELEVANCE, BODINE.
THE COURT: WHAT?

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[KNIGHT 136]

THE HOLDING CELL AND ONE WHEN YOU WERE IN THE BIG CELL THE SIZE OF THIS ROOM, EACH OF YOUR TIMES WOULD YOU DESCRIBE FOR

THE JURY PLEASE YOUR PHYSICAL CONDITION?
A. I WENT TO THE HOLDING CELL ONLY DURING THE DAY AND I WAS THERE ALL NIGHT. I DON'T KNOW WHAT TIME IT WAS, BUT LATE THAT NIGHT IT WAS REALLY COLD BECAUSE A WINDOW OVER THE CELL WAS OPEN. AND I KEPT YELLING SOMEBODY PLEASE BRING ME SOME MORE COVERS. AND THEY CAME SOONER OR LATER, BUT I GOT REALLY SICK.
Q. SICK HOW?
A. PHYSICALLY SICK. I WAS VOMITING. AND BLEEDING HEAVILY BECAUSE I NEVER HAD A BABY VAGINALLY. SO THEY CALLED THE AMBULANCE. AND THEY WANTED TO HANDCUFF ME AND SHANKLE ME.
Q. HANDCUFF YOU AND WHAT?
A. THEY WANTED TO HANDCUFF AND SHANKLE ME AND TAKE ME TO THE DOCTOR. AND I REFUSED THE TREATMENT. I REFUSED THE TREATMENT BECAUSE I DIDN'T WANT TO BE SEEN THAT WAY.
Q. AFTER THE TEN THOUSAND DOLLARS BAIL WAS POSTED - I'M SORRY, WAS SET, WERE YOU ABLE TO POST THAT BAIL?
A. YES, SIR.
Q. HOW?
A. MY PARENT AND MY RELATIVES.
Q. OKAY. YOU ANSWERED THE QUESTION I ASKED. WAS TEN THOUSAND DOLLARS PUT UP OR DID YOU USE A BAIL BONDSMAN?
A. YES, SIR, BAILS BONDMAN.

* * *

[KNIGHT 139]

Q. WHEN YOU LEFT, WERE YOU PROVIDED WITH A BOX THAT CONTAINED - WELL STRIKE THAT.
WERE YOU IN THE COURTROOM TODAY WHEN MS. BROWN TESTIFIED?
A. YES, SIR.
Q. DID YOU HEAR THE DESCRIPTION OF THE BOX THAT PEOPLE WERE DISCHARGED WITH?
A. YES.
Q. DID YOU GET ONE?
A. NO, SIR.
Q. WHEN YOU WERE ASKED TO SIGN A CONSENT FOR TESTING FOR YOUR SON BRANDON, WERE YOU TOLD THAT THE RESULTS OF THAT TEST WOULD BE TURNED OVER TO THE POLICE?
A. NO, SIR.
Q. OR TO THE SOLICITOR'S OFFICE?
A. NO, SIR.
MR. WHERRY: YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF MS. KNIGHT.
THE COURT: CROSS EXAMINATION.
MS. SHOWERS: THANK YOU.
CROSS-EXAMINATION
BY MS. SHOWERS:
Q. MS. KNIGHT, YOU GOT PREGNANT WITH YOUR THIRD CHILD BRANDON IN EARLY 1989, CORRECT?
A. YES.

[KNIGHT 140]

Q. AND YOU WENT FOR PRENATAL CARE, CORRECT?
A. YES.
Q. BUT YOU DIDN'T GO UNTIL ABOUT YOUR FOURTH MONTH, ISN'T THAT ALSO TRUE?
A. BECAUSE I DIDN'T HAVE A PERIOD BUT EVERY FOUR MONTHS.
Q. BUT YOU DIDN'T GO UNTIL YOUR FOURTH MONTH, CORRECT?
A. YES.
Q. AFTER THAT POINT, YOU DIDN'T GO ON REGULAR INTERVALS, DID YOU?
A. I DON'T REMEMBER.
Q. YOU DIDN'T GO REGULARLY TO PRENATAL CARE, YOU DON'T REMEMBER TELLING ME THAT?
A. THAT I DID GO?
Q. DO YOU REMEMBER WHEN I TOOK YOUR DEPOSITION?
A. YES.
Q. DO YOU REMEMBER TELLING ME THAT YOU DIDN'T GO TO YOUR PRENATAL CARE VISITS ON A REGULAR BASIS?
A. AS OFTEN AS I COULD GET THERE WITHOUT TRANSPORTATION.
Q. WOULD YOUR TURN TO PAGE 147, PLEASE. DOWN AT THE BOTTOM OF THE PAGE, LINE 23,THE QUESTION WAS:
"DID YOU GET PRENATAL CARE WITH BRANDON?"
AND YOUR ANSWER WAS: "YEAH."
QUESTION: "REGULAR PRENATAL VISIT?" AND ON THE NEXT PAGE, WHAT WAS YOUR ANSWER?

A. "THEY WEREN'T REGULAR."

* * *

[KNIGHT 143]

A. I COULD HAVE.
Q. WOULD YOU LIKE ME TO REFRESH YOUR RECOLLECTION?
A. THAT'S UP TO YOU.
Q. PAGE 37, LINE 5, THE QUESTION: "WERE YOU AWARE THAT DRUG USE WHILE PREGNANT CAN BE HARMFUL?"
AND YOUR ANSWER WAS?
A. "I HAD HEARD SOMETHING ABOUT IT. NOT IN NO DETAILS."
Q. AND THAT WAS TRUE THEN ON THE 26TH DAY OF SEPTEMBER 1989; IS THAT RIGHT?
A. YES.
Q. AND BEFORE YOU WENT TO MUSC FOR TREATMENT, YOU HAD HEARD ABOUT THE POLICY OF ARRESTING WOMEN IF THEY TESTED POSITIVE FOR DRUGS, HAD YOU NOT?
A. I HEARD SOMETHING ABOUT IT.
Q. AND WHEN YOU WENT TO MUSC FOR TREATMENT, YOU SIGNED A CONSENT FORM, DIDN'T YOU?
A. I GUESS.
Q. IS THAT YOUR SIGNATURE ON THE BOTTOM OF THAT?
A. YES, IT IS.
Q. THANK YOU.
MS. SHOWERS: DEFENDANTS' EXHIBIT 51-A.
Q. (BY MS. SHOWERS, CONTINUING) AND YOU KNEW YOU WERE USING

DRUGS AND YOU WERE GOING TO MUSC FOR TREATMENT, BUT YOU NEVER ASKED ANY DOCTOR OR ANY NURSE THERE FOR HELP OR SUBSTANCE ABUSE REFERRAL OR ANY TYPE OF TREATMENT LIKE THAT, DID YOU?

[KNIGHT 144]

A. NO, I DIDN'T.
Q. AND THEN YOU DELIVERED BRANDON ON NOVEMBER 6, 1989, CORRECT?
A. NO.
Q. WHAT DAY WAS IT?
A. NOVEMBER 7TH.
Q. SORRY. AND WHEN BRANDON WAS BORN HE HAD SOME PROBLEMS AT BIRTH, DIDN'T HE?
MR. WHERRY: OBJECTION, RELEVANCE.
MS. SHOWERS: YOUR HONOR, THE REASON FOR THE TESTING
-
THE COURT: SAY WHAT?
MS. SHOWERS: THE REASON FOR THE DRUG TESTING.
MR. WHERRY: THEN COMPETENCE. SHE NEVER SAW THE CHILD.
THE COURT: SAY WHAT?
MR. WHERRY: THEN COMPETENCE, SHE NEVER SAW THE CHILD, SHE TESTIFIED, BEFORE BEING ARRESTED.
MS. SHOWERS: SHE HAD CONVERSATIONS WITH MEDICAL PERSONNEL.
THE COURT: SAY WHAT?

MS. SHOWERS: SHE SAID THAT SHE TALKED TO SHIRLEY BROWN.

THE COURT: WELL THE ONLY WAY THAT THE TESTIMONY SO FAR, FROM THIS WITNESS, WOULD SEEM TO INDICATE THAT SHE WAS

* * *

[KNIGHT 147]

WELL LET'S LEAVE IT AT THAT. YOU MAY PROCEED.

Q. (BY MS. SHOWERS, CONTINUING) MS. KNIGHT, YOU GOT SUBSTANCE ABUSE TREATMENT AT CHARLESTON COUNTY SUBSTANCE ABUSE?

A. YES.

Q. AND YOU SUCCESSFULLY COMPLETED THAT TREATMENT AND YOU'RE OFF DRUGS; IS THAT RIGHT?

A. YES.

MS. SHOWERS: I HAVE NOTHING FURTHER.

MR. WHERRY: NO REDIRECT, SIR.

THE COURT: ALL RIGHT, SIR.

THE WITNESS: JUDGE, CAN I SAY SOMETHING?

THE COURT: SAY WHAT? .

THE WITNESS: CAN I SAY SOMETHING?

THE COURT: NO. YOU'RE EXCUSED.

(TESTIMONY OF ELLEN KNIGHT CONCLUDED.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CINDY LEGARE

[LEGARE 295]

(TESTIMONY EXCERPT OF CINDY LEGARE, 12-6-96.)

MS. PALTROW: I CALL CINDY LEGARE.

- - -

CINDY M. LEGARE PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. PALTROW:

Q. COULD YOU STATE YOUR NAME AND POSITION FOR THE JURY, PLEASE.

A. MY NAME IS CYNTHIA MOORE LEGARE, AND I WORK FOR THE CHARLESTON COUNTY SOLICITOR'S OFFICE. I'M AN INVESTIGATOR THERE.

Q. AND YOU WERE AN INVESTIGATOR THERE SINCE 1987; IS THAT CORRECT?

A. CORRECT.

Q. AND YOUR POSITION THERE INVOLVED AT SOME POINT AN INVOLVEMENT WITH THE INTERAGENCY POLICY, DIDN'T IT?

A. YES.

Q. AND THAT INVOLVEMENT CONCERNED TRACKING WOMEN WHO WERE IDENTIFIED AT MUSC AS POSITIVE FOR DRUGS; DIDN'T IT?

A. CORRECT.

Q. AND IN THAT POSITION YOU TRACKED WOMEN WHO TESTED POSITIVE FOR COCAINE WHETHER OR NOT THEY WERE ARRESTED, ISN'T THAT CORRECT?
A. CORRECT.
Q. AND YOU TRACKED THOSE WOMEN WHETHER OR NOT THEY GOT

[LEGARE 296]

TREATMENT?
A. CORRECT.
Q. AND YOU GOT THE INFORMATION ABOUT THOSE WOMEN FROM THE MEDICAL UNIVERSITY, DIDN'T YOU?
A. I CAN'T SAY IN EVERY INSTANCE IT WAS FROM THE MEDICAL UNIVERSITY BECAUSE I GOT INFORMATION FROM DIFFERENT AGENCIES AT SCAN MEETINGS SOMETIMES, AFTER SOMEBODY WAS ALREADY ARRESTED, WHICH THAT WOULD HAVE COME FROM THE POLICE.
Q. BUT WHEN YOU SAY THE SCAN MEETINGS, THAT WOULD HAVE BEEN MEETINGS AT THE MEDICAL UNIVERSITY; ISN'T THAT CORRECT?
A. AT THE MEDICAL UNIVERSITY. BUT PEOPLE FROM SUBSTANCE ABUSE WOULD BE THERE, DEPARTMENT OF SOCIAL SERVICES, MEDICAL UNIVERSITY, ME, THE POLICE OFFICER. AND THE INFORMATION WOULD HAVE COME FROM ALL OF THOSE PEOPLE, WHOEVER WAS WORKING WITH THE WOMEN.
Q. AND IT WAS IF A WOMEN WHO WAS BEING TREATED AT MUSC AND

HAD BEEN IDENTIFIED AS POSITIVE FOR DRUGS; ISN'T THAT CORRECT?

A. YES, I THINK MOST OF THOSE WOULD HAVE BEEN MEDICAL UNIVERSITY.

Q. AND YOUR PRIMARY CONTACT OUTSIDE OF THE SCAN MEETINGS WOULD HAVE BEEN SHIRLEY BROWN; IS THAT CORRECT?

A. MY PRIMARY CONTACT FOR WHAT?

Q. FOR INFORMATION ABOUT WHO TESTED POSITIVE UNDER THE POLICY?

[LEGARE 297]

A. ABOUT WHO TESTED POSITIVE. PROBABLY.

Q. AND THE PURPOSE OF COLLECTING THAT INFORMATION WAS TO -- ONE OF THE REASONS FOR COLLECTING THAT INFORMATION WAS TO FIND OUT WHETHER OR NOT A WOMAN WHO HAD TESTED POSITIVE WAS COMPLYING WITH SUBSTANCE ABUSE TREATMENT; ISN'T THAT TRUE?

A. YES.

Q. AND ONE OF THE REASONS FOR COLLECTING THAT INFORMATION WAS TO FIND OUT WHETHER A PARTICULAR PATIENT WHO -- YOU HAD IDENTIFIED AS YOU HAD BEEN INFORMED HAD TESTED POSITIVE, WHETHER SHE HAD BEEN ARRESTED; ISN'T THAT TRUE?

A. THAT WAS PART OF WHAT I TRACKED, YES, WHETHER THEY HAD BEEN ARRESTED.

Q. AND YOU WERE -- SOMETIMES GOT THE INFORMATION ABOUT WHETHER OR NOT THEY WERE ARRESTED AT SCAN MEETINGS AT THE MEDICAL UNIVERSITY; ISN'T THAT CORRECT?

A. I DON'T KNOW THAT I EVER GOT THAT INFORMATION. I WAS ALSO IN CLOSE CONTACT WITH DETECTIVE WARING, SHE WAS THE CITY POLICE OFFICER WHO WAS MY MAIN CONTACT ABOUT WHETHER OR NOT AN ARREST WAS MADE BECAUSE THAT WOULD HAVE BEEN HER JOB TO ARREST.

Q. AND SOME OF THE SCAN MEETINGS THEY DID, HOWEVER, DISCUSS WHETHER OR NOT A WOMEN HAD BEEN ARRESTED UNDER THE POLICY; ISN'T THAT CORRECT?

A. YES, BUT I WOULD ALSO HAVE KNOWN THEY WOULD HAVE BEEN ARRESTED BECAUSE THE CASE WOULD HAVE COME TO MY OFFICE,

[LEGARE 298]

GENERAL SESSIONS FOR GENERAL SESSIONS COURT.

Q. AND YOU KEPT YOUR LIST OF NAMES ON A YELLOW PAD, DIDN'T YOU?

A. A LEGAL PAD.

Q. AND CAN YOU TELL US WHO ASKED YOU TO KEEP THAT LIST?

A. CHARLIE CONDON.

Q. AND WHAT DID YOU DO WITH THE INFORMATION THAT WAS ON THAT LIST?

A. I WOULD KEEP IT. I WOULD UPDATE IT PERIODICALLY LIKE IF SOMEBODY HAD NOT BEEN ATTENDING SUBSTANCE ABUSE AND LATER ON STARTED ATTENDING SUBSTANCE ABUSE, I WOULD ADD THAT INFORMATION TO IT. AND EVERY SO OFTEN I WOULD GIVE IT TO CHARLIE CONDON AN UPDATED LIST WITH ALL OF THAT INFORMATION.

Q. AND THAT UPDATED LIST WOULD INCLUDE THE PATIENT'S NAME, WOULDN'T IT?

A. YES.

Q. AND IT WOULD INCLUDE INFORMATION ABOUT WHETHER THEY TESTED POSITIVE?

A. YES.

Q. AND MIGHT INCLUDE OTHER INFORMATION CONCERNING WHETHER OR NOT, FOR EXAMPLE, THEY HAD HAD AN ABORTION; ISN'T THAT TRUE?

MS. COMPANION: OBJECTION. 403 AND THERE IS NOTHING IN THE RECORD ABOUT THAT. NO FOUNDATION FOR THAT.

MS. PALTROW: MAY I RESPOND?

THE COURT: WELL, LET'S LOOK AT WHAT WE'RE DOING.

* * *

[LEGARE 302]

INTERAGENCY POLICY; ISN'T THAT CORRECT?

A. AS FAR AS I CAN REMEMBER, YES.

Q. DID YOU KEEP MORE OF THAN THE TWO DOCUMENTS THAT I HAVE

SHOWN YOU NOW THAT YOU HAVE IDENTIFIED THEM?
A. I THINK SO.
Q. AND DID YOU KEEP YOU -- DIDN'T KEEP THOSE IN A LOCKED FILE, DID YOU?
A. NO.
Q. AND THERE WEREN'T ANY WRITTEN PROCEDURES OR PROTOCOLS FOR INSURING THE SECURITY OF THOSE LISTS?
A. NOTHING WRITTEN, ALTHOUGH I HAVE A PRIVATE OFFICE AND THE SOLICITOR'S OFFICE ITSELF IS LOCKED.
Q. WASN'T ONE OF THE PURPOSES OF THE TRACKING THESE WOMEN WAS TO SEE IF THE POLICY WAS WORKING?
A. I THINK SO.
Q. AND AT SOME POINT DID YOU -- WERE YOU REPLACED BY SOMEBODY ELSE WHO TOOK OVER THIS FUNCTION FOR THE SOLICITOR'S OFFICE?
A. YES, I WAS.
Q. AND WHO WAS THAT?
A. GARDEN BLINCOW. I THINK THAT'S HOW YOU PRONOUNCE HER LAST NAME.
Q. AND SHE WAS HIRED SOLELY TO DO THAT JOB AT THE SOLICITOR'S OFFICE; ISN'T THAT CORRECT?
A. THAT WAS MY UNDERSTANDING.

* * *

[LEGARE 312]

THOSE REPORTS FROM MUSC, YOU KEPT THOSE AS PART OF YOUR JOB TRACKING, YOU KEPT SCAN REPORTS WRITTEN BY MEDICAL UNIVERSITY

PEOPLE AS PART OF YOUR JOB AT THE SOLICITOR'S OFFICE?

MS. COMPANION: OBJECTION, SHE IS CALLING FOR SPECULATION.

THE COURT: NO, I OVERRULE THE OBJECTION.

A. I CAN'T REALLY REMEMBER IF I KEPT THEM OR NOT. I MEAN, I KNOW I RECEIVED THEM. I DON'T KNOW IF I HANDED THEM IN TO MR. WHEN I HANDED IN THE SHEETS OR WHAT I DID WITH THEM.

BUT YOU DID RECEIVE THEM IN THE COURSE OF YOUR POSITION THERE TRACKING THEM; IS THAT CORRECT?

A. CORRECT.

MS. PALTROW: YOUR HONOR, I WOULD LIKE TO MOVE THIS INTO EVIDENCE.

MS. COMPANION: WE OBJECT.

THE COURT: I SUSTAIN THE OBJECTION. I MEAN, SHE HAS IN A GENERAL WAY IDENTIFIED THIS FORM AS SOMETHING THAT WAS A PRODUCT OF THE SCAN MEETING. AND SHE HAS SAID THAT SHE HAS RECEIVED SUCH FORMS, BUT SHE HAS NOT IDENTIFIED THESE FORMS AS BEING THOSE THAT SHE RECEIVED. AND SHE SAID THAT THAT IS NOT HER HANDWRITING THERE, WHICH WOULD NOT SEEM TO AUTHENTICATE IT SINCE IT'S NOT HER HANDWRITING. SO I DON'T THINK A PROPER FOUNDATION HAS BEEN LAID, SO I SUSTAIN THE OBJECTION.

Q. (BY MS. PALTROW, CONTINUING) THE SCAN REPORTS THAT YOU

[LEGARE 313]

RECEIVED AS PART OF YOUR JOB DIDN'T JUST INCLUDE INFORMATION ABOUT WHETHER OR NOT A WOMEN TESTED POSITIVE FOR DRUGS, DID IT?

A. NO, BECAUSE IT WAS NOT JUST FOR THAT PURPOSE OF -- OF TRACKING THE WOMEN FOR THIS PARTICULAR POLICY. BECAUSE AT THE SCAN MEETINGS WHEN WE WOULD GO, IT WOULD BE -- IT WOULD BE ALL KIND OF PROFESSIONALS WHO WERE WORKING WITH THESE WOMEN IN AN EFFORT TO HELP THEIR BABY. BUT EVEN BEFORE THAT PART OF THE MEETING BEGAN, THEY WOULD HAVE OTHER SCAN MEETINGS ABOUT OTHER CASES WITH THE -- DIFFERENT PROFESSIONALS MAYBE, BUT FROM THE SAME TYPE OF PLACE SHARING INFORMATION ABOUT OTHER ABUSE AND NEGLECT CASES.

Q. AND YOU WERE THERE FOR THE PART THAT WAS DISCUSSING COCAINE BABIES, WEREN'T YOU?

A. CORRECT.

Q. AND THE INFORMATION THAT WAS SHARED WITH YOU WAS MEDICAL INFORMATION, WASN'T IT?

A. YES.

Q. AND YOU DIDN'T HAVE A SEARCH WARRANT TO OBTAIN THAT INFORMATION?

A. DID I HAVE A SEARCH WARRANT? NO, I DIDN'T.
Q. YOU DIDN'T HAVE A COURT ORDER TO OBTAIN THAT INFORMATION, DID YOU?
A. NO, I DID NOT. BUT MAY I ANSWER MORE.
Q. NO THANK YOU.

* * *

[LEGARE 315]

COUNTY SUBSTANCE ABUSE CENTER FOR TREATMENT?
A. ON SOME CASES IT MAY HAVE BEEN CITY SCAN MEETINGS, BUT AT SOME; POINT IN MY INVOLVEMENT WITH THE POLICY I BEGAN RECEIVING LETTERS FROM SUBSTANCE ABUSE STATING WHETHER THEY WERE SUCCESSFUL OR UNSUCCESSFUL.
MS. COMPANION: ONE MOMENT, PLEASE, YOUR HONOR.
Q. (BY MS. COMPANION, CONTINUING) MS. LEGARE, WHAT WAS THE PURPOSE OF WHAT WE HAVE TALKED ABOUT TODAY AS THE INTERAGENCY POLICY FROM YOUR STANDPOINT AT THE SOLICITOR'S OFFICE?
A. WELL THE MEDICAL UNIVERSITY HAD - AS I KNOW IT, HAD COME TO. US SAYING THAT THEY HAD IDENTIFIED THAT THERE WAS A PROBLEM, AN EVER INCREASING PROBLEM WITH BABIES TESTING POSITIVE FOR COCAINE. AND IT WAS AN ATTEMPT TO TRY TO GET THESE WOMEN TO GET HELP SO THAT IT WOULD HELP THE BABIES NOT

BE TESTING POSITIVE FOR COCAINE.

MS. COMPANION: THANK YOU. NOTHING FURTHER.

MS. PALTROW: YOUR HONOR. NO REDIRECT.

THE COURT: OKAY. YOU'RE EXCUSED.

(TESTIMONY COMPLETED.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF ROBERT MALCOMB

[MALCOMB 750]

SERVED FOR TWO YEARS ON ACTIVE DUTY IN THE NAVY IN NORFOLK, CHARLESTON AND AT PARRIS ISLAND. I THEN WENT OFF ACTIVE DUTY AND KEPT MY RESERVE COMMISSION AND SERVED ABOARD A DESTROYER WITH SEA-BEE UNITS AND VARIOUS OTHER MEDICAL UNITS IN THE NAVY RESERVE. AND THEN IN 1984 I TRANSFERRED TO THE AIR FORCE RESERVE SO THAT I COULD GO TO FLIGHT SURGEON SCHOOL WITH THE AIR FORCE. AND SERVED SINCE WITH THE AIR FORCE AND SERVED IN THE CONFLICT IN PANAMA AND IN THE GULF. AND I HAVE 23 YEARS RESERVE AND ACTIVE DUTY TIME IN THE MILITARY. AND I SERVED PRIMARILY AS A GENERAL PRACTITIONER IN THE MILITARY RATHER THAN A PSYCHIATRIST.

Q. WHAT IS YOUR CURRENT POSITION IN THE MILITARY?

A. I'M A COMMANDING OFFICER OF THE 315TH MEDICAL CLINIC HERE AT CHARLESTON AT THE AIR FORCE BASE.

Q. AND YOU'RE MARRIED, SIR?

A. I'M MARRIED FOR 27 YEARS AND HAVE THREE CHILDREN.

Q. AND, DOCTOR, YOU HAVE BEEN IN THIS COMMUNITY PRACTICING SUBSTANCE ABUSE TREATMENT FOR APPROXIMATELY HOW MANY YEARS?
A. TWENTY YEARS.
Q. AND SINCE YOUR EXPERIENCE WITH SUBSTANCE ABUSE TREATMENT, HAVE YOU COME TO KNOW ANYTHING ABOUT THE INTERAGENCY POLICY?
A. YES, I HAVE.
Q. ARE YOU FAMILIAR WITH THAT?
A. I AM FAMILIAR WITH THAT POLICY.
Q. AND WERE YOU INVOLVED WITH THAT POLICY, DR. MALCOMB?

[MALCOMB 751]

A. I WAS FAMILIAR WITH ITS FORMULATION, BUT I WAS NOT PART OF THE COMMITTEE THAT WORKED OUT THAT POLICY, NO.
Q. DID YOU EVER HAVE AN OPPORTUNITY TO ADVISE ANY OF THE FOUNDERS OF THAT POLICY?
A. NO. THEY PERHAPS DISCUSSED IT WITH ME, BUT I DIDN'T PROVIDE ANY INPUT TO THAT ORIGINAL POLICY.
Q. AND SINCE IT WAS ENACTED OR IMPLEMENTED, DID YOU THEN BEGIN TO ADVISE THAT GROUP?
A. YES, I HAVE.
Q. AND CAN YOU TELL THE JURY ABOUT YOUR ADVICE TO THAT GROUP?
A. WELL, MY ADVICE ABOUT THAT POLICY IS THAT I BELIEVE AND SUPPORT THE NOTION OF COERCIVE TREATMENT OR THERAPY. AND I

THINK IT'S VALID, IT WORKS, IT'S WIDELY ACCEPTED THROUGHOUT THE COUNTRY. AND THERE IS A BODY OF SCIENTIFIC EVIDENCE TO SUPPORT THAT.

Q. CAN YOU EXPLAIN TO THE JURY WHAT YOU MEAN BY COERCIVE TREATMENT?

A. I CAN IF I CAN GIVE A LITTLE BACKGROUND TO THIS. BEGINNING IN ADDICTION WORK IN THE 1930'S THERE WAS A NOTION, AND IT STILL PERSISTS TO SOME EXTENT TODAY, THAT PEOPLE HAD TO HIT ROCK BOTTOM IN THEIR LIFE TO BE MOTIVATED ENOUGH TO HAVE TREATMENT FOR ADDICTION. IN OTHER WORDS, A PERSON HAD TO BE HURT IN A SENSE OF PERHAPS LOSING THEIR HEALTH OR THEIR JOB OR THEIR MARRIAGE, AND THEN, ONLY THEN WOULD THEY REALIZE HOW

[MALCOMB 752]

DANGEROUS OR SERIOUS WAS THE ADDICTION AND THEN THEY WOULD SEEK HELP.

WELL, IN THE 1960'S AND '70'S PEOPLE WORKING IN THE AREA BEGAN QUESTIONING THAT PREMISE, BECAUSE THEY SAID, MY GOODNESS, BY THE TIME PEOPLE ENTER TREATMENT, IF THEY LIVE LONG ENOUGH, THEY WOULD HAVE ALREADY LOST THEIR MARRIAGES, THEIR HEALTH, THEIR JOBS, THEIR SPIRITUALITY, EVERYTHING WOULD

BE GONE. SO THAT PERHAPS IT WOULD BE POSSIBLE TO BRING PRESSURE TO BEAR ON PEOPLE SO THAT THEY WOULD SEEK TREATMENT BEFORE THEIR LIVES WERE DESTROYED.

WELL, THAT WAS THE WAY COERCIVE THERAPY WAS BORN. AND OF COURSE THIS HAS BEEN ALONG MANY ROUTES, WHATEVER - WHENEVER THERE IS LEVERAGE, WHENEVER THERE IS A MECHANISM FOR COERCION, WE USE IT IN THE SUBSTANCE ABUSE TREATMENT FIELD TO REACH OUT AND HELP ADDICTS BEFORE THEY ARE LOST TO EVERYTHING. FOR EXAMPLE FAMILIES GET TOGETHER AND WE USE FAMILY PRESSURES. WE USE JOB AND WORK AND VOCATIONAL PRESSURES. AND CERTAINLY WE USE LEGAL PRESSURES. AND OF COURSE MANY STATES THROUGHOUT THE COUNTRY HAVE WHOLE LEGAL AND COURT SYSTEMS THAT JUST SIMPLY DEAL WITH THE ISSUE OF DRUG ABUSE OFFENSES, SEEING THAT PEOPLE EITHER GO TO TREATMENT OR THAT THEY GO TO JAIL. SO THAT'S COERCIVE TREATMENT.

Q. DOCTOR, YOU HAVE EXPERIENCE WITH USING LEGAL SANCTIONS AS LEVERAGE INTO TREATMENT?

A. OH, YES.

[MALCOMB 753]

Q. CAN YOU EXPLAIN TO THE JURY THE VALIDITY OR EFFECTIVENESS OF THAT?

A. WELL IT'S HIGHLY EFFECTIVE. I SAW A YOUNG MAN TODAY WHO IS ADMITTED TO THE HOSPITAL YESTERDAY. HE HAS BEEN DENYING HIS PROBLEMS ALL ALONG. AND THE FIRST THING HE SAID TO ME TODAY ON ROUNDS IS, DOCTOR, WOULD YOU MIND CALLING MY PROBATION OFFICER. AND I SAID I WOULD BE DELIGHTED TO. AND I'LL BE HAPPY TO HELP YOU IN ANY WAY I CAN, BUT LET'S TALK ABOUT YOUR TREATMENT, TOO. LET'S TALK ABOUT THE THINGS THAT YOU NEED TO DO TO HELP GET WELL TO PREVENT THIS DESTRUCTION OF YOUR LIFE. THAT'S AN EXAMPLE OF COERCIVE THERAPY. AND IT WORKS.

Q. DOCTOR, HOW WOULD YOU CHARACTERIZE THE VALIDITY OF THE THEORY THAT THE INDIVIDUAL MUST WANT TREATMENT BEFORE IT WILL BE SUCCESSFUL?

A. I THINK THE THEORY IS WRONG. I THINK IT IS DESTRUCTIVE TO PEOPLES' LIVES AND IT ALLOWS PEOPLES' LIVES TO DETERIORATE TO THE POINT WHERE SOMETIMES THEY CAN'T RECOVER BEFORE THEY GET HELP.

Q. AND WHICH PATIENTS TEND TO ENTER TREATMENT VOLUNTARILY, DOCTOR?

A. WELL, I BELIEVE THAT ALL TREATMENT TO SOME EXTENT IS COERCIVE BECAUSE THERE IS ALWAYS OUTSIDE INFLUENCES. BUT IF

WE LOOK AT THE LITERATURE ON THE PEOPLE THAT ENTER TREATMENT VOLUNTARILY, MANY OF THEM HAVE ALREADY LOST MARRIAGES, HAVE

[MALCOMB 754]

LOST JOBS AND HAVE HAD HEALTH PROBLEMS SUCH AS LIVER DISEASE FROM DRINKING, AND STROKES FROM COCAINE ABUSE AND SO FORTH. SO PEOPLE THAT ENTER TREATMENT VOLUNTARILY TEND TO BE SICKER AND WITH MORE PROBLEMS.

Q. AND, DOCTOR, CAN YOU EXPLAIN OR DESCRIBE THE BENEFITS OF COERCIVE TREATMENT?

A. WELL, THE BENEFITS OF COERCIVE TREATMENT IS THAT IT WORKS, IT'S EFFECTIVE. PEOPLE REMAIN IN TREATMENT LONGER. THEY ENTER TREATMENT AT A YOUNGER AGE. THEY HAVE LESS DESTRUCTION TO THEIR FAMILY LIVES AND THEIR HEALTH BEFORE THEY ENTER TREATMENT. THEY OFTEN STILL HAVE PRESERVATION OF THEIR JOB IF THEY WERE EMPLOYED.

Q. DOCTOR, WHAT PROGRAMS ARE AVAILABLE AT THE MEDICAL UNIVERSITY TO TREAT PREGNANT WOMEN?

MS. PALTROW: OBJECTION, YOUR HONOR. THE TIME FRAME HAS TO BE EXPLAINED. IT'S GOING TO BE MISLEADING AND PREJUDICIAL OTHERWISE.

MS. SHOWERS: THE AVAILABILITY OF SUBSTANCE ABUSE

TREATMENT HAS BEEN THE ISSUE. IF SHE WANTS TO BRING OUT SOMETHING ELSE ON CROSS-EXAMINATION HE CAN CERTAINLY TELL US WHAT IS AVAILABLE.

THE COURT: WELL SHE MENTIONED A PARTICULAR TIME FRAME SHOULD BE ATTACHED TO IT. I'M INCLINED TO AGREE WITH HER.

Q. (BY MS. SHOWERS, CONTINUING) DR. MALCOMB, CURRENTLY ARE

[MALCOMB 755]

THERE PROGRAMS AVAILABLE AT THE MEDICAL UNIVERSITY TO TREAT PREGNANT WOMEN?

A. YES.

THE COURT: AGAIN, I DON'T KNOW THAT THAT IS RELEVANT. NOW, IF HE IS INVOLVED IN THEM POSSIBLY IT COULD HAVE SOMETHING TO DO WITH HIS QUALIFICATIONS, BUT I DON'T THINK IT'S OFFERED FOR THAT AND I DON'T THINK IT'S RELEVANT.

Q. (BY MS. SHOWERS, CONTINUING) BETWEEN THE YEAR OF 1989 AND 1994, DR. MALCOMB, WERE THERE FACILITIES OR TREATMENT PROGRAMS AVAILABLE AT THE MEDICAL UNIVERSITY FOR PREGNANT WOMEN?

A. YES, THERE WERE.

Q. CAN YOU DESCRIBE THOSE FACILITIES TO THE JURY, PLEASE?

A. WELL THERE WERE A SPECTRUM OF PROGRAMS, SOME INVOLVED

INPATIENT TREATMENT AND SOME INVOLVED OUTPATIENT TREATMENT. INPATIENT TREATMENT WOULD, OF COURSE, BE THE PATIENT WOULD BE ADMITTED TO THE HOSPITAL, WOULD BE EVALUATED BY A TREATMENT TEAM OF DOCTORS, NURSES, PSYCHOLOGISTS AND SOCIAL WORKERS AND OTHER PERSONNEL. A TREATMENT PLAN WOULD BE DRAWN UP AND THAT TREATMENT WOULD BE PURSUED IN THE HOSPITAL. AND THAT TREATMENT MIGHT CONSIST OF VARIOUS MEDICAL TREATMENTS, PSYCHOLOGICAL TREATMENT, COUNSELING AND ATTENDANCE AT VARIOUS, WHAT WE CALL SELF-HELP GROUPS OR 12 STEPS, SUCH AS ALCOHOLICS ANONYMOUS OR NARCOTICS ANONYMOUS.

ALSO IN ADDITION TO INPATIENT TREATMENT, OUTPATIENT

[MALCOMB 756]

TREATMENTS WOULD CONSIST OF WHAT WE CALL INTENSIVE OUTPATIENT TREATMENT WHERE THE PERSON, AND THIS GOES BY A VARIETY OF NAMES, AND I APOLOGIZE THAT'S KIND OF CONFUSING, BUT INTENSIVE OUTPATIENT TREATMENT OR SO-CALLED DAY TREATMENT IS WHEN THE PATIENT GOES AND SPENDS THE ENTIRE DAY AT THE HOSPITAL PARTICIPATING IN SOME OF THE SIMILAR ACTIVITIES I HAVE JUST DESCRIBED AND THEN THEY GO HOME TO THEIR RESIDENCE AT NIGHT OR

PERHAPS A HALFWAY HOUSE AT NIGHT. AND THEN REGULAR OUTPATIENT THERAPY MIGHT JUST - AND THAT, BY THE WAY, COULD BE ANYWHERE FROM FOUR TO SIX HOURS A DAY FOR FOUR TO FIVE DAYS A WEEK. AND THEN REGULAR OUTPATIENT TREATMENT IS MUCH LIKE ANY OTHER TYPE OF MEDICAL OUTPATIENT TREATMENT, A PERSON MIGHT COME IN ONCE OR TWICE A WEEK AND SEE A PSYCHIATRIST OR PSYCHOLOGIST OR SOCIAL WORKER OR ALCOHOL OR ADDICTION COUNSELOR. AND THE LENGTH AND DURATION WOULD DEPEND ON THE NATURE OF THE PERSON'S PROBLEM, THE LENGTH AND SEVERITY.

Q. ARE YOU FAMILIAR WITH WHAT SUBSTANCE ABUSE FACILITIES WERE AVAILABLE BETWEEN THE YEAR 1989 AND 1992?

A. YES.

Q. AND THE SUBSTANCE ABUSE TREATMENT FACILITIES THAT WERE UTILIZED IN THE INTERAGENCY POLICY, WERE THEY APPROPRIATE?

A. YES, THEY WERE.

Q. THE ONES THAT THE WOMEN GOT REFERRED TO?

A. YES.

[MALCOMB 757]

Q. AND, DOCTOR, IN YOUR EXPERIENCE AS A SUBSTANCE ABUSE EXPERT, WAS THE INTERAGENCY POLICY AN APPROPRIATE MECHANISM TO GET WOMEN INTO TREATMENT?

A. YES, IT WAS.
MS. SHOWERS: NOTHING FURTHER.
THE COURT: CROSS-EXAMINATION.
MS. PALTROW: THANK YOU.

CROSS-EXAMINATION

BY MS. PALTROW:
Q. DR. MALCOMB, YOU TESTIFIED YOU WEREN'T INVOLVED IN THE INITIAL FORMULATION OF THE POLICY; IS THAT CORRECT?
A. THAT'S CORRECT.
Q. AND YOU WOULD HAVE BEEN ONE OF THE PEOPLE AT THE UNIVERSITY, OR ASSOCIATED WITH THE UNIVERSITY WITH ACTUAL EXPERTISE IN SUBSTANCE ABUSE AT THE TIME?
A. AT THE TIME I WAS MEDICAL DIRECTOR OF FENWICK HALL HOSPITAL, SO MY DUTIES AT THE UNIVERSITY WERE CURTAILED AND I WAS NOT, IN GENERAL, AVAILABLE AT THE UNIVERSITY ON A DAY-TO-DAY BASIS.
Q. BUT YOU WERE THERE SOMETIMES WEREN'T YOU?
A. I WAS THERE SOMETIMES.
Q. AND YOU HAD AN ASSOCIATION WITH THE MEDICAL UNIVERSITY AT THAT POINT DIDN'T YOU?
A. I DID INDEED.
Q. NOW YOU SAID THAT - ISN'T IT CORRECT THAT THERE ARE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF ROGER NEWMAN

[NEWMAN 155]

(TESTIMONY EXCERPT OF DR. ROGER NEWMAN.)

MR. WHERRY: CALL DR. ROGER NEWMAN, PLEASE, YOUR HONOR.

- - -

ROGER NEWMAN, M.D., PLF. WITNESS, SWORN

DIRECT EXAMINATION

BY MR. WHERRY:

Q. DR. NEWMAN, YOU'RE AN EMPLOYEE OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. YES, I AM.

Q. YOU HAVE BEEN AN EMPLOYEE THERE SINCE AT LEAST THE END OF THE '80'S?

A. 1986.

Q. DOCTOR, YOU ARE ALSO, IN ADDITION TO BEING AN EMPLOYEE OF THE MEDICAL UNIVERSITY, YOU'RE A MEMBER OF THE FACULTY; IS THAT CORRECT?

A. YES, I AM.

Q. AND, DOCTOR, YOU HAVE PRIVILEGES AT THE HOSPITAL; IS THAT FAIR?

A. YES, SIR.

Q. DOCTOR, WOULD YOU EXPLAIN TO THE JURY PLEASE, JUST VERY BRIEFLY, THE DIFFERENCE BETWEEN BEING ON THE FACULTY AND HAVING STAFF PRIVILEGES?
A. I'M NOT SURE I KNOW EXACTLY HOW TO DO THAT.
Q. LET ME HELP YOU.

* * *

[NEWMAN 157]

Q. YOUR FIELD OF SPECIALTY IS WHAT?
A. I'M - I. HAVE BOARDS IN OBSTETRICS AND GYNECOLOGY AND ALSO IN THE SUB-SPECIALTY OF MATERNAL FETAL MEDICINE.
Q. NOW, DOCTOR, YOU WERE A PARTICIPANT IN THE MEETINGS EARLY ON THAT EVENTUALLY RESULTED IN THE INTERAGENCY POLICY AS WE NOW KNOW IT, FAIR?
A. I ATTENDED THE SECOND MEETING. MY UNDERSTANDING I WAS AT THE SECOND MEETING REGARDING THIS POLICY AND AS A MEMBER OF THE DEPARTMENT OF OBSTETRICS AND GYNECOLOGY. AND AS MEMBER OF THE MATERNAL FETAL MEDICINE DIVISION WE WERE INVOLVED IN THAT POLICY, IMPLEMENTATION.
Q. DOCTOR, ONE OF THE PRELIMINARY THINGS THAT I WOULD LIKE TO DISCUSS WITH YOU, IF YOU WOULD BEAR WITH ME JUST A MOMENT. THE POLICY WAS, IN CONCEPT, TO IDENTIFY SUBSTANCE-ABUSING PREGNANT WOMEN IN PART, FAIR?
A. IN PART, YES, SIR.

Q. AND THAT WOULD INVOLVE THE DIAGNOSIS, WOULD IT NOT, IN PART THAT THE WOMAN WAS ABUSING CONTROLLED SUBSTANCES WHILE PREGNANT?
A. YES, SIR.
Q. TWO-PART DIAGNOSIS, ISN'T IT? FIRST, PREGNANCY. AND, SECOND, SUBSTANCE ABUSE?
A. YES, SIR.
Q. AND AFTER THAT DIAGNOSIS, PART OF THE POLICY WAS AT LEAST IN PART TO COUNSEL THE WOMEN, THE PATIENT ON THE FACT THAT

[NEWMAN 158]

THIS IS KIND OF A BAD THING TO DO?
A. WELL, AS PART OF THE POLICY ALL WOMEN ATTENDING THE PRENATAL CLINICS ARE - RECEIVING. OBSTETRICAL CARE AT THE UNIVERSITY RECEIVED COUNSELING REGARDING THE HAZARDS OF DRUG ABUSE AND PREGNANCY. THOSE PATIENTS WHO WERE IDENTIFIED AS HAVING A POSITIVE DRUG ABUSE SCREEN WHICH WERE DONE IN THE CONTEXT OF CLINICAL SITUATIONS ASSOCIATED WITH DRUG ABUSE, THOSE PATIENTS THEN RECEIVED FURTHER COUNSELING FROM THE STAFF AT THE UNIVERSITY AND WERE REFERRED TO SUBSTANCE ABUSE TREATMENT.
Q. SO THE NEXT STEP IN THE POLICY, FIRST DIAGNOSIS, THAT TWO-PRONGED DIAGNOSIS, THEN COUNSELING, THEN REFERRAL, FAIR?

A. YES, SIR.
Q. AND REFERRAL FOR SUBSTANCE ABUSE TREATMENT?
A. YES, SIR.
Q. OKAY. AND THAT WAS THE SUBSTANTIAL PART OF THE INTERAGENCY POLICY AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. THAT WAS PART OF IT. I DON'T KNOW THAT I COULD - I DON'T KNOW WHAT SUBSTANTIAL MEANS. I MEAN, THERE WERE OTHER PARTS THAT WERE INVOLVED IN THE POLICY.
Q. THAT WERE NOT DIAGNOSIS, COUNSELING AND REFERRAL?
A. THAT'S CORRECT.
Q. WERE YOU TREATING SUBSTANCE-ABUSING WOMEN?
A. NO, WE WERE TREATING THEIR PREGNANCY. BUT THE OTHER

[NEWMAN 159]

COMPONENT OF THE POLICY WAS AT THE TIME THAT THE WOMEN TESTED POSITIVE FOR DRUG ABUSE, IN ADDITION TO THE COUNSELING AND REFERRALS, THEY WERE ALSO MADE AWARE THAT THEY HAD VIOLATED SOUTH CAROLINA LAW, WHAT COMPONENTS OF THAT LAW THEY HAD VIOLATED, AND THAT IF THERE WAS FURTHER DRUG ABUSE IN PREGNANCY, THEY WERE SUBJECT TO POTENTIAL ARRESTS.
Q. DOCTOR, I PROMISE YOU I WILL GET TO THAT AREA, BUT I

THINK YOU'RE RIGHT. THERE WAS ANOTHER COMPONENT WHICH WAS THE FORENSIC COMPONENT, RIGHT? THE PART THAT DEALT WITH LAW ENFORCEMENT?

A. YES, SIR.

Q. SO THAT PART OF THE POLICY OF THE MEDICAL UNIVERSITY IN ACCOMPLISHING THEIR PURPOSES WAS, IF THE WOMEN WERE NOT COMPLIANT, THE CHARLESTON CITY POLICE AND THE SOLICITOR'S OFFICE WOULD BECOME INVOLVED AND RESTRAIN THEIR LIBERTY UNTIL THEY COMPLY, FAIR?

A. THE ISSUE OF COMPLIANCE WITH THE DRUG, ABUSE TREATMENT WAS SOMETHING THAT WAS CERTAINLY BEING - WAS BEING PURSUED, BUT I SUSPECT THAT THE MAJORITY OF PATIENTS WHO WERE SUBSEQUENTLY ARRESTED WERE ARRESTED FOR TESTING POSITIVE AGAIN.

Q. DOCTOR, LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT NUMBER 63 FOR IDENTIFICATION. AND, DOCTOR, ASK YOU WHETHER OR NOT - WITHDRAW THAT QUESTION. THAT IS, SIR, A LETTER THAT YOU WROTE, ISN'T IT?

A. YES, SIR, IT IS.

[NEWMAN 160]

Q. AND WHAT IS THE DATE OF THAT LETTER, DOCTOR?

A. DECEMBER 13, 1990.

Q. SO, THAT WAS ALMOST SIX YEARS AGO TODAY, NEXT WEEK? IT

WAS SIX YEARS AGO NEXT WEEK?
A. YES, SIR.
Q. DOCTOR, THE PURPOSE OF WRITING THAT LETTER WAS TO - OR THAT MEMO WAS TO COMMUNICATE WITH THE OB/GYN RESIDENTS UNDER YOUR SUPERVISION AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. NO, SIR.
Q. OKAY. WHAT WAS THE PURPOSE OF IT?
A. THERE WAS A - THE SOUTH CAROLINA COUNCIL ON MATERNAL, INFANT, CHILD HEALTH, REFERRED TO AS THE MICH COUNCIL, WAS HAVING HEARINGS IN COLUMBIA REGARDING A PHYSICIAN PAPER THAT THEY HAD PUT OUT REGARDING THE PROBLEMS OF DRUG ABUSE IN PREGNANCY AND THEIR POSITION REGARDING HOW TO DEAL WITH IT.
AS A RESULT OF THESE HEARINGS - WELL, INDIVIDUALS WERE INVITED TO COME TESTIFY AT THIS HEARING. I WAS UNABLE TO GO FOR OTHER RESPONSIBILITIES, SO INSTEAD I WROTE A LETTER TO THE COMMITTEE TO EXPRESS MY OPINIONS ABOUT THE ISSUE OF SUBSTANCE ABUSE AND PREGNANCY, ITS SERIOUSNESS EFFECTS ON THE STATE AND THE POLICY THAT WE WERE UNDERTAKING AT THE UNIVERSITY AND WHY I THOUGHT THEY WERE REASONABLE AND EFFECTIVE.
Q. YOU'RE QUITE CORRECT, I SHOWED YOU A DOCUMENT DIFFERENT

THAN I THOUGHT I WAS SHOWING YOU, BUT LET'S TALK ABOUT THIS

* * *

[NEWMAN 167]

CONFIDENTIALITY STATUTE IS NOT NECESSARILY THE SAME THING AS A VIOLATION OF A DOCTOR-PATIENT RELATIONSHIP. AND I DON'T WANT YOU TO CONFUSE THE TWO.

COUNSEL FOR THE PLAINTIFF ADVISES ME THAT THEY'RE OFFERING THIS EVIDENCE AS EVIDENCE OF RACE DISCRIMINATION, NOT AS EVIDENCE OF THE VIOLATION OF THE DOCTOR-PATIENT RELATIONSHIP, BECAUSE IT'S NOT ALLEGED THAT THAT IS THE BASIS UPON WHICH THE PLAINTIFFS' WISH TO RECOVER. SO, BEAR IN MIND THAT THIS IS COMING IN, AND EVEN THOUGH IT SAYS THAT HE IS BEING TROUBLED BY THE FACT THAT THERE MAY BE A VIOLATION OF THE DOCTOR-PATIENT RELATIONSHIP, IT'S NOT` BEING BROUGHT IN TO SHOW THAT IN AND OF ITSELF, IT'S BROUGHT IN TO SHOW THAT THAT, THE ALLEGED VIOLATION OF THE DOCTOR-PATIENT RELATIONSHIP IS EVIDENCE OF RACE DISCRIMINATION. OKAY.

IS THAT A FAIR STATEMENT?

MR. WHERRY: YES, SIR.

THE COURT: WITH THAT LIMITING INSTRUCTION, THE OBJECTION IS OVERRULED.

MR. WHERRY: THANK YOU

DEPUTY CLERK: PLAINTIFF'S EXHIBIT NUMBER 63.
Q. (BY MR. WHERRY, CONTINUING) DOCTOR, SHOWING YOU AGAIN PLAINTIFF'S EXHIBIT NUMBER 63, REFERRING TO THE SECOND PAGE, THE RELEVANT PARAGRAPH - AND THIS IS A LETTER WRITTEN BY YOU TO THE STATE COUNCIL OF MATERNAL INFANT AND CHILD HEALTH?
A. YES, SIR.

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[NEWMAN 169]

MR. WHERRY: SENTENCE BY SENTENCE AND ASK HIM A QUESTION.
Q. (BY MR. WHERRY CONTINUING) YOU SAY, DON'T YOU, "AS A PHYSICIAN AND MEDICAL ADVISOR, I HAVE BEEN SIGNIFICANTLY TROUBLED BY THE CONSIDERATION THAT THIS PROGRAM VIOLATES THE PHSYICIAN-PATIENT RELATIONSHIP AND PATIENT CONFIDENTIALITY." THAT'S THE FIRST SENTENCE YOU WROTE?
A. YES, SIR.
Q. NOW, DOCTOR, THAT MEANS THAT AT LEAST IN PART THAT IT WAS A CHANGE FROM, WHAT YOU HAD DONE BEFORE AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, ISN'T THAT SO, THIS POLICY WAS?
A. YES, SIR. IN SOME WAYS. THERE WERE PARTS OF IT THAT WERE CERTAINLY DIFFERENT.
Q. INSOFAR AS IT IMPACTED, FROM YOUR PERSPECTIVE, ON THE

PHYSICIAN-PATIENT RELATIONSHIP AND PATIENT CONFIDENTIALITY, IT WAS A CHANGE IN WHAT HAD HAPPENED BEFORE, AND THAT CONCERNED YOU?

A. YES, IT WAS A CHANGE IN THAT IT WAS - IT WAS NOT A CHANGE IN THE FACT THAT DRUG TESTING HAD BEEN GOING ON IN CLINICAL SITUATIONS REQUIRING IT, WE HAD DONE THAT.

Q. SURE.

A. YES.

Q. AND THAT'S WHAT YOU SAY IN YOUR NEXT SENTENCE?

A. RIGHT.

Q. IN YOUR NEXT SENTENCE YOU SAY, "I THINK I AGREE THAT THIS

[NEWMAN 170]

VIOLATION IS INHERENT IN THE REPORTING OF DRUG ABUSE BY PREGNANT WOMEN"?

A. YES, SIR.

Q. SO, WHAT YOU WERE SAYING IS, THAT IN THE PAST THERE HAD BEEN SOME REPORTING OF DRUG ABUSE BY PREGNANT WOMEN, TO - AND NOW THIS IS NOT WHAT YOU SAID IN YOUR LETTER - TO DSS, RIGHT?

A. YES, SIR.

Q. BUT THE CHANGE THAT YOU'RE REFERRING TO THAT CONCERNS YOU IS NOW INVOLVING THE POLICE AND THE COUNTY SOLICITOR?

A. YES, SIR.

Q. NOW THE NEXT SENTENCE IN THAT PARAGRAPH, DOCTOR, SAYS,

"HOWEVER, WITH THE CONTINUING EROSION OF THE PHYSICIAN-PATIENT RELATIONSHIP WHICH IS EVIDENCED IN SO MANY WAYS, THIS MAY BECOME A MOOT POINT."

MR. HOOD: HE SAID IN MANY WAYS.

MR. WHERRY: WHAT DID I SAY?

MR. HOOD: SO.

Q. (BY MR. WHERRY, CONTINUING) "IN MANY WAYS THIS MAY BECOME A MOOT POINT"?

MR. HOOD: MAY BE.

MR. WHERRY: "MAY BE A MOOT POINT."

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, THAT MEANS IN YOUR MIND AND WHAT YOU WERE WRITING TO THIS BODY, THAT ALTHOUGH YOU HAD THESE CONCERNS ABOUT THE CHANGE IN THE WAY THINGS WERE DONE, YOU WERE WILLING, IN YOUR MIND BECAUSE OF CHANGE IN

[NEWMAN 171]

SOCIETAL MORES TO OVERLOOK THAT CONCERN, FAIR?

A. I DON'T THINK I WAS PROPOSING THAT IT BE OVERLOOKED, I JUST WANTED THAT CONCERN TO BE PUT IN CONTEXT WHILE ANYTIME PATIENT INFORMATION WOULD BE GIVEN TO ANYONE ELSE OTHER THAN THE PHYSICIAN, THAT'S IN SOME DEGREE A VIOLATION OR THAT DOES NOT KEEP THAT INFORMATION CONFIDENTIAL. HOWEVER, THAT - THAT

LEVEL OF CONFIDENTIALITY NO LONGER EXISTS LEGALLY IN MANY, MANY WAYS , AND SO I WAS TRYING TO PUT THAT CONCERN IN CONTEXT FOR THE PEOPLE AT THE MICH WHO WERE EVALUATING THIS POLICY.

Q. YOU, OF COURSE, SIR, HAVE NO EDUCATION IN THE LAW, DO YOU?

A. NO, SIR.

Q. AND FOR THAT, SIR, YOU'RE FAIRLY FORTUNATE. YOU DO NOT HOLD YOURSELF OUT TO BE A MEDICAL ETHICIST, DO YOU?

A. NO, SIR, I DO NOT.

Q. THE MEDICAL UNIVERSITY OF SOUTH CAROLINA HAS A MEDICAL ETHICIST, DON'T THEY?

A. THEY HAVE ETHICISTS, YES.

Q. WHO IS THE MEDICAL ETHICIST AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. THEY HAVE A MEDICAL ETHICS COMMITTEE AND OF THE PEOPLE ON THAT COMMITTEE, WHO EXACTLY CARRIES THE TITLE OF MEDICAL ETHICIST, I'M NOT SURE.

Q. YOU KNOW MARY FAITH MARSHAL?

A. YES, I DO.

* * *

[NEWMAN 175]

SPECIFICALLY SAYS I WOULD HAVE TO LOOK AT IT, I CANNOT GIVE YOU THE SPECIFIC WORDING. WHAT I WAS GOING TO GO ON TO SAY WAS THAT -

MR. WHERRY: AND, YOUR HONOR, THAT'S WHERE I STOPPED HIM.

THE COURT: THAT'S WHERE I'M GOING TO LET HIM GO. THAT'S WHERE YOU DIDN'T HAVE ANY RIGHT TO STOP HIM.

THE WITNESS: WHAT I WAS GOING TO GO ON TO SAY WAS THAT REGARDLESS OF WHAT THE PATIENT INFORMED CONSENT SAYS, WE, THE REPORTING OF THAT INFORMATION TO THE POLICE OR SOLICITOR WAS REQUIRED OF US BY SOUTH CAROLINA LAW, WHICH WE WERE TOLD SUPERVENED.

AND AS I WENT ON IN THIS LETTER, JUST A LINE OR TWO DOWN FROM WHERE THE. COUNSELOR STOPPED ASKING ME, IT SAYS "MOST IMPORTANTLY WOULD BE THE LAWS REQUIRING THE REPORTING OF EVIDENCE OF CHILD ABUSE AS AN EXCELLENT EXAMPLE AS HOW SOCIETAL NEEDS TO PROTECT THE DEFENSELESS, ASSUMES GREATER IMPORTANCE THAN THE CONCEPT OF THE DOCTOR-PATIENT RELATIONSHIP AND THE CONFIDENTIALITY. AS YOU'RE AWARE THE REPORTING OF SUCH CHILD ABUSE IS CONSIDERED MANDATORY TO SOUTH CAROLINA LAW."

THE COURT: WHAT HE SAID IS BASICALLY WHAT HE THINKS THE LAW PROVIDES. AND TO THAT EXTENT AND TO THAT EXTENT ALONE YOU CAN CONSIDER WHAT HE SAID.

NOW, AT SOME POINT IN TIME I BELIEVE IT'S GOING TO

[NEWMAN 176]

BECOME NECESSARY FOR ME TO TELL YOU WHAT THE LAW IS. AND THAT MAY RELATE TO THIS REPORTING STATUTE THAT HE SAID WHAT HE THINKS IT MEANS. NOW, WHEN THAT TIME COMES, IF IT DOES COME, THEN WHAT I TELL YOU IS THE LAW. BUT IT MAY BE THAT WHAT HE THINKS THE STATUTE SAYS IS RELEVANT TO SOME ISSUE IN THIS CASE. AND BECAUSE IT MAY BE RELEVANT TO SOME ISSUE, I'M GOING TO LET YOU HEAR WHAT HE SAYS HE THINKS IT REQUIRES OVER COUNSEL'S OBJECTION.

OKAY. YOU MAY PROCEED.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, IN THE NEXT TO THE LAST PARAGRAPH IN YOUR LETTER YOU TALK ABOUT THE POOR QUALITY OF AND THE NEED FOR INCREASED SUBSTANCE ABUSE TREATMENT IN THE CHARLESTON AREA, FAIR?

A. LET ME JUST READ THAT PARAGRAPH AGAIN. YES, SIR. I STATE THAT IN ONE SENTENCE.

Q. SIR, MY QUESTION WAS SIMPLY, I DIDN'T ASK YOU TO READ IT OR TO STATE IT AGAIN, IT WAS SIMPLY THAT IT EXPRESSED YOUR CONCERN ABOUT THE AVAILABLE SUBSTANCE ABUSE TREATMENT FACILITIES IN THE WHOLE STATE WITH THE CHARLESTON AREA, FAIR?

A. YES, SIR.
Q. OKAY. AND THAT WAS REFERRING TO THE TIME AT WHICH THE POLICY WAS ADOPTED GENERALLY?
A. YES, SIR
Q. AND IT'S TRUE, DOCTOR, ISN'T IT, THAT ONE OF THE MOTIVATIONS BEHIND THE ADOPTION OF THE POLICY WAS TO LEVERAGE

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[NEWMAN 178]

WOULDN'T HAVE BEEN NECESSARY THEN TO HAVE THE POLICY, AT LEAST INSOFAR AS A PURPOSE OF IT WAS TO LEVERAGE DSS INTO BEING MORE RESPONSIVE, FAIR?
A. NO, SIR, I DON'T AGREE WITH THAT.
Q. LET ME REFER YOU NOW TO A DOCUMENT MARKED PLAINTIFF'S 19 FOR IDENTIFICATION AND ASK YOU TO LOOK AT THAT.
A. YES, SIR.
Q. THAT, SIR. THAT I MISTAKENLY REFERRED TO EARLIER AS A MEMO WRITTEN TO. YOU TO THE OB/GYN RESIDENTS AT THE MEDICAL UNIVERSITY; IS THAT RIGHT?
A. YES, SIR.
Q. AND THAT WAS WRITTEN BY YOU AS THE SUPERVISOR OF THESE RESIDENTS?
A. AS ONE OF THEIR SUPERVISORS.
Q. AND RESIDENTS ARE PEOPLE WHO ARE EITHER ROTATING THROUGH THE OB/GYN SERVICE OR HAVE CHOSEN TO DO AN OB/GYN RESIDENCY AT MUSC, FAIR?

A. YES, SIR.
Q. AND IN FACT WHAT THEY'RE REALLY DOING IS FINISHING THEIR EDUCATION TO BE DOCTORS?
A. THEY ARE ALREADY PHYSICIANS, THEY ARE INVOLVED IN A FOUR-YEAR SPECIALTY TRAINING PROGRAM.
Q. SO THEY'RE FINISHING THEIR EDUCATION AS DOCTORS?
A. YOU COULD SAY THAT.
Q. ALTHOUGH WHEN YOU GRADUATE FROM MEDICAL SCHOOL, DOCTOR

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[NEWMAN 180]

Q. AND THE QUESTIONS WERE CONCERNING THE INTERAGENCY POLICY, WE HAVE COME TO KNOW AS M-7?
A. YES, SIR.
Q. NOW, DOCTOR, ONE OF THE CONCERNS THAT WERE EXPRESSED AND THAT YOU DEALT WITH IN THIS MEMO, WAS A PERCEPTION THAT THE POLICY, A, WAS PUNITIVE, FAIR?
A. COULD YOU DIRECT ME TO THE POINT IN THE LETTER THAT YOU'RE REFERRING TO? JUST TO SAVE ME TIME FROM READING IT ALL OVER AGAIN.
Q. I WILL TRY. YES, I CAN. IF YOU WILL GO TO PAGE 3 OF THE LETTER THE LAST PARAGRAPH I BELIEVE ON PAGE 3. YOU TALK ABOUT THE GOALS OF THE DEPARTMENT; IS THAT CORRECT?
A. YES, SIR.

Q. AND THE GOALS OF THE DEPARTMENT BEING NOT ONLY THE UNIVERSITY'S GOALS, THE OBSTETRICAL AND GYNECOLOGICAL GOALS - I'M COMING TO THE PUNITIVE PART, BUT THEY'RE JOINT GOALS WITH THE POLICE DEPARTMENT AND SOLICITOR'S OFFICE, DON'T YOU?

A. YES, SIR.

Q. SO YOU WERE EXPLAINING TO THE RESIDENTS THAT THIS WAS A UNIFIED PROGRAM, IT WAS A PROGRAM THAT RESULTED FROM THE AGREEMENT OF THREE ENTITIES, IF YOU WILL? THE HOSPITAL?

THE COURT: I THINK THE LETTER SPEAKS FOR ITSELF. THINK YOU'RE ARGUING THE LETTER. THE LETTER SPEAKS FOR ITSELF. AND WHAT IT SAYS TO THE RESIDENTS IT SAYS TO THE RESIDENTS. YOU WANT TO PUBLISH IT, YOU CAN PUBLISH IT.

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[NEWMAN 182]

DEPUTY CLERK: PLAINTIFF'S EXHIBIT 19 IN EVIDENCE.

Q. (BY MR. WHERRY, CONTINUING) NOW, DOCTOR, IF YOU WOULD READ THE NEXT TO THE LAST PARAGRAPH ON THE LAST PAGE SLOWLY, IF YOU CAN READ FASTER THAN WE TALK.

A. "I WOULD LIKE TO AGAIN REITERATE THE GOALS NOT ONLY OF THE OBSTETRICAL DEPARTMENT OF THE MEDICAL UNIVERSITY OF SOUTH

CAROLINA, BUT ALSO THE GOALS OF THE POLICE DEPARTMENT AND SOLICITOR'S OFFICE. NAMELY THOSE GOALS ARE TO FIRST EDUCATE AS MANY PATIENTS AS POSSIBLE REGARDING THE HARMFUL EFFECTS OF ANY AND ALL DRUG ABUSE DURING PREGNANCY. SECONDLY, IF DESPITE EDUCATION DRUG ABUSE IS DOCUMENTED IN THE CURRENTLY PREGNANT WOMEN, AN EFFORT WILL BE MADE TO INSTITUTE A CHANGE IN THIS LIFE-STYLE THROUGH EDUCATION, COUNSELING, AND A MANDATORY ATTENDANCE AT A SUBSTANCE ABUSE CLINIC. THIRDLY, IF A PATIENT WHO IS KNOWN TO HAVE ABUSED DRUGS DURING PREGNANCY FAILS TO COMPLY WITH THIS TREATMENT PLAN OR IS NOTED TO BE ABUSING DRUGS IMMEDIATELY PRECEDING DELIVERY, THEN SHE WILL BE TAKEN INTO CUSTODY BY THE CHARLESTON CITY POLICE AND CHARGED WITH VARIOUS OFFENSES DESCRIBED BY THE SOLICITOR'S OFFICE. WHILE THIS MAY BE CONSIDERED PUNITIVE, I AGAIN - AGAIN I URGE YOU TO UNDERSTAND THAT THE PURPOSE BEHIND THIS IS PRIMARILY TO INSURE THAT DSS BECOMES INVOLVED IN FOLLOW-UP OF THAT INFANT AS WELL AS PROVIDING THE CRIMINAL JUSTICE SYSTEM AN OPPORTUNITY TO INVESTIGATE THE SITUATION AND PROBABLY IN MOST INSTANCES TO AGAIN MANDATE SUBSTANCE ABUSE TREATMENT AS A

[NEWMAN 183]

PREREQUISITE FOR RESUMING MATERNAL RELATIONSHIP WITH THAT CHILD."

Q. DOCTOR, AT THE TIME WHEN YOU WROTE THAT MEMO TO YOUR RESIDENTS, DID YOU FEEL THE POLICY WAS PUNITIVE?

A. NO, SIR, I DID NOT.

Q. EXPLAIN TO THE JURY, PLEASE, WHY YOU WROTE THAT IT MAY BE CONSIDERED TO BE PUNITIVE.

A. THAT IS A TERM THAT IS FREQUENTLY USED WHEN THIS POLICY IS DISCUSSED AND REFERRED. MANY PEOPLE CONSIDER THIS APPROACH PUNITIVE, AND THAT IS NOT WHAT I CONSIDERED IT.

Q. IN THAT LETTER, DOCTOR, YOU REPORT I THINK THREE CASE STUDIES, DON'T YOU?

A. THERE ARE SEVERAL PATIENTS WHO ARE DESCRIBED.

Q. YOU GOT THE INFORMATION ABOUT THOSE PATIENTS AND THEIR SUBSTANCE ABUSE AND THEIR ARREST FROM SHIRLEY BROWN, DIDN'T YOU?

A. YES, SIR.

Q. AND THAT INFORMATION ABOUT THOSE THREE PATIENTS THAT YOU GOT FROM SHIRLEY BROWN, THEIR SUBSTANCE ABUSE, THEIR ARRESTS WAS NOT INFORMATION THAT YOU NEEDED TO TREAT THOSE PATIENTS, WAS IT?

A. IT WAS FOLLOW-UP INFORMATION ON WHAT HAD BECOME OF THOSE

PATIENTS, BECAUSE AT THE MEETING THAT WE HAD WITH THE RESIDENTS WE HAD A RESIDENTS' MEETING EACH WEEK TO GO OVER VARIOUS ISSUES, BUT THEY WERE OBVIOUSLY AWARE OF THE POLICY,

[NEWMAN 184]

THEY WERE INVOLVED IN IT, AND THEY WANTED TO KNOW HOW THE POLICY WORKED, WHAT BECAME OF THE PATIENTS WHO WERE ARRESTED.

Q. MY QUESTION OF COURSE WAS: THAT WAS NOT INFORMATION THAT YOU NEEDED TO KNOW TO TREAT THOSE PATIENTS, WAS IT?

A. THOSE INDIVIDUAL PATIENTS?

Q. YES.

A. NO, SIR.

Q. NOW, DOCTOR, ANOTHER CONCERN THAT WAS EXPRESSED WAS THE WAY THE PATIENTS WOULD BE DISCHARGED, IF THEY WERE GOING TO THE JAIL?

A. I DON'T REMEMBER THAT SPECIFICALLY, NO.

Q. WELL, LET ME ASK YOU A DIFFERENT WAY. YOU WERE INVOLVED IN THE TREATMENT OF A NUMBER OF THESE OB/GYN PATIENTS WHO ARE SUBSTANCE-ABUSING WOMEN, FAIR?

A. YES, SIR.

Q. AND, DOCTOR, WHEN THEY WERE BEING DISCHARGED FROM THE HOSPITAL, BUT THAT DISCHARGE WAS GOING TO BE INTO THE CUSTODY OF THE CHARLESTON CITY POLICE DEPARTMENT, YOU WOULD BE AWARE

OF THAT, WOULDN'T YOU?
A. YES, SIR.
Q. AND, DOCTOR, I TAKE IT THE CONCEPT DISCHARGE IS A MEDICAL DECISION MADE BY A MEDICAL DOCTOR?
A. YES, SIR.
Q. YOU CAN'T GET OUT OF THE HOSPITAL WITHOUT THE DOCTOR SAYING OKAY, OR YOU SAYING I DON'T CARE WHAT THE DOCTOR SAYS,

[NEWMAN 185]

I'M LEAVING, FAIR?
A. A PATIENT CAN LEAVE UNDER THOSE CIRCUMSTANCES, BUT GENERALLY IT WOULD BE THAT THEY WOULD BE DISCHARGED FOLLOWING A MEDICAL DECISION THEY WERE ABLE TO GO HOME.
Q. DOCTOR, WHEN A WOMEN GIVES BIRTH TO A CHILD, THERE IS A PERIOD OF TIME AT WHICH SHE REQUIRES AFTER THAT BIRTH CERTAIN MEDICAL ATTENTION? I DON'T MEAN ATTENTION OF A DOCTOR, CERTAIN MEDICAL CARE; ISN'T THAT SO?
A. YES, SIR.
Q. AND PART OF THAT MEDICAL CARE WOULD INCLUDE THE USING AND THE HAVING AVAILABLE SANITARY NAPKINS?
A. YES, SIR.
Q. AND EPI FOAM, IS THAT WHAT IT'S CALLED?
A. THAT'S ONE MEDICATION THAT IS USED. NOT EVERY PATIENT NEEDS IT OR USES IT, BUT THAT'S ONE MEDICATION WE USE FOR

EPISIOTOMY DISCOMFORT.
Q. DOCTOR, WHEN A PATIENT LEAVES THE OB/GYN SERVICE AFTER DELIVERING A CHILD AT THE MEDICAL UNIVERSITY, THEY'RE GIVEN A KIT TO TAKE WITH THEM WITH THINGS THAT WILL HELP THEM POSTPARTUM, AREN'T THEY?
A. I BELIEVE THAT THEY ARE, YES, SIR.
Q. BUT, DOCTOR, IS IT SOMETHING THAT YOU CONSIDER IN AGREEING TO DISCHARGE A PATIENT THAT THE PATIENT WILL HAVE THOSE SUPPLIES, THE AVAILABILITY, THE THINGS THAT THE WOMEN NORMALLY TAKE WITH THEM FROM THE HOSPITAL WHEN YOU DISCHARGE

[NEWMAN 186]

THEM?
A. WHENEVER - YES, SIR. WHENEVER ANY PATIENT IS DISCHARGED THEY ARE - THERE IS - THEY MEET WITH THE PHYSICIAN, THE PHYSICIAN GIVES THEM DISCHARGE INSTRUCTIONS. USUALLY THIS INCLUDES PRECAUTIONS AS TO THINGS TO WATCH OUT FOR OVER THE SUBSEQUENT SEVERAL DAYS, DIFFERENT ACTIVITIES TO RECOMMEND AGAINST OR TO DO DEPENDING ON THE CLINICAL SITUATION. AND WAYS TO GET BACK IN TOUCH, PHONE NUMBERS OR ETCETERA TO GET BACK IN TOUCH WITH THE PROVIDERS IF THEY HAVE POSTPARTUM COMPLICATIONS. AND PATIENTS WERE GIVEN A PACKAGE AT THE TIME

OF DISCHARGE.
I'M AFRAID TO SAY I CAN'T TELL YOU EXACTLY WHAT WAS
IN IT. THERE WAS USUALLY WHAT IS CALLED A SITZ BATH. IT'S
PLASTIC - LITTLE PLASTIC TUB FOR CLEANING THE EPISIOTOMY.
AND WHETHER THERE WAS SANITARY NAPKINS IN THAT PACK OR NOT,
I'M NOT SURE. USUALLY DIAPERS. PLASTIC WATER JUG. AGAIN,
I'M SORRY I CAN'T TELL YOU EXACTLY WHAT WAS IN THAT PACKET,
BUT, YEAH, ALL OF THOSE THINGS WOULD GO. AND THE PATIENT
WOULD BE SEEN, COUNSEL, ADVISED BY THE PHYSICIAN PRIOR TO
THEIR DISCHARGE, AND THEN THEY WOULD BE DISCHARGED.
Q. DOCTOR, I REALIZE THAT EVERY PATIENT IS DIFFERENT, BUT ON
AVERAGE GIVE US SOME GUIDELINES AS TO HOW MANY TIMES IT WOULD
BE APPROPRIATE FOR A WOMEN, 24 HOURS POSTPARTUM, TO CHANGE
SANITARY NAPKINS?
A. GOSH. WELL THAT WOULD BE VERY HARD TO ANSWER IN REALLY

[NEWMAN 187]

ANY SPECIFICS BECAUSE IT DEPENDS UPON EACH INDIVIDUAL WOMAN'S
FASTIDIOUSNESS AND HOW MUCH POSTPARTUM LOCHIA OR BLEEDING THAT
THEY'RE HAVING. YOU KNOW, I WOULD GUESS IT'S PROBABLY CHANGED
EVERY SOMEWHERE TWO TO SIX HOURS, BUT I - IT WOULD REALLY

VARY FROM PERSON TO PERSON.
Q. DOCTOR, DO YOU THINK IT WOULD BE APPROPRIATE FOR A WOMEN,
ONE DAY OR LESS POSTPARTUM, TO BE DISCHARGED TO A JAIL CELL
WITH NO CLOTHING, ONLY A HOSPITAL GOWN, NO SANITARY NAPKINS,
NOR ACCESS TO ANY, AND NO OTHER MEDICAL SUPPLIES, WITH THE
ONLY PLACE TO COMFORT HERSELF BEING A JAIL COT, WOULD THAT BE
APPROPRIATE MEDICALLY?
A. NO, I WOULD NOT WANT TO THINK THAT THAT WAS HAPPENING.
Q. AND, DOCTOR, WAS IT TAKEN INTO CONSIDERATION BY YOU -
I'M NOT GOING TO ASK WHAT THE OTHER DOCTORS, JUST YOU, WHEN
YOU SIGNED DISCHARGES FOR WOMEN THAT YOU KNEW WERE GOING TO BE
DISCHARGED INTO CUSTODY, DID YOU CONSIDER WHETHER THEY WERE
GOING TO HAVE WITH THEM SANITARY NAPKINS, MEDICAL SUPPLIES,
CLOTHING OTHER THAN A HOSPITAL GOWN, BLANKETS FOR THEIR BED?
A. WELL, I THINK YOU WOULD HAVE TO ANSWER THAT QUESTION IN A
COUPLE OF WAYS: FIRST OF ALL, YES. THE OVERALL ANSWER IS,
YES, WE DID CONSIDER THOSE THINGS.
Q. NOT WE, YOU?
A. YES, I CONSIDERED THOSE THINGS. AND DISCUSSIONS WERE
HELD AT VARIOUS TIMES WITH PEOPLE FROM THE POLICE DEPARTMENT
AND WITH PEOPLE FROM THE SOLICITOR'S OFFICE AS TO WHAT WAS

[NEWMAN 188]

HAPPENING TO THESE PATIENTS WHEN THEY WOULD LEAVE THE HOSPITAL.

I WOULD SAY FIRST OF ALL THAT WHEN THEY LEFT THE HOSPITAL, AT THE TIME THEY WERE IN THE HOSPITAL, THEY RECEIVED NO DIFFERENT POSTPARTUM CARE THAN ANY OTHER WOMEN WOULD HAVE RECEIVED OTHER THAN AS IN REGARD TO THE COUNSELING REGARDING THE DRUG ABUSE POSITIVE TESTING. BUT AS FAR AS THEIR POSTPARTUM CARE, WHAT THEY WERE, PROVIDED WITH WHEN THEY LEFT THE HOSPITAL, PROVISIONS, SUPPLIES OR WHAT HAVE YOU, THEY WOULD HAVE BEEN TREATED EXACTLY THE SAME AS ANYONE ELSE.

IN TERMS OF SOME OF THE THINGS THAT ARE BEING ALLEGED IN TERMS OF NOT HAVING ANY CLOTHES, I CANNOT SPEAK TO THE PARTICULAR SITUATION THAT A PATIENT MAY BE - I MEAN, I WOULD WANT TO MAKE SURE A PATIENT HAD CLOTHING IF - I WOULD FEEL CONFIDENT THAT HER CLOTHING WERE NOT KEPT FROM HER. BUT IF A PATIENT DID NOT HAVE CLOTHING TO GO. TO THE HOSPITAL - I MEAN, TO GO OUT OF THE HOSPITAL IN, I WOULD HOPE THAT WOULD BE AN ISSUE FOR SOCIAL SERVICES TO ADDRESS AND GET THAT PATIENT CLOTHING TO GO IN.

WE WERE ASSURED BY THE POLICE THAT THE PATIENTS WERE BEING CARED FOR IN AN APPROPRIATE FASHION AT THE JAIL. IN TERMS OF HAVING A BLANKET AND PROPER MEDICAL NECESSITIES, THE JAILS ARE SUPPOSED TO BE ABLE TO PROVIDE THOSE AND WE WERE ASSURED THAT THEY WERE. WE ALSO HAD THE AVAILABILITY OF THESE PATIENTS, IF THEY HAD PROBLEMS, TO COME BACK TO OUR POSTPARTUM

[NEWMAN 189]

CLINICS, WHICH THEY DID QUITE FREQUENTLY ESCORTED BY A POLICEWOMAN.

Q. DOCTOR, WOULD YOU AGREE WITH ME IT WOULD BE INAPPROPRIATE FOR POSTPARTUM WOMEN, ONE DAY OR LESS POSTPARTUM, BEING DISCHARGED TO CUSTODY WHEN ASKED - WHEN HAVING ASKED TO BE ABLE TO PUT ON THE CLOTHES SHE HAD WITH HER BEFORE GOING INTO CUSTODY, TO HAVE THAT REFUSED BY MEDICAL PERSONNEL?

A. I WOULD FIND THAT - I WOULD FIND THAT INAPPROPRIATE, YES.

Q. DOCTOR, JUST ONE LAST QUESTION IN THIS AREA, I THINK. DID YOU EVER YOURSELF AS ONE OF THE PEOPLE - INVOLVED IN THIS POLICY, GET IN YOUR CAR AND DRIVE TO THE JAIL TO LOOK AT THE FACILITIES YOU WERE DISCHARGING WOMEN TO?

A. NO, SIR, I DID NOT.
Q. DOCTOR, YOU HAVE IN THE PAST STATED, HAVEN'T YOU, THAT IT WAS THE - IT BEING THE POLICY, THE PURPOSE OF THE POLICY WAS TO PRIMARILY - WAS PRIMARILY TO INSURE THAT DSS BECAME INVOLVED?
A. I WAS ASKED THAT QUESTION AND MADE THAT STATEMENT IN MY DEPOSITION BASED ON ONE OF THESE TWO LETTERS THAT WERE SHOWN. I THINK IT'S PROBABLY THIS LETTER THAT I SENT TO THE RESIDENTS, BUT I WOULD HAVE TO LOOK THROUGH IT. AND AT THE TIME OF MY DEPOSITION I SAID WHILE I SAID THAT, I WAS - PROBABLY WAS EMPHASIZING THAT POINT, I BELIEVE IT IS A VERY IMPORTANT ASPECT OF THE POLICY. BUT THE POLICY HAS OTHER

[NEWMAN 190]

IMPORTANT ELEMENTS AS WELL. IN ADDITION IT - IT IS IMPORTANT FROM THE PERSPECTIVE OF PROTECTING A PREGNANT WOMAN WHO IS TAKING THESE DRUGS AND COMPLICATIONS THAT OCCUR. AND IT'S IMPORTANT TO PREVENT STILLBIRTH AND NEONATAL DEATHS WHICH OCCURRED AND FOR THOSE INFANTS THAT DO SURVIVE THIS SITUATION AND DELIVERY. IT WAS IMPORTANT TO HAVE DSS INVOLVED FOR THE CONTINUING PROTECTION OF THAT CLIENT AND THE NEWBORN

ENVIRONMENT AND HOME ENVIRONMENT. SO MY ANSWER IN THE DEPOSITION I BELIEVE WAS THAT WHILE I SAID THAT AND BELIEVE IT TO BE TRUE, IT'S NOT THE MOST IMPORTANT ASPECT OF THE POLICY.

Q. DOCTOR, SPEAKING OF THIS PREMATURE BIRTH AND STILLBORN THOSE COMMENTS THAT YOU JUST MADE, YOU'RE AWARE, AREN'T YOU, OF THE MITTENDORF-EVAN SYSTEM DEVELOPED AT THE UNIVERSITY OF CHICAGO FOR THE COMPUTATION AND PREDICTION OF PREMATURE BIRTH?

A. THERE ARE MANY DIFFERENT PRE-TERM BIRTH PREDICTION MODELS, AND MITTENDORF IS ONE OF THEM. IT'S NOT ONE THAT WE SPECIFICALLY USE, NO.

Q. WELL MY QUESTION IS NOT WHETHER YOU USE IT NOT HOW MANY THERE ARE, WHETHER YOU'RE AWARE OF THE MITTENDORF-EVAN SYSTEM FOR PREDICTABILITY FOR PREMATURE BIRTH?

A. I HAVE HEARD OF IT, BUT I COULD NOT TELL YOU DETAILS OF IT.

Q. AND IN THE CONTEXT OF THAT ANSWER, LET ME JUST CONFIRM YOUR TERTIARY LEVEL HIGH-RISK PREGNANCY CENTER?

A. YES, SIR.

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[NEWMAN 193]

PROBLEM THAT PEOPLE DO HAVE IN KEEPING THESE APPOINTMENTS.

THE ENFORCEMENT OF THE POLICY WOULD BE NOT COMPLETELY BASED ON, YOU KNOW, A PERFECT ATTENDANCE MARK AT THESE CLINICS. IF A PATIENT MISSED A CLINIC APPOINTMENT BUT HAD A REASONABLE, RATIONAL EXCUSE, BUT DEMONSTRATED A CONTINUING INTEREST IN SUBSTANCE ABUSE TREATMENT, AND MORE IMPORTANTLY REMAINED FREE OF POSITIVE DRUG TESTING, THAT IS WHAT THEY ENDED UP BEING ARRESTED FOR. I THINK THERE WAS DISCRETION IN THE POLICY THAT ALLOWED THE CONSIDERATION OF ISSUES SUCH AS TRANSPORTATION AND OTHER REASONS WHY AN INDIVIDUAL PATIENT MAY MISS AN INDIVIDUAL APPOINTMENT AT A GIVEN TIME.

Q. AND THAT DISCRETION WAS LEFT TO SHIRLEY BROWN WASN'T IT?

A. NO. I WOULD SAY PROBABLY MOST OF THAT DISCRETION WAS LEFT TO THE COUNSELORS AT THE SUBSTANCE ABUSE FACILITY.

Q. AND WHEN THEY DETERMINED SOMEONE HAD NOT PARTICIPATED THE WAY THEY THOUGHT SHE SHOULD, THEY CALLED SHIRLEY BROWN WHO THEN DETERMINED WHETHER OR NOT TO CALL THE POLICE AND THE SOLICITOR'S OFFICE, FAIR?

A. I'M NOT SURE WHETHER THEY CALLED SHIRLEY BROWN OR THE SOLICITOR'S OFFICE DIRECTLY. BUT THEY WOULD HAVE INITIATED THOSE REPORTS, THAT'S TRUE.

Q. SIR, THERE WERE A NUMBER OF REFERRING AGENCIES TO YOU -

THAT WAS A BAD QUESTION.
THERE WERE A NUMBER OF REFERRING CLINICS AND
AGENCIES TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, FAIR?

[NEWMAN 194]

A. YES, SIR.
Q. THE FETTER CLINIC?
A. YES, SIR.
Q. YOUR OWN FAMILY PRACTICE CLINIC?
A. YES, SIR.
Q. AND I THINK IN YOUR DEPOSITION YOU MENTION SIX OR SEVEN OR EIGHT OF THEM?
A. PUBLIC HEALTH CLINICS IN THE TRI-COUNTY REGION.
Q. RIGHT. THE INTERAGENCY POLICY WASN'T ENFORCED AT THOSE CLINICS, WAS IT?
A. THOSE CLINICS WERE NOTIFIED OF OUR POLICY. YOU KNOW, WE ADVISED THEM TO ADOPT IT. WE ADVISED THEM TO ADOPT THE EDUCATIONAL COMPONENTS. BUT WE DID NOT HAVE ANY ADMINISTRATIVE CONTROL OVER THOSE CLINICS AND WE COULD NOT MANDATE THAT THIS BE INSTITUTED THERE.
Q. BUT ONE OF THE REASONS I THINK THAT YOU SAID THAT IT WAS ADOPTED AT MUSC WAS BECAUSE YOU PERCEIVED IT TO BE YOUR LEGAL DUTY. THAT WAS EXPLAINED TO YOU TO - TO THE PEOPLE AT THE HOSPITAL, IT WAS YOUR LEGAL DUTY TO ENFORCE THIS POLICY, FAIR?

A. YES, SIR.
Q. AND IN FACT THAT MEANS THAT YOU ATTENDED - JOE GOOD YOUR GENERAL COUNSEL TOLD YOU THAT, RIGHT?
A. YES, SIR.
Q. CHARLIE CONDON THE SOLICITOR TOLD YOU THAT?
A. YES, SIR.

[NEWMAN 195]

Q. THE INTERAGENCY POLICY WAS NOT ENFORCED AT ANY OF THESE CLINICS YOU MENTIONED, WAS IT, THAT REFERRED TO YOU DURING THE INTERAGENCY POLICY PERIOD?
A. NO, SIR, IT WAS NOT. TO MY KNOWLEDGE. WHETHER ANY OF THOSE PUBLIC HEALTH CLINICS ADOPTED COMPONENTS OF IT OR THE EDUCATIONAL COMPONENT OF IT, I FRANKLY CAN'T TELL.
Q. THE ARREST COMPONENT WASN'T ADOPTED BY THEM, WAS IT?
A. NO.
Q. NOW, DOCTOR -
A: NOT IN THE ANTEPARTUM SETTING.
Q. THAT IS, NOBODY GOT ARRESTED PRE-DELIVERY FOR USING DRUGS AND BEING PREGNANT; IS THAT RIGHT?
A. YES, SIR.
Q. POST-DELIVERY THE INFORMATION WOULD HAVE COME FROM MUSC RIGHT?
A. YES, SIR. COULD I CLARIFY THAT?
THE COURT: CERTAINLY.
A. WHEN THE POLICY WAS INITIALLY IMPLEMENTED, A PATIENT WHO

HAD NO PRENATAL CARE OR HAD RECEIVED PRENATAL CARE SOMEWHERE ELSE THAN THE MEDICAL UNIVERSITY PREGNANCY CLINICS, IF THEY WOULD HAVE COME IN, DELIVERED A BABY, HAD A COMPLICATION THAT WAS SUGGESTIVE OR ASSOCIATED WITH THE DRUG ABUSE, THEY WOULD HAVE BEEN TESTED. AND IF THEY TESTED POSITIVE, THEY - AND DELIVERED, THEY WOULD HAVE BEEN ARRESTED.

AFTER A PERIOD OF TIME THAT WAS CHANGED BECAUSE IN

[NEWMAN 196]

[ALL] OF THE CONCERNS THAT THE COUNSELOR IS BRINGING UP, THAT [SOME] PATIENTS HAD NOT HAD THE BENEFIT OF BEING INSTRUCTED IN [THE] POLICY AND PROVIDED WITH THE EDUCATIONAL MATERIALS AND [] AND WHATNOT IN THE ANTEPARTUM SETTING. SO AFTER THE [FIRST] THREE OR FOUR MONTHS OF THE POLICY IT WAS CHANGED IF THE [WOMAN] CAME FROM OUTSIDE THE UNIVERSITY SYSTEM WHO HAD NOT [BEEN] PROVIDED WITH THESE EDUCATIONAL MATERIALS AND TESTED [BEFORE] EVEN THOUGH SHE MAY HAVE DELIVERED, THAT PATIENT WAS [STILL] TREATED AS SOMEONE FROM OUR OWN CLINIC WHO MAY HAVE [TESTED] POSITIVE. SHE WAS COUNSELED, GIVEN EDUCATION, NOTIFIED [] - THAT THE SOLICITOR'S OFFICE WAS AWARE OF THEIR -

SUBSTANCE ABUSE, AND THAT SHE SHOULD GO TO SUBSTANCE ABUSE
[TREATMENT]
[Q. FINISHED], DOCTOR?
[A. YES.]
Q. DOCTOR, THE POLICY BEGAN WHEN?
A. I BELIEVE IN LATE 1989.
Q. OCTOBER 1ST?
[A. SPECIFIC] DATE, THAT SOUNDS REASONABLE.
[Q. IT WAS] APPROVED BY THE EXECUTIVE COMMITTEE OR WHATEVER OF [THE HOSPITAL?]
[A. YES,] SIR.
[Q. WHEN] DID IT END?
[A. I CAN'T] TELL YOU SPECIFIC DATE.
MR. HOOD: IF THE COURT PLEASE, YOU RULED ON THAT

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[NEWMAN 201]

PATIENT BEING DISCHARGED THE METHOD AND THE CIRCUMSTANCES
UNDER WHICH THEY LEAVE THE HOSPITAL TO GO TO WHEREVER IT IS
THEY'RE GOING?
A. WELL, AGAIN I'M NOT SURE EXACTLY WHAT YOU MEAN BY
METHOD. OBVIOUSLY LEAVING THE HOSPITAL IN A - WITH HANDCUFFS
IS EXTREMELY SAD, BUT I DON'T THINK IT HAS ANY RELEVANCE TO
THE MEDICAL DECISION THAT SHE IS ABLE TO BE DISCHARGED FROM
THE HOSPITAL.
Q. DOCTOR, YOU HAVE HAD THE OCCASION, HAVEN'T YOU, IN YOUR

MEDICAL CAREER, TO CAUSE PATIENTS WHO YOU THOUGHT WERE IN NEED OF IT FOR THE PROTECTION OF THEMSELVES OR OTHERS TO BE COMMITTED PSYCHIATRICALLY?

A. YES, SIR.

Q. AND YOU HAVE HAD OCCASION TO DO THAT, HAVEN'T YOU, DOCTOR, IN CONNECTION WITH PREGNANT WOMEN ABUSING AT LEAST ALCOHOL?

A. YES, SIR.

Q. AND UNDER THOSE CIRCUMSTANCES, DOCTOR, YOU AVAILED YOURSELF OF THE CIVIL COMMITMENT PROCEEDINGS?

A. YES, SIR.

Q. AND THE PATIENT WENT INTO MANDATORY REQUIRED TREATMENT, FAIR?

A. YES, SIR. WHEN YOU SAY I TOOK - I AVAILED MYSELF OF IT I SUSPECT THAT I PROBABLY DIDN'T PERSONALLY GO THROUGH THE PROCEDURE BUT PROBABLY ENLISTED THE ASSISTANCE OF THE

[NEWMAN 202]

DEPARTMENT OF PSYCHIATRY. ,

Q. SURE. AND PROBABLY SIGNED, AS ONE OF THE DOCTORS WHO SAID THIS WAS NECESSARY, RIGHT?

A. YES, SIR.

Q. DID YOU EVER DO THAT DURING THE PERIOD OF THE INTERAGENCY POLICY WITH ANY OF THE WOMEN WHO WERE ABUSING OTHER SUBSTANCES?

A. WHAT DO YOU MEAN BY OTHER SUBSTANCES?
Q. COCAINE?
A. NOT THAT I REMEMBER, NO, SIR.
Q. YOUR USING OR AVAILING YOURSELF OF THE INVOLUNTARY COMMITMENT PROCEDURE BOTH PREDATED AND POSTDATED THE POLICY, DIDN'T IT?
A. YES, SIR.
Q. WAS THERE ANY REASON, IN YOUR MIND, WHY THAT INVOLUNTARY COMMITMENT PROCEDURE THAT YOU HAVE USED BEFORE THE POLICY, AND I TAKE IT DURING THE POLICY, ALTHOUGH I DIDN'T ASK YOU THAT FOR ALCOHOL, AND AFTER THE POLICY, ANY REASON THAT IT COULDN'T HAVE BEEN USED DURING THE POLICY FOR COCAINE.
A. WELL, COULD - WE COULDN'T DO THAT BECAUSE THAT'S NOT WHAT THE POLICY INSTRUCTED US TO DO.
Q. ABSENT THE POLICY NOT INSTRUCTING YOU TO DO IT, WAS THERE ANY REASON THAT YOU COULDN'T DO IT? WAS COCAINE THE SAME KIND OF THING AS ALCOHOL IN SO FAR IS IT IMPACTED ON THE FETAL HEALTH?

[NEWMAN 203]

A. WE COULD HAVE INQUIRED AS TO THAT, YES.
Q. ONE OF THE THINGS THAT YOU DO AS AN ACADEMIC, AND YOU DID IT WITH THE TWIN STUDY, WHEN YOU WANT TO KNOW WHETHER A NEW

PROJECT, A NEW PROGRAM WAS VIABLE OR WAS WORKING ONCE YOU STARTED IT, YOU GIVE A - YOU SET UP A DESIGN STUDY, DIDN'T YOU?

A. WITH REGARDS TO THE TWIN CLINIC PAPER?

Q. YEAH, YOU DESIGNED A STUDY, DIDN'T YOU?

A. YES, SIR.

Q. WAS A STUDY DESIGNED WITH RESPECT TO THE INTERAGENCY POLICY THAT YOU KNOW OF BY ANY OF THE ACADEMICS?

A. DR. HORGER DID A REPORT OF AN OBSERVATIONAL INVESTIGATION OF IT AFTER IT HAD BEEN IN EFFECT APPROXIMATELY A YEAR.

Q. THAT'S A RETROSPECTIVE REPORT?

A. YES, SIR.

Q. RATHER THAN DESIGNING A STUDY PROSPECTIVELY, FAIR?

A. YES, SIR MY REPORT, I WOULD JUST CLARIFY I WOULD SAY THAT WHAT WE REPORTED FROM THE TWIN CLINIC WAS ALSO A RETROSPECTIVE REPORT OF THE OUTCOME OF OUR TWIN CLINIC PATIENTS COMPARED TO TWINS CARED FOR AT THE UNIVERSITY PRIOR TO OUR STARTING THE TWIN CLINIC. SO IN A SENSE THAT WAS REALLY A RETROSPECTIVE REVIEW OF THAT POPULATION EXPERIENCE AS WELL.

Q. I THINK, DOCTOR, JUST TWO MORE QUESTIONS FOR ME. THE FIRST ONE IS, YOU TALKED ABOUT PART OF THE POLICY WAS

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[NEWMAN 205]

A. WELL - NO, IT'S POSSIBLE. IT MAY DEPEND UPON THE NATURE OF THE CONVERSATION HOW MUCH TIME WE SPENT WITH IT. IF IT WAS JUST A DISCUSSION WITH THE PATIENT ACKNOWLEDGING THAT THIS TEST HAS TURNED OUT POSITIVE WE HAVE GOT A PROBLEM NOW BECAUSE THIS IS A VIOLATION OF THE LAW AND WE'RE GOING TO HAVE ONE OF OUR NURSE MANAGERS COME TALK TO YOU ABOUT IT MORE IN DETAIL, I MAY NOT MAKE A FORMAL NOTATION ABOUT THAT IN THE CHART. I MAY ALLOW THE NURSE MANAGER TO MAKE A FORMAL NOTATION AND I MAY CO-SIGN IT OR I MAY MAKE A COMMENT IN MY OWN PROGRESS NOTE, BUT I WOULDN'T SAY THAT I DID IT EVERY TIME.

Q. WHAT I'M TRYING TO ASCERTAIN, DOCTOR, IF WE LOOK AT ALL OF THE PATIENTS' RECORDS THAT WERE INVOLVED IN THE POLICY, WE WOULD FIND NOTES IN THERE FROM YOU - ON AT LEAST SOME OF THEM, THAT YOU HAD THIS COUNSELING CONVERSATION ABOUT THE LAW?

A. WELL I WOULD SAY THAT FIRST OF ALL I WAS NOT INVOLVED WITH ALL OF THE PATIENTS INVOLVED IN THE COUNSELING.

Q. I KNOW THAT.

A. AND FROM THE DEPOSITION, AT LEAST ONE OF THE CHARTS THAT

THEY SHOWED ME, I REMEMBERED SPEAKING TO THE PATIENT IN REGARDS TO THAT AND ADDING A NOTATION TO THE SOCIAL WORKER OR CASE MANAGER'S NOTE.

Q. SO THE ANSWER TO MY QUESTION IS YES?

A. YES.

Q. THANK YOU. DOCTOR, YOU INDICATED ANY PATIENTS WHO TESTED POSITIVE THE SECOND TIME WOULD BE ARRESTED AND CHARGED?

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[NEWMAN 211]

Q. AND HAVE YOU LECTURED EXTENSIVELY ACROSS THE UNITED STATES IN YOUR FIELD OF FETAL MATERNAL MEDICINE?

A. YES, SIR.

THE COURT: AGAIN, MR. HOOD, LET HIM TESTIFY AND STOP LEADING.

Q. (BY MR. HOOD, CONTINUING) HAVE YOU GIVEN POSTERS TO GRADUATE PATIENTS, DOCTOR?

THE COURT: AGAIN.

A. AS PART OF MY PROFESSIONAL RESPONSIBILITIES DOES INCLUDE RESEARCH AND EDUCATIONAL ACTIVITIES. THE RESEARCH THAT WE DO FREQUENTLY IS PRESENTED AT NATIONAL MEETINGS IN THE FORM OF ORAL PRESENTATION OR WHAT ARE REFERRED TO AS POSTERS. THAT RESEARCH USUALLY THEN GOES ON TO BE DEVELOPED INTO A

MANUSCRIPT THAT IS SUBMITTED FOR PUBLICATION.
Q. AND ARE YOU INVOLVED AS WELL IN RESEARCH?
A. YES.
Q. NOW, THIS LAWSUIT IS ABOUT WHAT WE CALL THE INTERAGENCY POLICY. I WANT YOU TO TELL THE JURY FIRST BEFORE THE POLICY IN LATE '89, IF A WOMEN CAME IN AND HAD MEDICAL COMPLICATIONS, WHAT WAS DONE? I WANT TO TALK ABOUT WHAT WAS BEING DONE IN - AT THE MEDICAL UNIVERSITY BEFORE THE POLICY.
A. IN REGARD TO DRUG TESTING OR GENERAL TREATMENT?
Q. WELL, NO. LET'S TALK ABOUT DRUG TESTING.
A. WELL, IF A PATIENT CAME INTO THE HOSPITAL THAT HAD AN OBSTETRICAL COMPLICATION THAT WE FELT WAS RELATED TO THE

[NEWMAN 212]

POTENTIAL OF DRUG ABUSE, WE WOULD PERFORM DRUG TESTING, URINE DRUG TESTING ON THAT PATIENT TO DETERMINE IF DRUGS WERE INVOLVED. WE DID IT NOT UNDER A PROTOCOL, AT THAT POINT BUT MORE JUST AS PART OF CLINICAL DECISION MAKING.
AT SOME POINT, I THINK PROBABLY IN '89, WE DID PUT TOGETHER A LIST JUST TO TRY TO MAKE IT MORE UNIFORM OF WHAT WE

FELT WERE THE INDICATORS FOR WHICH WE SHOULD OBTAIN URINE DRUG TESTS. AND AGAIN THIS WAS PRIOR TO INSTITUTING THE POLICY. WE WERE RECOGNIZING WHAT WE FELT WERE MORE AND MORE PATIENTS EXPERIENCING, USING COCAINE DURING PREGNANCY AND WE FELT AND IT WAS IN OUR OPINION RELATED TO A NUMBER OF DIFFERENT OBSTETRICAL COMPLICATIONS. WHAT WE PROBABLY SAW THE MOST OF WERE ABRUPTIO PLACENTA, STILLBIRTHS AND PREMATURE LABOR THAT DIDN'T RESPOND TO THE TYPICAL TREATMENTS THAT WE USED. AND, AGAIN, THESE ARE VERY SERIOUS.

AND ALSO THE PEDIATRICIANS WERE ALSO TELLING US THAT IN THEIR EXPERIENCE THEY WERE DEALING WITH MORE AND MORE BABIES THAT WERE HAVING WITHDRAWAL TYPE SYNDROME AND OTHER PROBLEMS THEY FELT WAS ATTRIBUTED TO COCAINE OR OTHER DRUGS AS WELL. BUT, WE WERE EXPERIENCING, WE THOUGHT, A SIGNIFICANT INCREASE IN THIS. AT THE SAME TIME THE MEDICAL LITERATURE THERE WAS MORE AND MORE BEING WRITTEN ABOUT AS TO CONSEQUENCE OF DRUG ABUSE AND PREGNANCY.

AND IN MANY OCCASIONS IT BECAME VERY CLINICALLY NECESSARY TO HAVE THIS INFORMATION. HOW TO DEAL WITH

PREMATURE LABOR IN THIS SITUATION WAS DIFFERENT. THEY DIDN'T RESPOND TO THE TYPICAL MEDICATION WE USED. THEY AT SOME POINT, IF WE USED THE TYPICAL MEDICATION WE USED, IN A PATIENT WHO WAS ON COCAINE, THAT INCREASED THE MATERNAL RISK OF THE DRUG. THERE WERE REPORTS OF WOMEN BEING TREATED WITH DRUGS SUCH AS RITODRINE AND TERBUTALINE, WHICH ARE TYPICALLY USED FOR PRE-TERM LABOR, WHICH IS CARDIAC STIMULANT, AND THAT BEING USED ON TOP OF A PATIENT WHO HAD USED COCAINE, WHICH IS ALSO A CARDIAC STIMULANT, RESULTING IN HEART ATTACKS AND STROKES AND THINGS LIKE THAT. SO WE WERE CONFRONTING THESE CASES OF PREMATURE LABOR AND WE WERE COLLECTING THAT INFORMATION.

STILL BIRTHS WE COLLECTED. EXCUSE ME, WHEN THERE WERE STILLBIRTHS OF ABRUPTIO PLACENTA, WE WOULD GET THIS INFORMATION AND TRY TO IDENTIFY THE CAUSE. IF A WOMEN LOST A BABY, SHE WAS GOING TO BE INTERESTED IN KNOWING WHY, WE WERE INTERESTED IN KNOWING WHY, AND WE WOULD WANT TO DO WHAT WE COULD TO PREVENT IT. IN FUTURE PREGNANCIES THERE IS A RISK OF RECURRENCE OF STILLBIRTH, AND TO BE ABLE TO DEAL WITH THAT RISK YOU HAVE TO KNOW WHAT CAUSED IT. AND COCAINE WAS PROVING

TO BE ONE OF THE THINGS ASSOCIATED WITH IT.

WE ALSO EXPERIENCED, AGAIN, WOMEN WITH ABRUPTIO PLACENTA. I VERY VIVIDLY REMEMBER A PATIENT WHO WE HAD BEEN FOLLOWING IN OUR HIGH-RISK CLINIC HAD HAD A VISIT WITHIN THE LAST SEVERAL DAYS FOR WHATEVER REASON HAD WANTED TO BE ADMITTED AND PUT INTO LABOR, I CAN'T REMEMBER THE REASON WHY.

[NEWMAN 214]

WE DIDN'T FEEL LIKE IT WAS NECESSARY AT THAT POINT. AND SHE CAME BACK WITH AN ABRUPTIO PLACENTA AND I BELIEVE HER BABY DIED. AND SHE WAS VERY ANGRY TELLING US THAT WE SHOULD HAVE PUT HER IN THE HOSPITAL LAST WEEK WHEN SHE FELT LIKE SHE SHOULD HAVE BEEN DELIVERED AND THAT IT WAS ALL OUR FAULT. AND FORTUNATELY IN THAT CASE FOR US, NOT FOR HER OR THE BABY, SHE PROVED TO BE COCAINE POSITIVE. AND SHE - WE DIDN'T HEAR MUCH FROM HER AFTER THAT. BUT I HAD NO DOUBT WE WERE GOING TO BE SUED BY HER FOR MALPRACTICE UNTIL WE HAD THAT INFORMATION.

SO HAVING THAT INFORMATION HAD CLINICAL IMPORTANCE, IT HAD IMPORTANCE FROM KNOWING THE CASE OF WHY THINGS HAPPEN, BOTH FOR THE PATIENTS' BENEFIT AND OUR BENEFIT TO KNOW WHY

THINGS HAPPENED. SO WE TESTING THE PATIENT AT THAT POINT IN TIME.
Q. AND THAT'S UDS, URINE DRUG SCREENS?
A. YES, SIR.
Q. OKAY.
A. I WOULD ALSO ADD THAT PEDIATRICIANS WERE TESTING AS WELL BECAUSE THEIR MANAGEMENT OF NEWBORNS WERE AFFECTED BY WHETHER OR NOT THEY WERE GOING TO HAVE A COCAINE WITHDRAWAL OR OTHER MANIFESTATIONS OF COCAINE EXPOSE.
Q. NOW THE POLICY THAT WE'RE DISCUSSING IN THIS LAWSUIT, WOULD YOU EXPLAIN TO THE JURY THE EVOLUTION OF THE POLICY FROM YOUR PERSPECTIVE AS A PHYSICIAN TREATING PATIENTS AND BEING AMONG THE DEPARTMENT OF OBSTETRICS AT THE MEDICAL UNIVERSITY?

[NEWMAN 215]

A. MY PERSPECTIVE ON THE EVOLUTION OF THE POLICY INVOLVES BEING ASKED TO ATTEND A MEETING IN 1989. AT THAT TIME THAT MEETING WAS ATTENDED BY A VARIETY OF INDIVIDUALS FROM THE DEPARTMENT OF OBSTETRICS AND GYNECOLOGY, PEOPLE FROM THE DEPARTMENT OF PEDIATRICS, AND MANY OF THE OTHER DEFENDANTS IN THIS SUIT TO DISCUSS WHAT WAS NECESSARY IN OUR ROLES AS PHYSICIANS AND PUBLIC SERVANTS IN REGARD TO THE LAW REGARDING

REPORTING POSITIVE COCAINE DRUG TESTS. MY UNDERSTANDING WAS THAT IT HAD BEEN LEARNED BY THE HOSPITAL LAWYER, MR. GOOD, WE WERE DOING THIS TEST AND HE WAS CONCERNED ABOUT WHAT WAS HAPPENING.

MR. WHERRY: COMPETENCE. HEARSAY. HE IS NOW TALKING ABOUT MR. GOOD'S CONCERN. HE IS NOT A PARTY, HE CAN ONLY LEARN THAT FROM WHAT MR. GOOD TOLD HIM OR SOMEONE ELSE TOLD HIM.

THE COURT: WELL, IT'S MY UNDERSTANDING THAT THIS WITNESS IS NOT ONLY A DEFENDANT, BUT HE IS ALSO SOMEONE WHO WAS INVOLVED IN THE PROMULGATION OF THIS POLICY; IS THAT NOT CORRECT.

MR. WHERRY: YES, SIR.

THE COURT: ALL RIGHT. IT'S ALSO MY UNDERSTANDING THAT - WHY THE POLICY WAS PROMULGATED IN THE FIRST INSTANCE IS RELEVANT, IS IT NOT?

MR. WHERRY: SIR, I THINK SO.

THE COURT: JUST ANSWER MY QUESTION. IS IT NOT THE

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[NEWMAN 218]

OKAY.

HOW LONG ARE YOU GOING TO BE, MR. HOOD?

MR. HOOD: I'M NOT SURE. TWENTY MINUTES.

THE COURT: WE NEED TO TAKE A BREAK, SO LET'S TAKE IT NOW WHILE WE HAVE STOPPED THE TESTIMONY

(WHEREUPON, A BREAK WAS TAKEN OFF THE RECORD.)

Q. (BY MR. HOOD, CONTINUING) DR. NEWMAN, YOU WERE EXPLAINING TO THE JURY THE EVOLUTION OF THE POLICY AND THE MEETINGS THAT YOU WENT TO. PLEASE CONTINUE.

A. WELL, AS I SAID, THERE WAS A - ONE MEETING THAT I WAS NOT IN ATTENDANCE AT. THE SECOND. MEETING, THE DEPARTMENT - MEMBERS OF THE DEPARTMENT OF OBSTETRICS AND GYNECOLOGY ATTENDED. AND THE PURPOSE OF THE MEETING WAS TO ADDRESS THE ISSUE OF INCREASING FREQUENCY OF COCAINE POSITIVE MOTHERS AND OBSTETRICAL AND NEWBORN COMPLICATIONS IT WAS CAUSING AND HOW COULD WE APPROACH - WHAT COULD WE DO IN TERMS OF INTERVENTION TO TRY TO STOP THIS PROBLEM OR AT LEAST REDUCE IT.

Q. NOW BEFORE THERE WAS A FORMAL POLICY, WAS THERE A PROTOCOL CONCERNING URINE DRUG SCREENS FOR PATIENTS?

A. THERE WERE SOME STAGES. I THINK IN 1988 AND MAYBE THROUGH EARLY PARTS OF 1989, PATIENTS THAT WERE BEING SCREENED FOR - HAVING THEIR URINE SCREENED FOR DRUGS WAS DETERMINED BY

THE INDIVIDUAL PHYSICIAN TAKING CARE OF THAT PATIENT BASED ON THEIR CLINICAL JUDGMENT. AND I DON'T THINK THERE WAS ANY POLICY AS TO WHO SHOULD BE TESTED AND WHO SHOULDN'T.

[NEWMAN 219]

IN, I THINK JUNE OF 1989, DR. ED HORGER, WHO IS HEAD OF THE DIVISION OF THE MATERNAL FIELD OF MEDICINE, AT THE TIME SENT OUT A MEMO LISTING CRITERIA THAT WE FELT WERE APPROPRIATE INDICATIONS TO PERFORM URINE DRUG SCREENING. AND THEN THAT LIST BECAME THE BASIS OF A SLIGHTLY EXPANDED LIST OF INDICATORS FOR TESTING THAT WAS INCLUDED AS PART OF THE POLICY ULTIMATELY.

Q. OKAY. AND BEFORE THE POLICY, WAS A RECOMMENDATION, IN YOUR EXPERIENCE, TO PATIENTS TO OBTAIN SUBSTANCE ABUSE VOLUNTARILY WORKING?

A. NO, SIR.

Q. BEFORE THE POLICY WERE THEY SUBJECTIVE, THAT IS, UP TO THE INDIVIDUAL DOCTORS' CHOICE WITH REGARD TO URINE DRUG SCREEN?

A. YES, SIR. ONE OF THE SPECIFIC REASONS THAT WE CHOSE TO INSTITUTE A PROTOCOL AS TO WHO WERE APPROPRIATE CANDIDATES FOR SCREENING IS BECAUSE WE FELT THAT WOULD BE BETTER, MORE

EVENHANDED THAN TO LEAVE IT UP TO THE SUBJECTIVITY OF INDIVIDUAL PRACTITIONERS.

Q. AND ONCE THE POLICY WAS PUT INTO EFFECT, WHICH I THINK IS NOVEMBER OF '89, FROM THAT TIME FORWARD WAS THERE A SPECIFIC MEDICAL CRITERIA BY WHICH PATIENTS WERE TESTED?

A. YES, SIR. SEVERAL MEDICAL CRITERIA.

Q. AND DID IT MATTER WHETHER THE PATIENT WAS A NATIVE AMERICAN, AFRICAN AMERICAN, WHATEVER RACE

[NEWMAN 220]

A. NO. NO, SIR. AS I SAID, WE SPECIFICALLY PUT THE LIST OF INDICATORS TOGETHER AND INSISTED THAT LIST OF INDICATORS BE PART OF THE POLICY TO INSURE THAT PEOPLE WERE TESTED FOR MEDICAL INDICATIONS AND NOT FOR OTHER EXTRANEOUS INDICATIONS.

Q. NOW I HAVE GOT A BLOWUP OF THE MEDICAL INDICATIONS, I THINK IT'S AN EXHIBIT, LETTER FORM, THAT I WOULD LIKE TO GO OVER WITH YOU.

THE COURT: SHOW IT TO COUNSEL.

MR. WHERRY: I HAVE SEEN IT, JUDGE.

Q. (BY MR. HOOD, CONTINUING) DOCTOR, COME DOWN AND STAND ON THIS SIDE OF THIS POSTER FOR ME, PLEASE. MAYBE THIS WILL HELP

SO THE LAST JURY CAN SEE.
A. WELL THE INDICATIONS THAT WE USED, THESE ARE THE INDICATIONS THAT WERE DEVELOPED FOR THE POLICY THE M-7 POLICY. THE INDICATION THAT WERE USED PRIOR TO THE M-7 POLICY BASICALLY ARE THESE ONES LISTED UNDER "A" WHICH WERE THE OBSTETRICAL INDICATORS. AND THEN FOR THE PURPOSES OF THE POLICY WE ADDED THESE DOWN HERE WHICH WERE THE INVOLVEMENT OF THE PEDIATRICIANS AND NEONATOLOGISTS.
THE PATIENTS THAT WE FELT REQUIRED SCREENING WOULD BE THE PATIENTS THAT PRESENTED FOR LABOR - IN LABOR OR TO OUR DELIVERY SUITE WHO DID NOT AVAIL THEMSELVES TO ANY PRENATAL CARE AT ANY POINT DURING THAT PREGNANCY.
THEN THESE TWO HERE WOULD REALLY BE SOMEWHAT ANALOGOUS TO THAT. THESE WERE PATIENTS WHO EITHER HAD WHAT IS

[NEWMAN 221]

CALLED LATE PRENATAL CARE, WHICH FOR OUR PURPOSES WERE WOMEN WHO DID NOT COME FOR PRENATAL CARE UNTIL AFTER 24 WEEKS OF GESTATION, SO THIS IS REALLY THE LAST THIRD OF THEIR PREGNANCY, AND THEN PATIENTS WHO HAD INCOMPLETE PRENATAL CARE. AND WE USED THE CRITERIA OF PATIENTS WHO MAY HAVE COME

FOR PRENATAL CARE EARLY BUT THAT HAD HAD LESS THAN SIX PRENATAL CARE VISITS.

Q. LET ME STOP YOU. US MEN SOMETIMES DON'T UNDERSTAND THIS. HOW MANY WEEKS IS NORMAL, PREGNANCY?

A. PREGNANCY LASTS 42 WEEKS. TYPICALLY DIVIDED INTO TRIMESTERS, FIRST, SECOND, THIRD. FIRST WOULD BE UP TO 13 WEEKS AND SECOND UP TO 26 WEEKS, AND THE THIRD TRIMESTER WAS DELIVERY.

Q. AND WHEN IS A CHILD CONSIDERED VIABLE. AS TO THE FETUS?

A. FOR THE PURPOSES OF THIS POLICY WE USED 27 WEEKS. BABIES ARE CERTAINLY VIABLE AS EARLY AS 26 AND SOMETIMES 25 WEEKS, ALTHOUGH AT THAT POINT IT'S MUCH MORE RISKY TO BE BORN AND MOST OF THOSE BABIES WILL PROBABLY DIE AT 24 TO 25 WEEKS. BUT BY 27 WEEKS THERE IS AN EXCELLENT CHANCE OF SURVIVAL. I THINK THE MEDICAL UNIVERSITY HAS ABOUT 80 PLUS OR 80 PERCENT FOR SURVIVAL AT 27 WEEKS, WHICH WOULD BE ROUGHLY A LITTLE OVER TWO POUNDS.

Q. TWO POUNDS?

A. YES.

Q. THE FOURTH INDICATION IS PROBABLY THE MOST COMMON

COMPLICATION OF COCAINE ABUSE IN PREGNANCY, WHICH IS ABRUPTIO PLACENTA. THE PLACENTA IS AN ORGAN THAT PROVIDES THE EXCHANGE OF OXYGEN AND NUTRIENTS FOR THE BABY AND THE MOM. AND UNDER THE INFLUENCE OF COCAINE, FOR INSTANCE, THAT CAUSES AN INTENSE HYPERTENSIVE EPISODE IN THE USE OF COCAINE. BLOOD PRESSURE GOES UP DRAMATICALLY WHEN YOU TAKE COCAINE. AND THAT BLOOD PRESSURE CAN CAUSE A SEPARATION FROM THE PLACENTA, FROM THE UTERUS. BLEEDING BEGINS AND AS THE BLEEDING CONTINUES IT FORMS A CLOT THAT JUST GRADUALLY SEPARATES THE PLACENTA. SOMETIMES IT CAN BE SMALL AND THE BABY WILL SURVIVE IT AND THEN USUALLY IF THE ABRUPTION INVOLVES HALF OF THE PLACENTA OR MORE, IT WILL BE FATAL.

Q. IS THAT A MEDICAL CRISES?

A. OH, YES. I MEAN, AGAIN HALF THE TIME OR MORE IT CAN BE FATAL TO THE INFANT, THAT IS SEVERE ABRUPTION. AND IT'S ASSOCIATED WITH HEMORRHAGE AND SHOCK AND COAGULATING PROBLEMS IN THE MOTHER. SO, IT'S POTENTIALLY LIFE-THREATENING TO THE MOTHER AS WELL.

Q. AND CAN THAT BE CAUSED BY ONE USE OF COCAINE DURING PREGNANCY?

A. YES. YES. IT DOESN'T RELATE TO CHRONIC OR HOW MUCH YOU

USED IT OR HOW YOU TOOK IT, IT'S AN INDIVIDUAL RESPONSE THAT CAN BE CAUSED BY A SINGLE USE OF COCAINE.

Q. LET'S TALK ABOUT COCAINE FOR A MINUTE. FOR A CHILD IN UTERO, WHEN THE MOTHER INGESTED IT, WHAT DOES THAT DO TO THE

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LIFE SUPPORT FOR THAT BABY?

A. WELL, THE DRUG IS - CAUSES CONSTRICTION OF BLOOD VESSELS. IT'S A VASAL CONSTRICTOR. WHEN YOUR BLOOD VESSEL CONSTRICTS YOUR BLOOD PRESSURE GOES UP, SO TWO THINGS ARE HAPPENING TO THE FETUS. FIRST OF ALL THE BLOOD SUPPLY TO THE PLACENTA AND TO THE BABY IS GOING TO BE REDUCED BECAUSE OF THE CONSTRICTION OF THE BLOOD VESSELS. ONE OF THE OTHER THINGS THAT IS ASSOCIATED WITH COCAINE USED IN PREGNANCY IS GROWTH RETARDATION, WHICH IS MORE OF A CHRONIC EFFECT, IT'S A BABY THAT HAS HAD RESTRICTIONS TO ITS BLOOD SUPPLY ON MULTIPLE OCCASIONS THROUGHOUT THE PREGNANCY.

Q. AND IF THAT HAPPENS WHEN THE CHILD'S ARM IS DEVELOPING OR HAND IS DEVELOPING, THE MOTHER USES COCAINE, WHAT CAN HAPPEN TO THE ARM?

MR. WHERRY: OBJECTION TO THE LEADING NATURE OF THE QUESTION.

Q. (BY MR. HOOD, CONTINUING) WHAT CAN HAPPEN TO THE ARM OR THE HAND?

A. WELL, IT'S REPORTED BY SOME INVESTIGATORS THAT CONGENITAL ANOMALIES CAN BE ASSOCIATED WITH COCAINE INGESTION. AND THE PROPOSED MECHANISM IS AT THE TIME OF FETAL DEVELOPMENT, THE FIRST 13 - 12 OR 13 WEEKS OF PREGNANCY, IF AT THAT TIME THERE IS INTERRUPTION OF THE OXYGEN SUPPLY, IT INTERFERES WITH THE DEVELOPMENT OF THAT PARTICULAR ORGAN SYSTEM. AND THE EXAMPLE WAS AN ARM OR A LEG, BUT THERE ARE MANY - IT COULD HAPPEN TO

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ANY ORGAN SYSTEM.

AND PROBABLY THE ONE THAT I HAVE SEEN MOST FREQUENTLY RELATED TO COCAINE USE IS A DISRUPTION OF THE URINARY TRACT. THE DEVELOPMENT OF THE URINARY TRACT. SO THAT BLOCKAGE TO ESCAPE URINE AND WHATEVER ABNORMALITIES AND HOW THE KIDNEYS DEVELOP. SO, GOING BACK TO, THE QUESTION WAS, THE TWO EFFECTS THAT COCAINE HAS ON. PREGNANCY IS TO CONSTRICT THE BLOOD VESSELS AND REDUCE SUPPLY OF OXYGEN AND NUTRIENTS TO THE BABY.

AND ALSO SECONDARY TO THAT, BLOOD PRESSURE GOES UP,

AND THE PLACENTA IS REALLY A HUGE VASCULAR ORGAN, IT'S AN INTERMINGLING OF SMALL BLOOD VESSELS BETWEEN THE MOTHER AND BABY'S CIRCULATION. THE BLOOD DOESN'T ACTUALLY CROSS, BUT THE BABY'S VESSELS ARE VERY THIN WALLS, AND BLOOD AND OXYGEN AND NUTRIENTS AND THINGS DIFFUSE CIRCULATION BY THE MOTHER. IF ONE OF THOSE SMALL VESSELS RUPTURES AND BLEEDING OCCURS, THAT CLOT, THAT BLEEDING WILL DISRUPT OTHER VESSELS AND CAUSE MORE BLEEDING AND LEAD TO THE PLACENTAE ABRUPTION THAT I MENTIONED EARLIER.

Q. OTHER CRITERIA UNDER THE POLICY WHICH WOULD MEAN THE MOTHER WOULD GET TESTED.

A. INTRAUTERINE FETAL DEATH OR STILLBIRTH, PREMATURE LABOR. WHEN WE COULD FIND NO OTHER OBVIOUS CAUSE. FIRST INSTANCE, WOMEN WITH TWINS, HUGE RISK FACTOR. IF THAT PATIENT WOULD HAVE AN OBVIOUS CAUSE, URINARY TRACT INFECTION, IF THEY HAD

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BEEN IN A CAR ACCIDENT, THAT PATIENT WOULDN'T HAVE BEEN SCREENED BUT SOMEBODY WHO HAD NO OTHER APPARENT REASON TO BE IN LABOR WOULD BE SOMEBODY THAT WE WOULD SCREEN. COCAINE HAS BEEN SHOWN TO STIMULATE UTERINE CONTRACTIONS, AND THE EXACT

MECHANISM I DON'T THINK I CAN EXPLAIN.
Q. DEFINE THIS WORD PRE-TERM. PRE-TERM LABOR?
A. PRE-TERM LABOR IS ENTERING LABOR PRIOR TO 37 WEEKS GESTATION. WE SAY PREGNANCY LASTS 40 - WOMEN ARE CONSIDERED TO BE AT TERM BETWEEN - BETWEEN 37 AND 42 WEEKS. ANYTHING LESS THAN 37 IS CONSIDERED PRE-TERM. OBVIOUSLY THE MORE PRE-TERM YOU ARE THE GREATER RISK OF BEING -
Q. IN OTHER WORDS, IF THE BABY COMES BEFORE IT WAS 37 WEEKS?
A. YES, SIR.
Q. WHAT ARE WE DEALING WITH MEDICALLY?
A. WELL, IT WOULD DEPEND ON THE TIME AND GESTATION. A BABY BORN AT 36 WEARS. IS GOING TO DO, VIRTUALLY AS WELL AS A BABY BORN AT TERM. THEY MAY HAVE A LITTLE JAUNDICE, THEY MAY HAVE A LITTLE FEEDING PROBLEM, DIFFICULTY WITH TEMPERATURE REGULATION, BUT THEY'RE NOT GOING TO HAVE MAJOR COMPLICATIONS. A BABY BORN AT 24 WEEKS IS GOING TO DIE. MAYBE AFTER A LONG PERIOD OF TIME IN THE NURSERY, BUT IT'S VERY UNLIKELY TO SURVIVE. WE SEE MORE PRE-TERM LABOR IN WOMEN BETWEEN 29 AND 31 WEEKS. IF YOU GRAPHED IT OUT, THAT'S WHEN MOST PRE-TERM LABOR SEEMS TO OCCUR. AND A BABY THAT IS

DELIVERED AT 30 WEEKS GESTATION HAS AN 85 PERCENT CHANCE OF

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SURVIVAL. BUT THE MAJORITY OF THOSE BABIES WOULD GO TO THE INTENSIVE CARE UNIT, THE MAJORITY WOULD PROBABLY REQUIRE BEING ON A VENTILATOR FOR A VARIABLE PERIOD OF TIME. AND THEY WOULD BE AT RISK FOR OTHER COMPLICATIONS, WHICH ARE LESS FREQUENT BUT VERY SEVERE, SUCH AS INTRACRANIAL HEMORRHAGE, A BOWEL THAT BECOMES ISCHEMIC AND HAS TO BE REMOVED. INFECTION, JAUNDICE AND PROBLEMS SUCH AS THAT.

SO A BABY BORN AT 30 WEEKS GESTATIONAL, A RULE OF THUMB THAT WE USE WHEN WE ADVISE MOMS IS THE BABY WILL PROBABLY STAY IN THE HOSPITAL AS LONG AS IT WOULD HAVE NEEDED TO STAY IN YOUR TUMMY BEFORE IT GOES HOME. SO 30-WEEK BABY YOU'RE LOOKING AT PROBABLY SEVEN TO EIGHT MONTHS -

MR. WHERRY: OBJECTION, YOUR HONOR, ON RELEVANCE. THIS HAS NOTHING TO DO WITH THE LAWSUIT. THE LAWSUIT HAS TO DEAL WITH THE POLICY. NOT WHETHER COCAINE IS GOOD FOR PREGNANT WOMEN TO USE OR NOT.

THE COURT: WHETHER COCAINE IS WHAT?

MR. WHERRY: GOOD FOR PREGNANT WOMEN TO USE OR NOT.

IT HAS TO DO WITH THE POLICY AND THE WAY THEY FRAMED IT RATHER THAN NARROWLY TAILORING IT. SO RATHER THAN GOING THROUGH ALL THE CRITERIA AND TELLING US ALL THE THINGS THAT GO WRONG, THE ONLY PURPOSE IS 403 AND I SUGGEST THAT THIS JUST SIMPLY ISN'T RELEVANT.

THE COURT: I DON'T KNOW THAT IT'S APPROPRIATE OR NECESSARY TO GO DOWN THIS CHART, WITH EACH WITNESS. BUT WE DO

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HAVE A NUMBER OF DEFENDANTS AND THEY ARE CHARGED WITH CERTAIN ACTS THAT ALLEGEDLY DAMAGED THE PLAINTIFFS.

MR. WHERRY: YES, SIR.

THE COURT: AND I THINK THEY HAVE A RIGHT TO EXPLAIN WHY THEY DID WHAT THEY DID, AND THAT INCLUDES EXPLAINING WHY THEY TOOK THEIR ACTIONS OR WHY THEY ACTED OR WHAT KNOWLEDGE THEY HAD OR WHAT THEY HAVE BEEN TOLD. BASICALLY TO PUT IT SHORT, WHAT WAS IN THEIR HEAD. AND SO I THINK HE HAS A RIGHT TO DO THAT. I THINK ALL OF THE DEFENDANTS HAVE THE RIGHT TO DO THAT. WHETHER I'LL PERMIT COUNSEL TO DO IT IN THE MANNER HE IS DOING IT WITH ALL DEFENDANTS REMAINS TO BE SEEN. BUT, FOR THE TIME BEING, I THINK THE QUESTION WAS APPROPRIATE AND I

OVERRULE YOUR OBJECTION.
Q. (BY MR. HOOD, CONTINUING) DR. NEWMAN, YOU TALKED ABOUT THE BABIES GOING TO THE NICU, WHICH IS BASICALLY THE INTENSIVE CARE UNIT FOR BABIES. AS Y'ALL WERE FORMULATING THESE CRITERIA TO DETERMINE WHETHER OR NOT TO TEST WOMEN, WOMENS' URINE, WAS COST A CONSIDERATION? THE COST?
MR. WHERRY: OBJECTION. YOU ALREADY RULED ON THAT.
THE COURT: NO.
MR. WHERRY: MAY I BE HEARD AT SIDEBAR.
THE COURT: SIR?
MR. WHERRY: MAY I BE HEARD AT SIDEBAR.
THE COURT: ABSOLUTELY.
(SIDEBAR AS FOLLOWS:)

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MR. HOOD: YES, SIR.
THE COURT: AN OBJECTION WAS MADE TO THAT. I OVERRULED THE OBJECTION. LET'S JUST ASK HIM WHAT FINANCIAL MATTERS HE GAVE CONSIDERATION TO AND WHAT CONSIDERATION HE GAVE TO THEM. NOW THAT'S A NON-LEADING QUESTION. TWO OF THEM.
MR. HOOD: YES, SIR.
Q. (BY MR. HOOD, CONTINUING) WOULD YOU ANSWER THOSE QUESTIONS?
A. IN THE FORMULATION OF THIS POLICY WE DID GIVE

CONSIDERATION TO FINANCIAL ISSUES IN TERMS OF OUR CONCERN OVER THE COSTS THAT COULD BE ENCOUNTERED IN TAKING CARE OF BABIES THAT WERE BORN PREMATURELY OR WITH OTHER - WITH MALFORMATIONS OR OTHER PROBLEMS THAT WOULD REQUIRE EITHER PROLONGED NEONATAL INTENSIVE CARE OR EVEN LONGER TERM CARE. IN DISCUSSIONS IN GENERAL WITH THE NEONATOLOGIST, WE, FROM LONG-STANDING, WE ARE AWARE OF THE VERY HIGH COSTS OF INTENSIVE CARE UNIT STAYS.

MR. WHERRY: I OBJECT, TO THAT.

THE COURT: OBJECTION OVERRULED. YOU MAY PROCEED.

A. SPECIFIC NUMBERS AS TO THE COSTS OF VARIOUS SPECIFIC BABIES WHO MAY HAVE BEEN BORN DUE TO COCAINE INGESTION I COULD NOT TELL YOU. JUST AS EVIDENCE OF MY CONCERN OVER THE COST, I WOULD REFER TO THE LETTER THAT I SENT TO THE MICH COUNCIL THAT WE HAVE TALKED ABOUT EARLIER WHERE I POINTED OUT THAT I FELT THAT THE COST OF TAKING CARE OF THESE BABIES AND THE

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CONTINUING COSTS THAT MAY OCCUR WAS ONE REASON WHY THIS STATE SHOULD HAVE AN INTEREST IN TRYING TO REDUCE THIS.

Q. (BY MR. HOOD, CONTINUING) ALL RIGHT, SIR. AND NOT FOR

THE PURPOSE OF THE TRUTH OF THE NUMBER, BUT I WOULD LIKE TO NOW ASK HIM WHAT HIS UNDERSTANDING WHEN THE POLICY WAS FORMULATED WHAT THE AVERAGE NUMBERS WERE OF THE COST OF A NORMAL DELIVERY VERSUS THE COST OF TAKING CARE OF THE CHILD IN THIS NICU?

MR. WHERRY: I WOULD LIKE TO BE HEARD ON THAT.

THE COURT: OKAY.

MR. WHERRY: THE NICU UNIT DOESN'T HAVE ANYTHING SPECIFICALLY TO DO WITH COCAINE. IT TAKES CARE OF, ALL OF THE TESTIMONY HAS BEEN, OF EVERY PREMATURE CHILD THAT NEEDS NEONATAL INTENSIVE CARE. HE'S ALREADY SAID THAT HE KNOWS THE COST OF THAT BUT NOT AS RELATED, TO COCAINE. SO IT HAS NOTHING TO DO WITH THIS CASE. THE COST OF TAKING CARE OF A BABY IN THAT UNIT HAS NOTHING MORE TO DO WITH IT THAN TAKING CARE OF A BROKEN LEG.

THE COURT: I THINK HE HAS ANSWERED THE QUESTION, BUT I'M NOT POSITIVE, AND I'LL PERMIT HIM TO ANSWER IT AGAIN. PHRASE IT - RESTATE IT, MR. HOOD.

Q. (BY MR. HOOD, CONTINUING) WHEN THE POLICY WAS FORMULATED, WHAT WAS YOUR UNDERSTANDING OF THE AVERAGE COSTS?

THE COURT: AVERAGE COSTS OF WHAT?

MR. HOOD: NORMAL DELIVERY AND OF A CHILD THAT HAD

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CLINICS RECEIVED LETTER FROM THE MATERNAL FETAL, MEDICINE PHYSICIAN ABOUT DRUG POLICY AND THE HARMS OF DRUG ABUSE AND PREGNANCY AND THE NEED TO STOP. AND SAW THE VIDEOTAPE THAT WAS PREPARED REGARDING THAT SAME ISSUE. THAT WAS ROUTINE FOR EVERYBODY WHO ATTENDED OUR PRENATAL CLINICS.

Q. ALL RIGHT. THAT LETTER IS. JOINT EXHIBIT 10, FOR THE BENEFIT OF THE JURY. IT'S IN EVIDENCE. THE URINE DRUG SCREEN IS DONE AND IF IT'S POSITIVE, THEN WHAT WAS DONE UNDER THE POLICY?

A. IF THE URINE DRUG SCREEN WAS POSITIVE FOR THE FIRST TIME, THEY WERE SHOWN AGAIN THE VIDEO THAT THEY HAD RECEIVED BEFORE, THEY WERE SPOKEN WITH BY THE PHYSICIANS, AS I HAVE TALKED ABOUT EARLIER. THEY WERE BASICALLY WHAT IS OUTLINED ON THE LIST THERE. THEY WERE COUNSELED AS TO THE FACT THAT THEY WERE FOUND TO BE POSITIVE FOR DRUGS. THE EFFECTS OF THOSE DRUGS COULD HAVE HAD - WOULD HAVE ON THEIR PREGNANCY OUTCOME, THE FACT THAT IT'S HARMFUL AND THAT THEY HAVE - THEY HAVE ALSO

VIOLATED THE LAW.
THEY WERE PROVIDED AT THAT TIME A LETTER FROM THE SOLICITOR'S OFFICE THAT INDICATED THAT THEY HAVE TESTED POSITIVE. THIS IS IN VIOLATION OF THE LAW. BUT THAT IF THEY CAN REFRAIN FROM FURTHER DRUG TAKING AND ATTEND SUBSTANCE ABUSE TREATMENT AND CONTINUE WITH THEIR PRENATAL CARE, THAT AMNESTY FOR THAT WOULD BE GRANTED. BUT IF THEY DID NOT COMPLY WITH THOSE RECOMMENDATIONS TO STOP FURTHER DRUG TAKING, DID

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NOT COMPLY WITH THE RECOMMENDATION TO RECEIVE SUBSTANCE ABUSE TREATMENT, AND IF THEY WERE FOUND, TO BE POSITIVE AGAIN, THAT THEY WERE SUBJECT TO POSSIBLE ARREST.

Q. NOW, IN THOSE STEPS THAT YOU'VE JUST GONE THROUGH, IS THERE A POLICEMAN INVOLVED?

A. NO, SIR.

Q. IS A PROSECUTOR FROM THE NINTH CIRCUIT JUDICIAL CIRCUIT SOLICITOR'S OFFICE INVOLVED?

A. NO. WITH THE EXCEPTION OF THE LETTER THAT WE PROVIDED WHICH HAD BEEN PROVIDED BY THE SOLICITOR'S OFFICE.

Q. AND WAS ONLY ONE INDIVIDUAL OR CASE MANAGER FOR THESE PATIENTS, SHIRLEY BROWN WAS SHE THE ONLY PERSON THAT DID ANYTHING UNDER THIS POLICY?

A. NO, SIR. THE EVALUATION AND POTENTIAL TESTING OF PATIENTS, IF THEY MET THE INDICATED CRITERIA, THAT WAS DONE BY THE MEDICAL STAFF. IF THE PATIENT THEN TESTED POSITIVE, YOU MOVED ON TO THAT NEXT LEVEL THAT I JUST DESCRIBED. THAT WAS DONE IN CASES, SOME CASES BY MS. BROWN. WE HAD - BUT THAT WAS IN HER ROLE AS CASE MANAGER. WE HAD OTHER CASE MANAGERS WHO ALSO SERVED THAT FUNCTION. AND WHEN THE CASE MANAGERS WERE NOT AVAILABLE BASED ON VACATION OR ILLNESS OR WHATEVER, THAT MAY HAVE BEEN DONE BY A SOCIAL WORKER OR BY ONE OF THE PHYSICIANS' STAFF AS I ALSO MENTIONED EARLIER.

MR. WHERRY: YOUR HONOR, NOW THAT MR. HOOD IS NO LONGER USING THE BLOWUP, MAY WE HAVE IT REMOVED FROM BEING SET

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UP IN FRONT OF THE JURY SO THEY CAN CONTINUE TO READ IT DURING THE REST OF THE TESTIMONY.

THE COURT: YES.

MR. WHERRY: THANK YOU.

MR. HOOD: I'M READING IT. I WOULD LIKE TO READ IT RIGHT WHERE IT IS. IT'S AN EXHIBIT IN EVIDENCE.

THE COURT: GO AHEAD.

Q (BY MR. HOOD, CONTINUING) WAS THERE A POLICEMAN THAT HAD

AN OFFICE OR A DESK IN THE HOSPITAL?
A. NOT THAT I'M AWARE OF. THE HOSPITAL SECURITY HAD OFFICES VARIOUS PLACES, NONE ON THE LABOR, AND DELIVERY OR ANTEPARTUM OR POSTPARTUM FLOOR
Q. AND IF THE PATIENT SUCCESSFULLY COMPLETED AND WENT TO THE SUBSTANCE ABUSE TREATMENT, WAS THAT THE END OF IT?
A. YES, SIR.
Q. AND IF THE PATIENT DIDN'T, THEN WHAT HAPPENED?
A. WHEN THEY RETURNED FOR DELIVERY IF THEY TESTED POSITIVE AGAIN, THEY WOULD - THE SOLICITOR'S OFFICE OR THE POLICE - THE POLICE OR SOLICITOR'S OFFICE WOULD BE NOTIFIED OF THE PATIENT'S FAILURE TO COMPLY WITH THE POLICY AND TO HAVE REPEAT POSITIVE TESTING.
Q. NOW AT THE SAME TIME THIS POLICY WAS GOING INTO EFFECT YOU WROTE A LETTER TO THE OB/GYN RESIDENTS NOVEMBER 14, 1989. AND YOU TALKED ABOUT NOT KNOWING THEM, BUT YOU TALKED ABOUT DIFFERENT PATIENTS. AND THIS LETTER HAS BEEN PUT IN

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EVIDENCE. WHAT WAS THE PURPOSE OF YOU WRITING THIS LETTER TO THESE MEDICAL RESIDENTS?
A. AS I MENTIONED EARLIER, WE HAD WEEKLY CONFERENCES WITH

THE RESIDENTS. DIFFERENT DIVISIONS WOULD HAVE DIFFERENT CONFERENCES THROUGHOUT THE WEEK, BUT OURS WAS ON WEDNESDAY AND WE WOULD TALK ABOUT VARIOUS TOPICS, AND ON MORE THAN ONE OCCASION WE TALKED ABOUT THE POLICY. THE RESIDENTS HAD QUESTIONS ABOUT IT HOW IT WORKED. QUESTIONS. SOME OF THE QUESTIONS THAT WERE - HAVE BEEN ASKED TODAY. AND ONE OF THEIR QUESTIONS WAS WHAT BECAME OF THE WOMEN WHO WERE ARRESTED.

AND TRYING TO ANSWER THAT QUESTION, I ASKED SHIRLEY BROWN, I BELIEVE, FOR INFORMATION AS TO WHAT BECAME OF THE FIRST SEVERAL PATIENTS WHO HAD BEEN ARRESTED. AND THAT WAS PROVIDED TO ME AS WELL AS SOME INFORMATION ABOUT SEVERAL PATIENTS WHO HAD TESTED POSITIVE BEFORE THE POLICY AND WHAT BECAME OF THEM.

THE PURPOSE OF GAINING THAT INFORMATION WAS TO TRY TO SHOW THE RESIDENTS THAT THE GOAL OF THIS POLICY WAS NOT TO LOCK PEOPLE UP AND THROW AWAY THE KEY, THE GOAL OF THE POLICY WAS TO USE THE LEGAL AUTHORITY OF THE STATE TO HELP PEOPLE GET INTO SUBSTANCE ABUSE TREATMENT. AND IN FACT THAT'S WHAT HAPPENED TO THE MAJORITY OF WOMEN WHO WERE TAKEN THROUGH THIS POLICY.

Q. WE HEARD -

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A. IF I COULD, HE JUST ASKED - HE ASKED ME A QUESTION EARLIER ABOUT PUNITIVE. I DON'T BELIEVE THAT THAT IS PUNITIVE. I THINK -

MR. WHERRY: YOUR HONOR, I OBJECT TO WHAT THIS WITNESS BELIEVES. MAY I ASK THAT IT BE STRICKEN. IT WAS GRATUITOUS ON NO QUESTION PENDING.

MR. HOOD: THERE WAS A QUESTION ABOUT THE LETTER.

THE COURT: WAIT JUST A MINUTE. I'LL PERMIT THE ANSWER.

Q. (BY MR. HOOD, CONTINUING)WHEN YOU WERE ASKED EARLIER ABOUT THE LETTER, THE WORD PUNITIVE APPEARED IN THIS THREE-PAGE LETTER. I WOULD LIKE FOR YOU TO EXPLAIN WHY AND WHAT YOUR MEANING WAS TO THE JURY?

A. AS I WAS SAYING, THAT THE POLICY WAS FREQUENTLY REFERRED TO AS BEING PUNITIVE. FROM THE - I WOULD - I WOULD BE WILLING TO AGREE THAT IT'S POSSIBLY COERCIVE, BUT I DID NOT BELIEVE THAT IT WAS PUNITIVE IN THAT THE RESULTS OF THE POLICY WERE TO TRY TO GET WOMEN INTO SUBSTANCE ABUSE TREATMENT SO THAT THEY COULD, YOU KNOW, GET THEIR ADDICTION TAKEN CARE OF

AND - AND IMPROVE THEIR LIFE. AND ALSO TO PROTECT THE INFANTS. EITHER IN UTERO OR AFTER DELIVERY. AND FROM THAT PERSPECTIVE MY OPINION, WHICH IS WHAT I SPOKE TO IN THE THIRD PARAGRAPH OF THIS LETTER THAT I READ EARLIER, IS THAT I DON'T CONSIDER THAT PUNITIVE. I CONSIDER THAT AN EFFORT THAT WE MADE, YOU COULD CALL IT INNOVATIVE, YOU- IT'S BEEN CALLED A

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THE COURT: I OVERRULE THE OBJECTION.

A. SHIRLEY BROWN'S ROLE WAS AS THE CASE MANAGER. SHE WAS TO BE NOTIFIED OF POSITIVE URINE DRUG SCREENS WHEN THEY OCCURRED AND PROVIDE THE FOLLOW-UP THAT WAS OUTLINED ON THE - IN THE POLICY THAT WE JUST WENT OVER.

ON OCCASION WHEN A PATIENT CAME THROUGH WITH A CLEAR INDICATION THAT SHE SHOULD HAVE BEEN TESTED, IF THAT WAS MISSED BY WHOEVER THE PHYSICIAN WAS PROVIDING CARE, IT WAS THE PHYSICIAN'S RESPONSIBILITY TO IDENTIFY THOSE PATIENTS MEETING INDICATIONS AND TO OBTAIN A URINE DRUG SCREEN IN THOSE CASES TO CHOOSE NOT TO DO THAT WE FELT WAS SUBJECTIVE AND INAPPROPRIATE.

MR. WHERRY: I OBJECT TO WHAT SHIRLEY BROWN'S ROLE IS. HE IS NOW TALKING ABOUT WHAT DOCTORS SHOULD HAVE DONE.

THE COURT: THE STATEMENT WAS TO CHOOSE NOT TO DO THAT.

THE WITNESS: YES.

THE COURT: WHAT DO YOU MEAN TO CHOOSE?

THE WITNESS: IF A PHYSICIAN SAW A PATIENT THAT MET ONE OF THE INDICATORS THAT WE HAD OUTLINED FOR URINE DRUG SCREEN TESTING AND EITHER CHOSE NOT TO DO IT OR DIDN'T RECOGNIZE THIS WAS AN INDICATOR ON THE LIST, SHIRLEY BROWN MAY HAVE IDENTIFIED THAT AS BEING AN OVERLOOKED TEST AND MAY HAVE ADDRESSED THAT TO THE PHYSICIAN. SIMILARLY IF I WOULD HAVE IDENTIFIED IT AS BEING A PATIENT WHO HAD BEEN OVERLOOKED, I

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OBJECTION WAS MADE WAS THAT EXAMPLES OF VARIOUS MANDATORY TESTING IN HOSPITALS WERE GOING TO BE BROUGHT OUT SO THAT THE JURY MAY COMPARE THOSE WITH WHAT WERE DONE HERE IN AN ATTEMPT TO SHOW IF THAT WAS OKAY, SYPHILIS TESTING, THAN THIS IS OKAY. AND I THINK THAT IF THE JURY DID THAT, THAT IT WOULD BE A CONFUSION OF THE ISSUES IN THIS CASE. THE FACT THAT A

SYPHILIS TESTING MAY HAVE BEEN LEGITIMATE, MAY NOT HAVE BEEN LEGITIMATE, HAS NO BEARING ON THIS CASE WHATSOEVER. WE DON'T KNOW WHO WAS, WE DON'T KNOW HOW MANY WERE, WE DON'T KNOW THE CRITERIA, WE ARE REALLY COMPARING APPLES AND ORANGES, OR IF IT'S THAT CLOSE A COMPARISON. AND ANY POSSIBLE RELEVANCE IS SO FAR OUTWEIGHED BY THE - I THINK ACTUAL PREJUDICE AND PROBABLE CONFUSION, AND I'M GOING TO SUSTAIN THE OBJECTION.

MR. WHERRY: THANK YOU.

THE COURT: OKAY.

Q. (BY MR. HOOD, CONTINUING)DOCTOR, IS IT YOUR UNDERSTANDING THAT WITHOUT AN AMNESTY POLICY IN PLACE, THAT DOCTORS WOULD BE REQUIRED TO REPORT TO THE POLICE THE FIRST POSITIVE DRUG TEST A PREGNANT WOMEN HAD?

A. YES, SIR.

MR. WHERRY: OBJECTION, LEADING.

THE COURT: I SUSTAIN THE OBJECTION. LADIES AND GENTLEMEN OF THE JURY, DISREGARD THE QUESTION AND THE ANSWER THERETO.

Q. (BY MR. HOOD, CONTINUING) WHAT WAS YOUR UNDERSTANDING

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WITH REGARD TO THE REQUIREMENT TO REPORT WOMEN WITH A POSITIVE

URINE DRUG SCREEN?
A. WE WERE INFORMED THAT IT WAS OUR RESPONSIBILITY.
MR. WHERRY: I OBJECT, HEARSAY. WE WERE INFORMED.
THE COURT: WELL, LET ME - LET ME SEE YOU UP HERE A MOMENT.
(SIDEBAR AS FOLLOWS:)
THE COURT: WE HAVE GOT A DOUBLE-EDGE PROPOSITION. AS FAR AS WHAT. THE CHILD ABUSE STATUTE PERMITS OR REQUIRES CONCERNING REPORTING AS A MATTER OF LAW, I BELIEVE THAT I'LL PROBABLY HAVE TO INSTRUCT THE JURY ON THAT AT SOME POINT IN TIME. NOW, IN THE MEANTIME THIS WITNESS HAS BEEN SUED FOR ACTUAL AND PUNITIVE DAMAGES IT SEEMS TO ME THAT HIS KNOWLEDGE, HIS INTENT, HIS MOTIVES ARE RELEVANT ON THAT POINT. AND IF HE WAS TOLD BY THE GENERAL COUNSEL, AND HE HAS ALREADY SAID THAT HE WAS TOLD BY GENERAL COUNSEL, HE HAS ALREADY BEEN ASKED THIS QUESTION ABOUT THREE TIMES THAT IF HE WAS TOLD BY GENERAL COUNSEL IT WAS LEGAL, THEN IT SEEMS TO ME THAT THAT HAS A BEARING ON THE QUESTION OF PUNITIVE DAMAGES, IF NOTHING ELSE.
Q. (BY MR. HOOD, CONTINUING)WHAT WAS YOUR UNDERSTANDING OF THE REQUIREMENT?
A. I WAS TOLD DIRECTLY BY INDIVIDUALS I FELT WERE

RESPONSIBLE FOR GUIDING ME AS TO THE LEGALITIES OF MY ACTIONS
THAT IT WAS OUR RESPONSIBILITY TO REPORT POSITIVE URINE DRUG

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SCREENS UNDER THE LAW, PARTICULARLY AS IT' RELATES TO THE CHILD
ABUSE STATUTES. I WAS ALSO TOLD THAT - THAT THE
PROSECUTORIAL OFFICES HAD THE LEGALITY OF - OR THE DISCRETION
THAT THEY COULD PROVIDE AMNESTY AND NOT NECESSARILY ACT ON
THAT REPORT, BUT THAT IT WAS MY RESPONSIBILITY TO REPORT IT.
Q. AND THE SUBSTANCE ABUSE COUNSELING UNDER THE POLICY, WAS
THAT DONE BY THE MEDICAL UNIVERSITY?
A. NO, SIR.
Q. AND THE DIAGNOSIS OF SUBSTANCE ABUSE, PROBLEM WITH A
MATERNAL PATIENT, WAS. THAT DONE BY THE MEDICAL UNIVERSITY?
A. YES, SIR.
Q. BY THE WAY, MS. SHOWERS REMINDED ME, YOU - I DIDN'T ASK
YOU, HOW MANY YEARS YOU GOT THAT GOLDEN APPLE AWARD?
A. I WAS ALWAYS A BRIDE. I NEVER WON IT, BUT I'VE BEEN
NOMINATED A NUMBER OF TIMES.
Q. FIVE TIMES?
A. YES, SIR.
THE COURT: YOU DIDN'T FORGET TO ASK. YOU ASKED HIM
EARLIER.

MR. HOOD: I THOUGHT THAT I DID, TOO. SHE SAID THAT I DIDN'T. I WANTED TO MAKE SURE.

THE COURT: BUT THAT DOESN'T MAKE TEN NOW.

Q. (BY MR. HOOD, CONTINUING) YOU ASKED ABOUT ALCOHOL, IS IT ILLEGAL FOR A MOTHER THAT'S PREGNANT TO DRINK ALCOHOL?

A. NO, SIR.

* * *

[NEWMAN 267]

POPULATION AT MUSC IS DISPARATE FROM THE POPULATION AS A WHOLE AS FAR AS RACIAL BALANCE OR RACIAL MAKEUP?

A. YES, SIR.

Q. AND IN FACT, THE POPULATION OF SOUTH, CAROLINA IN GENERAL TERMS, 30 PERCENT BLACK, 70 PERCENT WHITE?

A. I DON'T KNOW FOR SURE, BUT I WOULD AGREE WITH THAT.

Q. SO, DOCTOR, YOUR SIX-TO-ONE PREVALENCE WOULD BE GATHERED FROM A POPULATION THAT WAS DISPARATE BY 50 PERCENT, FAIR?

A. WELL THAT SIX-TO-ONE NUMBER WAS FROM THAT REPORT.

Q. I MISUNDERSTOOD. I THOUGHT THE TESTIMONY WAS THAT THAT WAS BASED ON YOUR EXPERIENCE?

A. NO, I SAID THAT THAT REPORT WAS CONSISTENT WITH MY EXPERIENCE

Q. SO YOUR EXPERIENCE WAS SIX TO ONE?

A. YES.
Q. IN A POPULATION THAT IS A DISPARATE TO THE POPULATION AS A WHOLE?.
A. YES, I GUESS SO.
Q. NOW, THE NEXT QUESTION, DOCTOR, IS THAT - LET ME CHANGE MY LINE OF THOUGHT, IF I MAY. IN ONE OF THESE THINGS THAT MR. HOOD HELD UP FOR YOU, IT INDICATES THAT ONE OF THE REASONS FOR TESTING URINE FOR DRUGS IS HISTORY OF ALCOHOL ABUSE, FAIR?
DRUG OR ALCOHOL ABUSE?
A. YES, SIR.
Q. SO IF A PATIENT CAME IN PREGNANT WITH A HISTORY OF

[NEWMAN 268]

ALCOHOL ABUSE, THAT WOULD LEAD YOU TO TEST HER FOR DRUGS?
A. THE DRUG TEST THAT WE USED WAS A BROAD-BASED TEST THAT INCLUDED ALCOHOL AS WELL AS NUMEROUS DRUGS.
Q. OKAY. IF SHE TESTED POSITIVE FOR ALCOHOL ABOVE .10, A SIGNIFICANT AMOUNT OF ALCOHOL?
A. YES, SIR.
Q. THAT WOULD BE A DANGER TO FETAL HEALTH, FAIR?
A. YES, SIR.
Q. SHE WAS NOT REPORTED TO THE, POLICE, WAS SHE?
A. NO, SIR.
Q. NOW, DOCTOR, ALCOHOL ABUSE IN PREGNANCY CREATES A

HIGH-RISK OF POOR FETAL OUTCOME, DOESN'T IT?

MR. HOOD: IF THE COURT, PLEASE, OBJECT ON THE GROUND OF RELEVANCY.

THE COURT: I'LL PERMIT HIM TO ASK IT. OBJECTION OVERRULED.

MR. WHERRY: THANK YOU.

Q. (BY MR. WHERRY, CONTINUING) ALCOHOL ABUSE IN PREGNANCY CREATES A HIGH-RISK OF POTENTIAL FOR POOR FETAL OUTCOME, DOESN'T IT?

A. YES, SIR.

Q. NOW, DOCTOR, TO THE FETUS IT MAKES NO DIFFERENCE WHETHER THE ABUSE IS FROM COCAINE, HEROIN, METHAMPHETAMINES OR ALCOHOL, DOES IT?

A. THE DIFFERING DRUGS DO HAVE DIFFERING EFFECTS ON THE

[NEWMAN 269]

FETUS, BUT --

Q: AS FAR AS ABUSE, IT'S ABUSE OR NOT?

MR. HOOD: I OBJECT TO CUTTING HIM OFF.

THE COURT: I THINK IT'S APPROPRIATE. GO AHEAD.

Q. (BY MR. WHERRY, CONTINUING) THAT BEING SAID, ABUSE IS ABUSE, RIGHT?

A. YES.

Q. AND YOU RECOGNIZE YOUR RESPONSIBILITY AS A PHYSICIAN TO

REPORT CHILD ABUSE TO THE POLICE, DIDN'T YOU?
A. WE DID NOT DIMINISH THE IMPORTANCE OF ALCOHOL WHEN WE WOULD IDENTIFY WOMEN WHO WERE ABUSING ALCOHOL WE WOULD DO WHAT WE COULD DO TO TRY TO PREVENT THAT. AND THAT WOULD INCLUDE COUNSELING, REFERRAL TO SOCIAL SERVICES, A RECOMMENDATION TO GO TO SUBSTANCE ABUSE TREATMENT, INSTRUCTIONS AS TO WHAT THE RISKS OF ALCOHOL IS TO A BABY. BUT SINCE ALCOHOL IS NOT AN ILLEGAL SUBSTANCE THERE IS NO - WE DID NOT HAVE RECOURSE.
THE POLICE WEREN'T INTERESTED IN THAT.
Q. DOCTOR, I JUST HAVE ONE MORE QUESTION IN THAT LINE OR ONE MORE GROUP OF QUESTIONS. MY HAND IS NOT AN ILLEGAL THING IS IT?
A. NO, SIR.
Q. BUT IF I BEAT MY CHILD WITH IT, THAT IS ABUSING A CHILD, ISN'T IT?
A. YES, SIR, POTENTIALLY.
Q. AND YOU WOULD REPORT THAT, WOULDN'T YOU?

[NEWMAN 270]

A. YES, SIR.
Q. SO THE FACT THAT THE USE OF ALCOHOL IS NO MORE ILLEGAL THAN THE USE OF MY HAND REALLY HAS NOTHING TO DO WITH THE CHILD THAT IS BEING ABUSED, DOES IT?
A. I GUESS YOU'RE RIGHT, YES.

Q. DOCTOR, POSITIVE FOR AMPHETAMINES WASN'T REPORTED EITHER, WAS IT?
A. TO MY KNOWLEDGE, IT WAS, YES.
Q. TO THE POLICE?
A: YES.
Q. POSITIVE HEROIN"
A. YES.
Q. POSITIVE BARBITURATES?
A. TO MY KNOWLEDGE, YES.
Q. POSITIVE MARIJUANA?
A. NO.
Q. WELL, MARIJUANA IS ILLEGAL, ISN'T IT?
A. YES, IT IS.
Q. HAS THE POTENTIAL FOR POOR, FETAL OUTCOME?
A. THAT'S QUESTIONABLE THE RELATIONSHIP BETWEEN MARIJUANA AND POOR FETAL OUTCOME.
Q. WITH A POLICY, DOCTOR, YOU WOULD AGREE WITH ME THAT THIS POLICY WAS PRIMARILY ADDRESSED TO COCAINE?
A. IT WAS THE DRUG THAT WAS POSITIVE MOST FREQUENTLY IN THIS POLICY AND IT WAS THE DRUG THAT PROBABLY LED US TO OUR CONCERN

[NEWMAN 271]

OVER THESE BAD OUTCOMES. BUT ALL OF THE DRUGS ABUSE WERE HANDLED THE SAME WAY.
Q. PRE-POLICY, BEFORE 10/7, IF YOU HAD AN ABRUPTION, IF YOU HAD MANY OF THE SYMPTOMS THAT YOU HAD ON THE CHART HERE, YOU

WERE NOT ABLE TO DETERMINE, IN MOST CASES, WHETHER IT WAS CAUSED BY TOBACCO, ALCOHOL, AN AMPHETAMINE OR COCAINE, WERE YOU?

A. IF WE DID A URINE DRUG SCREEN WE WOULD DETERMINE IF THE PATIENT HAD CONSUMED ANY OF THOSE DRUGS PRIOR TO THE ABRUPTION.

Q. WELL, PRIOR OR WITHIN 48 HOURS?

A. WITHIN 48 HOURS.

Q. SO IF A PATIENT ABUSED ALCOHOL - WELL, ACTUALLY ALCOHOL WOULDN'T EVEN BE FOR 48 HOURS, WOULD IT?

A. I BELIEVE. THAT YOU'RE RIGHT, YES, IT'S GOING TO BE A SHORTER - SHORTER INTERVAL TO DETECT SIGNIFICANT AMOUNTS OF ALCOHOL.

Q. BECAUSE ALCOHOL DISSIPATES .015 PER HOUR?

A. YES, SIR.

Q. SO .15, AFTER TEN HOURS THERE IS NO ALCOHOL LEFT?

A. PROBABLY NOT.

Q. SO, DOCTOR, AND BY THE WAY, THAT'S TWICE OR THAT'S 50 PERCENT MORE THAN THE LEGAL DRUNK, ISN'T IT?

A. I'M SORRY.

Q. .15 IT'S 50 PERCENT MORE THAN BEING LEGALLY DRUNK?

[NEWMAN 272]

A. I BELIEVE THAT YOU'RE RIGHT, YES.

Q. BUT - SO WITHIN THAT TIME PARAMETER, WE DIDN'T KNOW -

MR. HOOD: I DON'T KNOW WHAT HE JUST SAID, BUT I DON'T THINK I AGREE WITH IT AND I DON'T THINK IT'S RELEVANT. HE IS NOW TALKING ABOUT SOME ALCOHOL STATUTE. IT'S BEYOND THE SCOPE.

THE COURT: I DON'T KNOW WHAT RELEVANCE THAT HAS TO THIS CASE.

MR. WHERRY: CLARIFYING THE DOCTOR'S ANSWER.

THE COURT: I THINK PROBABLY THE TIME FRAME MAYBE HAD SOME MARGINAL RELEVANCE, BUT TO GET INTO A DUI STATUTE THAT HAS TO DO WITH THE PRESUMPTION IN A CRIMINAL CASE, I STRUGGLED WITH THAT FOR YEARS AS TO WHETHER OR NOT THAT STATUTE IS EVEN RELEVANT IN A CIVIL CASE. AND SO -

MR. WHERRY: I'LL MOVE ON.

THE COURT: WELL, LADIES AND GENTLEMEN, DISREGARD IT. I DON'T KNOW WHAT EFFECT IT'S GOING TO HAVE, BUT ALL OF I YOU KNOW WHAT THE LEVEL OF ALCOHOL YOU CAN HAVE IN YOUR BLOOD BEFORE YOU CAN BE ARRESTED FOR DUI, AND THAT'S WHAT HE IS REFERRING TO, BUT THAT DOESN'T HAVE ANYTHING TO DO WITH THIS CASE. PLEASE DISREGARD IT.

Q. (BY MR. WHERRY, CONTINUING) IN THE SOUTH CAROLINA

PREVALENT STUDY THAT YOU REFERRED TO, THAT WAS CONSISTENT WITH YOUR FINDINGS?
A. I DIDN'T HAVE ANY QUARREL WITH IT. WE FOUND THAT COCAINE

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[NEWMAN 279]

THOSE NINE, THE DOCTOR YOU SAID THAT ORDERED IT, ORDERED A URINE DRUG SCREEN, IT WAS WITH THE KNOWLEDGE THAT IF POSITIVE, IT WOULD BE USED FOR MEDICAL PURPOSES AND FORENSIC PURPOSES, THE INFORMATION WILL GO TO SOLICITOR'S OFFICE, CHARLESTON POLICE?
A. I DON'T KNOW IF THE WORD FORENSIC IS CORRECT. WE WERE DOING IT FOR SEVERAL REASONS. MEDICAL PATIENT CARE ISSUES. AND IF THE TEST WAS POSITIVE, DEPENDING ON WHAT POINT IN PREGNANCY THE PATIENT WAS AND IF THEY HAD BEEN POSITIVE BEFORE, THAT INFORMATION WOULD HAVE BEEN FORWARDED TO THE SOLICITOR'S OFFICE. AND THE PATIENTS HAD BEEN NOTIFIED OF THAT POSSIBILITY PRIOR.
Q. PRIOR TO THE URINE SCREEN BEING TAKEN, PRIOR TO THE URINE SAMPLE BEING TAKEN?
A. YES, SIR.
Q. WHEN YOU SAY THAT THEY WERE NOTIFIED. OF THAT, DOCTOR, WAS THERE A DOCUMENT, THAT YOU'RE AWARE OF, THAT WAS SIGNED BY

THEM BEFORE THEY. GAVE THE URINE SAMPLE THAT SAID IN IT IF POSITIVE THIS IS GOING TO GO TO THE POLICE?

A. IN THE ANTEPARTUM CLINICS THAT WAS PART OF THE INFORMATION THAT WAS RELATED TO PATIENTS. AND THEY DID SIGN A DOCUMENT IN THE ANTEPARTUM CLINICS INDICATING THAT-THEY DID RECEIVE THE SUBSTANCE ABUSE INFORMATION AND SEEN THE VIDEO.

Q. AND THE SUBSTANCE ABUSE INFORMATION, DID THAT TELL THEM IT WAS GOING TO GO TO THE POLICE?

[NEWMAN 280]

A. THE LETTER FROM THE SOLICITOR'S OFFICE DOES AND I WOULD HAVE TO LOOK AT IT AGAIN. THERE WAS A LETTER THAT WE PROVIDED FROM YOUR DIVISION REGARDING DRUG USE AND PREGNANCY. I WOULD HAVE TO LOOK AT THAT AND SEE IF IT MENTIONS IT AS WELL.

Q. THE SOLICITOR'S LETTER WAS GIVEN ONLY. AFTER A POSITIVE DRUG SCREEN, WASN'T IT?

A. THAT'S TRUE. I'M SORRY.

Q. THE DOCTOR'S LETTER WAS GIVEN ONLY AFTER POSITIVE DRUG SCREEN, BECAUSE IN FACT IT SAYS YOU HAVE BEEN IDENTIFIED AS HAVING -

A. NO, THERE IS ANOTHER LETTER THAT I BELIEVE THAT WAS GIVEN TO EVERY PATIENT COMING FOR ANTEPARTUM CARE.

Q. THEY WERE ALSO GIVEN, WERE THEY NOT, DOCTOR, A BOOKLET THAT TALKED ABOUT THEIR PRIVACY RIGHTS AT THE HOSPITAL?
A. I BELIEVE SO, YES.
Q. DOCTOR, I THINK IN THE LAST PARAGRAPH OR ONE OF THE LETTERS THAT YOU READ, YOU INDICATED THAT IF - I THINK THE QUOTE WAS, IF IT CAN BE SHOWN TO BE EFFECTIVE, REFERRING TO THE POLICY. WAS THAT BECAUSE, DOCTOR, AT THAT TIME AT THE EARLY STAGES OF THIS POLICY, YOU DIDN'T KNOW WHETHER IT WAS GOING TO BE EFFECTIVE, YOU DIDN'T KNOW WHETHER IT WAS GOING TO WORK OR NOT?
A. I THINK THAT THAT WAS IN THE LETTER THAT WE HAD SENT TO THE MICH COUNCIL IN COLUMBIA. AND IN THAT LETTER IN OTHER -
IN OTHER PARTS, I INDICATED THAT THE PRELIMINARY INFORMATION

[NEWMAN 281]

THAT WE HAD COLLECTED AT THE MEDICAL UNIVERSITY SUGGESTED THAT IT WAS AN EFFECTIVE INTERVENTION, THAT IT WAS REDUCING THE FREQUENCY OF POSITIVE TESTS WITHOUT, IN OUR OPINION, DRIVING ANYBODY AWAY FROM CARE AND WITH AN INCREASED FREQUENCY OF TESTING. I REALIZED, HOWEVER, AS I THINK. WE ALL DID, THAT THIS WAS A - AN EARLY INTERVENTION, AND WITH PRELIMINARY

DATA. SO I THINK I WAS JUST MAKING - MAKING THE APPEAL TO THE MICH COUNCIL THAT THIS IS SOMETHING THAT SHOULD BE PURSUED. THAT THERE IS A GREAT DEAL AT STAKE HERE WE THINK PRELIMINARILY THIS IS EFFECTIVE, BUT WE NEED - IT NEEDS TO BE CONTINUED TO BE LOOKED AT.

Q. DOCTOR, YOU SAID THAT THERE WERE OTHER CASE MANAGERS DOING THE SAME THING BESIDES SHIRLEY BROWN; IS THAT RIGHT?

A. YES, SIR.

Q. WHO, MELISIA HENRY WAS ONE?

A. OTHER CASE MANAGERS, THERE WERE CASE MANAGERS ON THE PEDIATRIC SERVICE OR THE NEONATAL SERVICE THAT I DO NOT KNOW THEIR NAMES. AND THEN FREQUENTLY IF THE NURSE MANAGERS WERE UNAVAILABLE THEY WOULD IDENTIFY SOMEONE TO FILL THAT ROLE IN THEIR ABSENCE.

Q. THAT WOULD BE THE POINT PERSON. THE POINT PERSON FOR CONTACT BETWEEN MUSC AND THE POLICE DEPARTMENT, THE SOLICITOR'S OFFICE WAS SHIRLEY BROWN?

A. OR MELISIA HENRY.

Q. OKAY. CAN YOU JUST ESTIMATE OR APPROXIMATE FOR ME WHAT

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[NEWMAN 285]

DAILY QUESTIONS.

Q. WERE YOU AWARE AT THE BEGINNING OF THIS POLICY OF THE

FEDERAL DRUG TREATMENT CONFIDENTIALITY ACT?
A. NO, SIR.
Q. AND WHEN YOU DISCUSSED THE POTENTIAL FOR THESE RIGHTS BEING VIOLATED AND YOU INQUIRED LIKE YOU DID TO MR. GOOD -
MR. HOOD: THE COURT PLEASE, THIS IS BEYOND THE SCOPE.
MR. WHERRY: JUDGE, THIS IS THE LETTER THAT HE READ IN TOTAL.
THE COURT: GO AHEAD.,
Q. (BY MR. WHERRY, CONTINUING) WHEN YOU WERE CONCERNED ABOUT THESE RIGHTS THAT MIGHT BE VIOLATED AND YOU HAD THESE DISCUSSIONS WHERE YOU WERE TOLD IT WAS PERFECTLY LEGAL WITH PEOPLE, I TAKE IT LIKE MR. GOOD, THE GENERAL COUNSEL OF THE HOSPITAL?
A. YES, SIR, ONE OF SEVERAL INDIVIDUALS.
Q. WHAT OTHER LAW TRAINED INDIVIDUALS ARE YOU TALKING ABOUT IT WITH?
A. PEOPLE FROM THE SOLICITOR'S OFFICE AND HEAD OF THE POLICE DEPARTMENT.
Q. DID ANY OF THOSE PEOPLE ADDRESS THE FEDERAL DRUG CONFIDENTIALITY ACT?
A. NOT TO MY MEMORY, NO.
Q. NOW, THE CONCERNS THAT YOU SAID IN THE LETTERS THAT YOU

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[NEWMAN 287]

Q. THERE IS NONE, SIR. THE JUDGE SUSTAINED THE OBJECTION TO MR. HOOD.
A. SORRY.
Q. YOU INDICATED, I THINK, WHERE MR. HOOD HAD THE CHART UP FOR YOU AND YOU WERE EXPLAINING WHAT HAPPENED IN THE POLICY, I THINK YOU INDICATED THAT IF THEY SUCCESSFULLY COMPLETED TREATMENT, THAT THE - THAT THE - THAT THE PROCESS WAS OVER; IS THAT RIGHT?.
A. MY UNDERSTANDING WAS THAT IT'S AN AMNESTY SITUATION WHERE IT WOULD BE NOT PURSUED BY THE SOLICITOR'S OFFICE OR THE POLICE.
Q. AND THEN I THINK YOU SAID IF THEY DIDN'T SUCCESSFULLY TREAT - COMPLETE THE PROGRAM AND CAME BACK TO THE HOSPITAL WITH ANOTHER POSITIVE UDS, THAT THEY WOULD BE PROSECUTED. WERE BOTH COMPONENTS THERE, THEY HAD TO NOT COMPLETE THE PROGRAM AND HAVE A SECOND POSITIVE DRUG SCREEN?
A. TECHNICALLY THE CRITERIA INDICATE THAT IF THEY FAILED TO FOLLOW THROUGH WITH THE DRUG ABUSE TREATMENT THROUGH THE SUBSTANCE ABUSE AGENCY, THEY COULD HAVE BEEN - THE POLICE WOULD HAVE BEEN NOTIFIED BY THE SUBSTANCE ABUSE AGENCIES AND THEY POTENTIALLY COULD HAVE BEEN SUBJECT TO PROSECUTION.
Q. AND WERE; FAIR?

A. I DO NOT KNOW THAT IN PRACTICE. WHAT I BELIEVE WAS HAPPENING WAS THAT IT WOULD BE A COMBINATION OF BOTH FAILING TO COMPLETE SUBSTANCE ABUSE TREATMENT AND THEN RETURN WITH A

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[NEWMAN 289]

LOT OF THINGS?
A. YES, SIR.
Q. THE DECISION TO REFER THE MATTER TO THE POLICE IF ONE REFUSED TREATMENT OR WAS - OR DID NOT SUCCESSFULLY COMPLETE THE TREATMENT, THE INFORMATION CAME FROM DSS, THE DECISION WAS MADE BY SHIRLEY BROWN WHETHER TO REFER, RIGHT?
A. YOU'LL - I'M NOT SURE THAT I'M FOLLOWING YOU WHAT THIS CHAIN IS. IF SOMEONE DID NOT ATTEND THE SUBSTANCE ABUSE TREATMENT.
Q. OR DIDN'T COMPLETE IT DSS WOULD INFORM SHIRLEY BROWN, RIGHT?
A. WELL, I THINK IT WOULD HAVE INITIATED WITH THE SUBSTANCE ABUSE TREATMENT AGENCY.
Q: I'M SORRY. I DIDN'T MEAN DSS. THE SUBSTANCE ABUSE TREATMENT AGENCY WOULD INFORM SHIRLEY BROWN?
A. I'M NOT SURE WHO THEY CALLED, WHETHER IT WENT THROUGH -
Q. IT WASN'T YOU, WAS IT?

A. NO, SIR. I WOULD HAVE ASSUMED THEY PROBABLY WOULD HAVE CONTACTED THE SOLICITOR'S OFFICE DIRECTLY.

Q. WELL, HAVE YOU NOW BECOME AWARE OF THE FEDERAL DRUG CONFIDENTIALITY ACT?

A. NO, I COULDN'T TELL YOU THE DETAILS.

Q. DOCTOR, ONE LAST AREA OF QUESTIONING WHICH YOU MAY HAVE BEGUN TO REALIZE IT'S INCREDIBLE NO STUDY WAS SET UP TO DETERMINE THE SUCCESS OF THE POLICY AT ANY POINT IN TIME, WAS

[NEWMAN 293]

A. I BELIEVE WHEN I TESTIFIED BEFORE I WAS ASKED THAT QUESTION. I REALLY DIDN'T KNOW. I DON'T BELIEVE THEY WERE. I WAS PERSONALLY CALLED AT ONE TIME BY A STAFF MEMBER FROM ANOTHER HOSPITAL TO INQUIRE ABOUT OUR POLICY BECAUSE THEY WERE DISCUSSING IT, BUT I HAD NO PERSONAL KNOWLEDGE AS TO WHAT THE OTHER HOSPITALS WERE DOING.

Q. AND YOU'RE AWARE THAT THE LAWS OF SOUTH CAROLINA APPLY TO ALL OF THE HOSPITALS IN CHARLESTON NOT JUST YOURS; ISN'T THAT CORRECT?

A YES, SIR. YES, MA'AM. I'M SORRY.

Q. YOU SAID IN RESPONSE TO MR. HOOD'S QUESTION THAT IT WAS NEVER YOUR INTENT TO DISCRIMINATE. ISN'T IT CORRECT THAT

BEFORE YOU PUT THIS POLICY INTO PLACE THAT YOU DID NOT HAVE ANY RESEARCH TO SUGGEST THAT A POLICY OF ARRESTING OR THREATENING ARREST OF PREGNANT COCAINE USERS WOULD IMPROVE THE HEALTH OUTCOME OF UNBORN CHILDREN?

A. I WOULD AGREE WITH THAT IN THE SPECIFIC. I DON'T THINK THERE WAS A LOT OF RESEARCH THAT SUGGESTED ANY PARTICULAR EFFECTIVE APPROACH TO THIS. AND MOST PEOPLE WHO WOULD WRITE ON THIS TOPIC WOULD EXPRESS FRUSTRATION IN THE FAILURE TO FIND SUCCESSFUL INTERVENTIONS.

Q. AND DID YOU MAKE - YOU DIDN'T MAKE A WHOLE LITERATURE REVIEW, DID YOU, FOR TREATMENT OF SUBSTANCE-ABUSING WOMEN?

A. NOT A WHOLE LITERATURE REVIEW, BUT WE'RE CERTAINLY FAMILIAR WITH A LOT OF THE LITERATURE IN THE OBSTETRICAL

[NEWMAN 294]

JOURNALS.

Q. IN OBSTETRICAL JOURNALS, BUT NOT IN, FOR EXAMPLE, THE CENTER FOR SUBSTANCE PREVENTION ISN'T THAT CORRECT?

A. NO, MA'AM. BUT I WOULD SUGGEST A NUMBER OF PEOPLE WHO WRITE IN THOSE ARTICLES, AS OPPOSED TO SUBSTANCE ABUSE IN PREGNANCY, WOULD ALSO WRITE IN THE OBSTETRICAL LITERATURE. DR. CHASNOFF BEING ONE EXAMPLE.

Q. AND YOU DIDN'T REVIEW LITERATURE ON THE NATIONAL INSTITUTE ON DRUG ABUSE CONCERNING SUBSTANCE ABUSE?.
A. NO, MA'AM.
Q. AND YOU DIDN'T CONSULT WITH LOIS HAYNES, THE STATE PERSON IN CHARGE OF WOMEN AND DRUG USE?
A. I DID NOT PERSONALLY, NO.
Q. AND WOULDN'T IT BE FAIR TO SAY, DR. NEWMAN, THAT YOU WOULDN'T PRESCRIBE A DRUG TO A PATIENT IF THERE HAD BEEN NO RESEARCH ON ITS EFFECTIVENESS OR ITS INEFFECTIVENESS?
A. I WOULD SAY THAT'S TRUE.
Q. AND ISN'T IT CORRECT THAT YOU WOULDN'T PERFORM A NEW MEDICAL PROCEDURE, UNTESTED PROCEDURE WHERE THERE WAS NO RESEARCH WHAT IT WOULD DO TO THAT PATIENT; ISN'T THAT CORRECT?
A. IN GENERAL I WOULD SAY YES.
MS. PALTROW: I HAVE NO FURTHER QUESTIONS.
(EXCERPT COMPLETE.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF DARLENE NICHOLSON

[NICHOLSON 274]

(TESTIMONY OF DARLENE NICHOLSON,
12-5-96.)
- - -
DARLENE NICHOLSON, PLF. WITNESS, SWORN.
DIRECT EXAMINATION
BY MR. WHERRY:
Q. MS. NICHOLSON, WHERE DO YOU LIVE, PLEASE?
A. I'M SORRY?
Q. WHERE DO YOU LIVE?
A. NORTH CHARLESTON.
Q. AND HOW OLD ARE YOU?
A. THIRTY-SIX.
Q. WHAT IS YOUR DATE OF BIRTH?
A. 9/26/61.
Q. OKAY. NOW I ASK YOU TO SPEAK UP SO THE JURY CAN HEAR YOU.
IN 1994, DID YOU HAVE A BABY?
A. YES, I DID.
Q. WHAT DATE?
A. FEBRUARY 21ST.
Q. OKAY. AND WHERE DID YOU HAVE THAT BABY?
A. MEDICAL UNIVERSITY.
Q. OF SOUTH CAROLINA?
A. SOUTH CAROLINA.

Q. WHERE DID YOU GET YOUR PRENATAL CARE?
A. THE MEDICAL UNIVERSITY OB-GYN CLINIC.

[NICHOLSON 275]

Q. WHY DID YOU GO THERE?
A. IT WAS THE ONLY PLACE THAT I COULD GO BECAUSE OF MY INSURANCE, WHICH WAS MEDICAID.
Q. NOW, PRIOR TO YOUR PREGNANCY WERE YOU REGULARLY USING DRUGS AT SOME POINT IN TIME IN YOUR LIFE?
A. YES, I WAS.
Q. WHAT DRUGS?
A. HEROIN.
Q. OKAY. DID THERE COME A POINT IN TIME IN WHICH YOU SOUGHT HELP FOR YOUR HEROIN PROBLEM?
A. YES, SIR.
Q. AND WHAT WAS THE NATURE OF THE HELP THAT YOU RECEIVED?
A. I GOT ON THE METHADONE CLINIC.
Q. EXPLAIN TO THE JURY WHAT THE METHADONE CLINIC IS?
A. IT'S A MAINTENANCE PROGRAM. IT'S SUPPOSED TO BE TO KEEP HEROIN ADDICTS OFF THE STREET SO THEY CAN MAINTAIN A NORMAL LIFE-STYLE WITHOUT GETTING SICK.
Q. AND IS METHADONE A DRUG?
A. YES, IT IS.
Q. ARE YOU PRESCRIBED THAT DRUG?
A. YES, YOU ARE.
Q. WERE YOU?
A. YES, I WAS.
Q. HOW FREQUENTLY DID YOU TAKE IT?

A. ONCE A DAY EVERY DAY.

[NICHOLSON 276]

Q. AND DID YOU GET A MONTH SUPPLY OR DID YOU HAVE TO GO SOME PLACE DAILY?
A. I HAD TO GO EVERY DAY TO TAKE IT.
Q. PRIOR TO YOUR GETTING PREGNANT, WERE YOU FAITHFULLY TAKING YOUR METHADONE?
A. YES, I WAS.
Q. WHAT DOES METHADONE DO TO YOU? WHAT DID IT - WHAT DID IT DO TO YOU? WHAT EFFECT DID IT HAVE ON YOU?
A. IT KEPT ME FROM BEING SICK.
Q. SICK HOW?
A. PHYSICALLY, FROM THE HEROIN.
Q. WELL DESCRIBE THE HEROIN SICKNESS.
A. IT'S - IT'S A VERY PHYSICAL SICKNESS. YOU - YOU CAN'T FUNCTION WITHOUT IT. IT'S REALLY HARD TO EXPLAIN. YOU JUST CAN'T DO ANYTHING. YOU CAN'T - YOU GET NAUSEATED TO YOUR STOMACH, YOUR BODY HURTS, YOUR BONES HURT. YOU JUST CAN'T DO ANYTHING UNTIL YOU HAVE IT IN YOUR SYSTEM.
Q. AND DOES METHADONE QUELL THAT?
A. YES, IT DOES.
Q. DO YOU REMEMBER APPROXIMATELY THE FIRST TIME OR THE FIRST DATE THAT YOU WENT FOR PRENATAL CARE TO MUSC?
A. NO, SIR, I CAN'T SAY THAT I DO.

Q. AT THAT TIME IN ADDITION TO THE METHADONE, DID YOU TAKE ANY OTHER DRUGS?
A. I WAS USING COCAINE

[NICHOLSON 277]

Q. WHY?
A. THE METHADONE MADE ME VERY TIRED AND SLEEPY. I REALLY DIDN'T KNOW WHAT TO DO BECAUSE IT SEEMED LIKE I COULDN'T FUNCTION WITH IT AND I COULDN'T FUNCTION WITHOUT IT, I HAD NO ENERGY. SO I WOULD KIND OF USE THE COCAINE TO BALANCE MYSELF OUT TO BALANCE MY SYSTEM SO I THOUGHT SO THAT I WOULD HAVE THE ENERGY TO DO WHAT I NEEDED TO DO DURING THE COURSE OF THE DAY.
Q. DID THERE COME A POINT IN TIME IN THE COURSE OF YOUR PRENATAL TREATMENT WHEN YOU MET NURSE BROWN?
A. YES, SIR.
Q. DESCRIBE FOR THE JURY WHAT THAT WAS LIKE AND WHAT HAPPENED, PLEASE.
A. I BELIEVE IF I'M NOT MISTAKEN I WAS IN MY SEVENTH MONTH OF PREGNANCY. I WAS GOING PRETTY REGULARLY TO MY PRENATAL VISITS. I WENT IN FOR A REGULAR DOCTOR VISIT. AND THEY EXAMINED ME AND TOLD ME THAT I WAS DEHYDRATED. THE NURSE DID. I CAN'T RECALL HER NAME. THAT I NEEDED TO GO TO THE

MAIN HOSPITAL TO GET HOOKED UP TO GLUCOSE.

MR. HOOD: IF THE COURT PLEASE, I MOVE TO STRIKE THE ANSWER AS NOT BEING RESPONSIVE TO THE QUESTION. OBVIOUSLY SHE DOESN'T KNOW THE ANSWER TO THE QUESTION.

THE COURT: WHAT WAS THE QUESTION?

MR. WHERRY: I ASKED HER TO DESCRIBE HER ENCOUNTER WITH NURSE BROWN, WHICH I BELIEVE SHE IS LEADING UP TO EXPLAINING HOW SHE GOT TO HER, BUT THE OBJECTION NONRESPONSIVE

[NICHOLSON 278]

I THINK IS ONLY AVAILABLE TO THE PERSON THAT ASKED THE QUESTION.

MR. HOOD: SHE IS GOING INTO HEARSAY NOW.

THE COURT: NO, I DON'T THINK SO. DOES THIS EXPLANATION INVOLVE NURSE BROWN?

THE WITNESS: IT'S HOW I COME TO MEET HER, YES, SIR.

Q. (BY MR. WHERRY, CONTINUING) GO AHEAD.

A. LIKE I WAS SAYING, I WAS TOLD TO GO TO THE MAIN HOSPITAL, THEY SAID I WAS DEHYDRATED AND I NEEDED TO BE HOOKED UP TO GLUCOSE.

WELL, I WENT OVER TO THE MAIN HOSPITAL AND THEY PUT

ME IN A ROOM. AND I SAT THERE FOR A FEW-MINUTES BEFORE ANYBODY CAME IN. AND WHEN THEY CAME IN THEY TOLD ME TO DRINK LOTS OF WATER. THEY KEPT HAVING ME DRINK WATER. I ASKED THEM IF I WAS TO BE HOOKED UP TO THE GLUCOSE MACHINE. I DIDN'T GET NO ANSWER, THEY JUST TOLD ME TO KEEP DRINKING WATER. WELL THEY CAME BACK IN, I DON'T REMEMBER THE TIME FRAME BUT - AND TOLD ME TO USE THE BATHROOM IN A CUP. AND I ASKED WHAT FOR. AND THEY SAID TO SEE IF I HAD ENOUGH FLUID IN MY SYSTEM SO THEY COULD SEND ME HOME. SO I DID THIS. I USED THE RESTROOM IN THE CUP.

I GUESS ABOUT 15 MINUTES LATER IS WHEN MS. BROWN CAME IN AND THAT'S THE FIRST TIME I HAD EVER MET HER. AND SHE TOLD ME THAT I HAD TESTED POSITIVE FOR COCAINE. AND ASKED ME IF I REALIZED THAT I HAD A PROBLEM. AND I SAID YES I KNEW I

[NICHOLSON 279]

HAD A PROBLEM. SHE SAID THAT I - ASKED ME IF I WOULD BE WILLING TO GO INTO TREATMENT. AND I TOLD HER THAT I WOULD GO INTO TREATMENT. I - SHE WENT OUT THE ROOM AND SAID THAT SHE HAD TO MAKE SOME PHONES CALLS. AND SHE CAME BACK IN, I WASN'T WILLING TO GO RIGHT AT THAT TIME.

Q. WHY?
A. I HAD A SEVEN YEAR OLD AT HOME THAT WAS SUPPOSED TO BE GETTING HOME FROM SCHOOL, THERE WAS NO ONE THERE TO TAKE CARE OF HIM. SHE SAID THAT I COULD EITHER GO THEN OR I WOULD BE ARRESTED.
Q. LET ME STOP YOU THERE. WHO IS SHE?
A. SHIRLEY BROWN.
Q. WHEN WAS THEN, GO THEN?
A. RIGHT THAT MINUTE. I - LET'S SEE, MY LITTLE BOY USUALLY GOT HOME AROUND 2:30 I BELIEVE, SO THIS MUST HAVE BEEN LIKE 2, QUARTER AFTER MAYBE.
Q. OKAY. WHAT DID YOU SAY WHEN SHE TOLD YOU THAT YOU HAD TO GO RIGHT THEN RIGHT THAT MINUTE?
A. I EXPLAINED TO HER ABOUT MY SON COMING HOME FROM SCHOOL AND THAT I WOULD NEED TO MAKE PREPARATIONS.
Q. DID SHE TELL YOU WHERE YOU WERE GOING FOR TREATMENT?
A. MEDICAL UNIVERSITY.
Q. INPATIENT OR OUTPATIENT?
A. INPATIENT.
Q. DID SHE TELL YOU WHAT DEPARTMENT?

[NICHOLSON 280]

A. NO. I DON'T BELIEVE SO.
Q. OKAY. WHAT DID SHE SAY WHEN YOU TOLD HER THAT YOU HAD TO GO HOME AND TAKE CARE OF YOUR BABY, YOUR CHILD?

A. THAT IF I DIDN'T GO INTO TREATMENT THEN THAT I WOULD BE ARRESTED. I OFFERED --
Q. AGAIN, WHAT DATE WAS THIS? WHAT MONTH?
A. IT WAS DECEMBER.
Q. OF WHAT YEAR?
A. '94.
Q. DO YOU REMEMBER ABOUT WHEN IN THAT MONTH?
A. I'M SORRY. IT WAS '93, BECAUSE HE WAS BORN FEBRUARY.
Q. YES. OKAY.
A. I'M SORRY.
Q. DO YOU REMEMBER WHEN IN THAT MONTH, BEGINNING, MIDDLE, END?
A. MAYBE THE 17TH I THINK.
Q. OKAY. WHEN SHE TOLD YOU THAT YOU DID NOT GO INTO THE INPATIENT TREATMENT RIGHT THEN OR YOU WOULD BE ARRESTED, WHAT DID YOU SAY?
A. I ASKED IF I COULD BE ESCORTED HOME JUST LONG ENOUGH TO TALK TO MY SON. BECAUSE I'M VERY CLOSE TO MY SON, HE HAS NEVER REALLY BEEN AWAY FROM ME BEFORE OTHER THAN TO GO TO HIS GRANDPARENTS' ON THE WEEKEND OR SOMETHING, BUT HE ALWAYS KNEW WHERE HIS MOMMY WAS.
Q. WHAT DID NURSE BROWN SAY?

[NICHOLSON 281]

A. I WAS NOT ALLOWED TO GO.
Q. WHAT HAPPENED TO YOU?

A. I WAS ESCORTED OVER TO MEDICAL UNIVERSITY, AND I WAS SCARED. I WAS TERRIFIED. I TRIED TO LEAVE. I JUST WANTED TO BE ABLE TO EXPLAIN TO HIM, YOU KNOW, THAT MOMMY WAS GOING IN THE HOSPITAL. AND JUST TO MAKE ARRANGEMENTS TO MAKE SURE THAT HE WOULD BE OKAY WHILE I WAS IN THE HOSPITAL.

Q. WERE YOU ABLE TO?

A. NO, I WAS NOT. AND WHEN I TRIED TO LEAVE, THEY SHUT THE DOOR SO I WAS NOT ALLOWED TO LEAVE.

Q. DO YOU KNOW WHAT HAPPENED TO YOUR SON THAT AFTERNOON?

A. MY BOYFRIEND WAS ABLE TO GET IN TOUCH WITH HIS MOTHER AND SHE PICKED HIM UP. AND THEY DIDN'T EXPLAIN TO HIM WHAT WAS GOING ON BECAUSE THEY WEREN'T QUITE SURE.

Q. WAS HE WITH YOU AT THE HOSPITAL?

A. NO, HE WAS NOT. HE WAS AT SCHOOL. MY BOYFRIEND WAS, YES.

Q. ALL RIGHT. HOW LONG DID YOU STAY IN THE HOSPITAL?

A. THIRTY DAYS.

Q. AT THE RISK OF ASKING A LEADING QUESTION, I TAKE IT THEN YOU WERE RELEASED SOMETIME IN THE MIDDLE OF JANUARY?

A. RIGHT.

Q. WHEN YOU WERE RELEASED IN THE MIDDLE OF JANUARY I'M SORRY, BETWEEN THE MIDDLE OF DECEMBER AND THE MIDDLE OF

JANUARY, DID YOU RECEIVE ANY PRENATAL CARE WHILE YOU WERE AN

[NICHOLSON 282]

INPATIENT?
A. YES.
Q. WOULD YOU DESCRIBE GENERALLY THAT PRENATAL CARE.
A. I WAS TAKEN OUT TO MY PRENATAL VISITS TO THE OB-GYN CLINIC DURING MY INPATIENT TREATMENT.
Q. HOW WERE YOU DISCHARGED 30 DAYS LATER, WHAT HAPPENED THAT CAUSED YOU TO BE ABLE TO GET OUT?
A. THAT'S AS LONG AS THE INSURANCE WOULD COVER - WAS 30 DAYS.
Q. WERE YOU FREE TO LEAVE DURING THAT 30-DAY PERIOD?
A. NO, I WAS NOT.
Q. AND WHEN THE INSURANCE EXPIRED AFTER 30 DAYS, YOU WERE THEN FREE TO LEAVE?
A. RIGHT.
Q. WHERE DID YOU GO AFTER YOUR INSURANCE EXPIRED AND THEY LET YOU GO?
A. I BELIEVE I WENT BACK TO MY IN-LAWS. OR TO MY IN-LAWS.
Q. I'M JUST THINKING, BUT JUST BEAR WITH ME FOR MOMENT. I'M TRYING TO PHRASE A QUESTION IN MY MIND. DO YOU KNOW WHAT WOULD HAVE HAPPENED TO YOU IF YOU HADN'T HAD INSURANCE COVERAGE?
MR. HOOD: IF THE COURT PLEASE, THAT'S ABSOLUTE SPECULATION.

THE COURT: I SUSTAIN THE OBJECTION.
Q. (BY MS. WHERRY, CONTINUING) AFTER YOU WE DISCHARGED YOU SAID THAT YOU WENT TO YOUR IN-LAWS?

[NICHOLSON 283]

A. RIGHT.
Q. WHEN WAS YOUR NEXT ASSOCIATION WITH MUSC OR SHIRLEY BROWN?
A. WITH SHIRLEY BROWN OR WITH MUSC?
Q. EITHER ONE.
A. WELL, I CONTINUED TO GO TO MY PRENATAL VISITS. THERE WAS A TIME THAT I DID NOT GO LIKE I WAS SUPPOSED TO GO TO MY PRENATAL VISITS BECAUSE I GOT SCARED.
Q. WHY WERE YOU SCARED?
A. BECAUSE I HAD - WAS USING. THEY HAD - BECAUSE MY PREGNANCY, THE METHADONE, THEY HAD LOWERED MY DOSAGE ON THE METHADONE AND I WAS GETTING SICK, SO I STARTED USING ANOTHER OPIATE TO MAKE UP FOR THAT, SO.
Q. WHAT OTHER OPIATE?
A. PERCODAN.
Q. WHAT OTHER OPIATE?
A. PERCODAN.
Q. THAT'S A PRESCRIPTION MEDICATION?
A. RIGHT.
Q. AND WHAT WERE YOU SCARED ABOUT?
A. BECAUSE OF WHAT HAPPENED BEFORE I - IT JUST TERRIFIED

ME. I DIDN'T KNOW WHAT WOULD HAPPEN NEXT, I DIDN'T WANT TO BE LOCKED UP.

Q. SO YOU DIDN'T GO FOR PRENATAL CARE?

A. DURING A PERIOD OF TIME, RIGHT.

[NICHOLSON 284]

Q. WHEN WAS THE NEXT TIME YOU WENT FOR PRENATAL CARE OR NEXT THING THAT HAPPENED?

A. THE METHADONE CLINIC FOUND OUT I WAS NOT GOING FOR MY PRENATAL CARE, SO I WAS NOT ALLOWED TO PICK UP MY METHADONE UNTIL AFTER I RECEIVED MY PRENATAL CARE. SO I HAD TO START GOING BACK IN ORDER TO GET MY METHADONE.

Q. AND WHAT HAPPENED WHEN YOU WENT BACK?

A. I WAS - I DON'T REALLY RECALL. I WAS TOLD BY MY DOCTOR OR MIDWIFE AT THE TIME THAT I NEEDED TO STAY CLEAN BECAUSE SHIRLEY BROWN WAS ON HER BACK ABOUT ME AND -

MR. HOOD: COURT PLEASE, I MOVE TO STRIKE THAT AS NONRESPONSIVE.

THE COURT: I THINK IT WAS.

MR. WHERRY: THANK YOU.

Q. CONTINUE.

THE COURT: LADIES AND GENTLEMEN, STRIKE THE ANSWER IN ITS ENTIRETY. I DON'T THINK IT WAS RESPONSIVE. AND EVEN

IF IT WERE, I'M NOT SURE THAT IT'S ADMISSIBLE. SO LET'S - YOU WANT TO EXPLORE IT AT THE SIDEBAR, I'LL BE GLAD TO DO IT, BUT.

MR. WHERRY: YES, SIR, MAY I.

THE COURT: IT SEEMS TO ME THAT IT CAN'T - I JUST DON'T KNOW HOW IT COULD HAVE ANY PROBATIVE VALUE EXCEPT FOR IT'S TRUTH, AND IT SEEMS TO ME THAT IT'S HEARSAY.

Q. (BY MR. WHERRY, CONTINUING) AS THE RESULT OF WHAT THIS

[NICHOLSON 285]

MIDWIFE TOLD YOU, WHAT DID YOU DO?

A. I PUT MYSELF BACK INTO TREATMENT. I WENT BACK INTO -

Q. WHERE?

A. MEDICAL UNIVERSITY.

Q. THE SAME PLACE YOU HAD JUST GOTTEN OUT OF?

A. RIGHT.

Q. AND DID YOU HAVE ANY CONTACT WITH SHIRLEY BROWN THERE?

MR. HOOD: IF THE COURT PLEASE, I'M GOING TO OBJECT TO LEADING.

Q. (BY MR. WHERRY, CONTINUING) AFTER YOU PUT YOURSELF BACK IN, WHAT HAPPENED NEXT?

A. I STAYED IN UNTIL AFTER I HAD MY BABY.

Q. WHEN DID YOU HAVE YOUR BABY?

A. FEBRUARY 21ST.

Q. DESCRIBE HAVING THE BABY.

A. I WAS IN - I WAS IN TREATMENT WHEN I WENT INTO LABOR. THEY TOOK ME OVER TO THE EMERGENCY ROOM AND - OVER TO THE MAIN HOSPITAL AND I HAD MY BABY.
Q. DID YOU HAVE CONTACT WITH ANY HUMAN BEINGS DURING THAT PROCESS?
A. THE LADY THAT TOOK ME OVER THERE TO HAVE THE BABY, THE NURSE MIDWIFE WHO HAD SEEN ME THROUGH MY PRENATAL CARE VISITS, AND A FRIEND OF MINE THAT WAS IN TREATMENT WITH ME HAD CALLED MY BOYFRIEND TO LET HIM KNOW THAT I HAD WENT INTO LABOR AND HE WAS THERE.

[NICHOLSON 286]

Q. AFTER YOU HAD YOUR BABY, WHAT HAPPENED?
A. THE NEXT MORNING IT WAS THE NEXT TIME THAT I SAW SHIRLEY BROWN.
Q. WHAT HAPPENED WHEN YOU SAW HER?
A. SHE -
Q. THIS IS THE MORNING AFTER YOU HAD YOUR BABY?
A. IF I'M NOT MISTAKEN. YES, SIR, IT MUST HAVE BEEN.
Q. WHAT HAPPENED?
A. SHE CAME INTO THE ROOM AND SHE APPARENTLY HAD CALLED DSS. AND THEY TOLD ME THAT I COULD NOT TAKE MY BABY HOME WITH ME.
Q. WHO TOLD YOU THAT?

A. SHIRLEY BROWN TOLD ME THAT. AND DSS ALSO PHONE CALLED ME THAT SAME DAY AND TOLD ME THAT I COULD NOT TAKE MY BABY HOME.
Q. WHAT WAS THE NEXT THING THAT HAPPENED?
A. I - I WENT BACK INTO TREATMENT AFTER THAT AND THE BABY STAYED IN THE HOSPITAL.
Q. HOW LONG WERE YOU IN TREATMENT?
A. MAYBE A WEEK AFTERWARDS TO COMPLETE MY 30 DAYS.
Q. AND THEN WHAT HAPPENED?
A. I WAS ALLOWED - BECAUSE I WAS CLEAN DURING THAT TIME I WAS ALLOWED TO TAKE THE BABY HOME WITH ME. I HAD SPOKEN TO MY LAWYER AND, YOU KNOW.
Q. AT MUSC, DID YOU HAVE ANY OTHER MEDICAL TREATMENT AT ABOUT THAT SAME PERIOD OF TIME?

[NICHOLSON 287]

A. UMM, I - I DON'T UNDERSTAND WHAT YOU -
Q. OKAY. DID YOU HAVE ANY CONVERSATION WITH SHIRLEY BROWN OR ANYONE AT MUSC CONCERNING YOUR ABILITY TO CONCEIVE MORE CHILDREN?
A. I HAD - I HAD A NORPLANT PUT IN.
Q. WHAT IS A NORPLANT?
A. IT'S - IT'S A BIRTH CONTROL DEVICE PUT IN YOUR ARM.
Q. WHAT - WHERE DID YOU LEARN ABOUT THE NORPLANT?
A. MUSC.

Q. WHO TOLD YOU?
A. THIS ALL HAPPENED SO QUICKLY. IT WAS THE VERY NEXT MORNING AFTER I HAD THE BABY WAS THE FIRST TIME I HEARD ABOUT IT.
Q. YES, MA'AM.
A. I'M GOING TO GO BACK A MINUTE. PREVIOUSLY I HAD SIGNED PAPERS SAYING THAT I WOULD HAVE MY TUBES TIED.
Q. WHY DID YOU SIGN THOSE PAPERS?
A. BECAUSE THEY WANTED ME TO.
Q. WHO IS THEY?
A. THE MEDICAL UNIVERSITY.
Q. WHO IS THEY?
A. I DON'T RECALL. I GUESS IT WAS THE NURSE MIDWIFE I HAD TALKED TO.
MR. HOOD: I MOVE TO STRIKE THE ANSWER.
THE COURT: YOU SAID THAT YOU GUESS. LADIES AND

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[NICHOLSON 297]

MR. WHERRY: THANK YOU, SIR.
Q. (BY MR. WHERRY, CONTINUING) I LOST MY TRAIN OF THOUGHT. YOU SAW THE FILM, YOU TOLD THE NORPLANT PEOPLE THAT YOU DIDN'T WANT TO HAVE THE NORPLANT?
MR. HOOD: OBJECTION, LEADING.
THE COURT: I THINK THAT SHE WAS AT THAT POINT, WE CAN READ THE RECORD BACK, BUT I THINK SHE WAS AT THAT POINT

WHERE YOU HAD ASKED HER AS A RESULT OF WHAT YOU SAW ON THE FILM, WHAT DID YOU TELL THESE PEOPLE AND THEN I THINK YOU ASKED WHAT - YOU WERE AT THAT POINT OF SAYING WHAT DID THEY RESPOND.

MR. WHERRY: YES. THAT WAS MY PRELIMINARY QUESTION TO LEAD TO THAT.

Q. (BY MR. WHERRY, CONTINUING) AFTER YOU TOLD THEM YOU DIDN'T WANT THE NORPLANT, WHAT DID THEY SAY TO YOU?

A. THEY TOLD ME THAT BEFORE I COULD LEAVE THE HOSPITAL I NEEDED TO HAVE IT DONE. THAT'S WHAT WAS TOLD TO ME.

Q. HAVING BEEN TOLD THAT, WHAT DID YOU DO?

A. I HAD IT DONE.

Q. THAT WAS IN WHAT YEAR?

A. '94.

Q. DO YOU STILL HAVE THE NORPLANT?

A. NO, I DON'T.

Q. WHY?

A. MY HEPATITIS HAS GOTTEN BAD OVER THE PAST FEW YEARS, MY

[NICHOLSON 298]

ENZYMES WENT UP REAL HIGH AND MY DOCTOR REQUESTED THAT IT BE TAKEN OUT.

Q. WHEN WAS IT TAKEN OUT?

A. THIS YEAR.

MR. HOOD: YOUR HONOR, PLEASE, THIS IS HEARSAY.

MR. WHERRY: WHEN IT WAS TAKEN OUT IS NOT HEARSAY.
THE COURT: SAY WHAT?
MR. WHERRY: MY QUESTION WAS WHEN WAS IT TAKEN OUT. THAT'S NOT HEARSAY.
THE COURT: NO, I DON'T THINK IT IS, BUT - OKAY.
MR. HOOD: HER RESPONSE TO THE QUESTION WAS -
THE COURT: HER RESPONSE WAS THAT HER DOCTOR SAID TO TAKE IT OUT. AND I DON'T THINK THAT THAT HAS ANY ASSERTION IN IT TO BE HEARSAY. SO I OVERRULE THE OBJECTION.
Q. (BY MR. WHERRY, CONTINUING) THANK YOU. WHEN WAS IT TAKEN OUT?
A. THIS YEAR I BELIEVE JANUARY. I'M NOT POSITIVE.
Q. NOW, JUST ONE LAST AREA OF QUESTIONING, MS. NICHOLSON. ALL THAT YOU HAVE TOLD US HERE ON THE WITNESS STAND, WHAT EFFECT HAS THAT HAD ON YOUR LIFE AS YOU WERE GOING THROUGH IT AND WHAT EFFECT DOES IT HAVE ON YOUR LIFE NOW AS YOU GO FORWARD?
A. I HAVE ANXIETY AND PANIC ATTACKS AND IT'S - THEY HAVE GOTTEN WORSE. BECAUSE OF MY LIVER I'M SUPPOSED TO GO TO DOCTOR ON A REGULAR BASIS, AND I STILL - I STILL DON'T GO

LIKE I SHOULD.
Q. WHY?
A. I GET - I GET SICK TO MY STOMACH. I THROW UP. I GET TO WHERE I CAN'T BREATHE. I TRY TO MAKE IT. I CAN'T GO BY MYSELF, I HAVE TO HAVE SOMEONE GO WITH ME. I TRY TO GO AS OFTEN AS I'M SUPPOSED TO BECAUSE I NEED TO BE THERE. THE LAST TIME I WENT I HAD TO WALK OUT. MY BOYFRIEND WAS WITH ME. I WAS SITTING IN THE WAITING ROOM AND I JUST GOT SO NERVOUS AND UPSET AND I COULDN'T BREATHE. I LEFT. I MEAN, I HAVE - I HAVE NIGHTMARES. I JUST - AND MY LITTLE BOY, ANYTIME I GO ANYWHERE HE IS SCARED TO DEATH THAT I'M NOT GOING TO COME BACK HOME.
Q. HOW DOES THAT MAKE YOU FEEL?
MR. HOOD: OBJECT TO LEADING.
A. TERRIBLE.
Q. HOW DOES THAT MAKE YOU FEEL?
MR. WHERRY: IT'S NOT LEADING.
THE COURT: GO AHEAD.
A. IT SCARES ME BECAUSE I CAN'T CONTROL IT. I CAN'T CONTROL WHEN THIS THING - WHEN I GET LIKE THAT, I DON'T WANT TO BE THAT WAY. I'M TERRIFIED OF HOSPITALS. I MEAN, I DON'T WANT TO BE THIS WAY.
Q. DID YOU HAVE THOSE FEELINGS BEFORE WHAT YOU EXPERIENCED

WHATYOU REPORTED TO US IN YOUR TESTIMONY?
A. NO. NO, I DID NOT. I NEVER PARTICULARLY LIKED GOING TO

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[NICHOLSON 303]

MINE, BUT I WAS WRONG.
(SIDEBAR TERMINATED.)
THE COURT: WE'RE GOING TO TAKE A BREAK AT FOUR.
LET'S JUST TAKE IT NOW AND IT MIGHT MAKE IT EASIER. TAKE
ABOUT 15 OR 20 MINUTES.
(WHEREUPON, A BREAK WAS TAKEN OFF THE RECORD.)
THE COURT: I BELIEVE WE'RE READY FOR
CROSS-EXAMINATION.
MS. CRAIG: YOUR HONOR, I WOULD LIKE TO PUT
PLAINTIFF NICHOLSON'S MEDICAL RECORDS IN EVIDENCE PLEASE. THE
SUBSTANCE ABUSE RECORDS SUBJECT TO YOUR RULING.
THE COURT: MEDICAL RECORDS AND SUBSTANCE ABUSE
RECORDS OFFERED AND RECEIVED UNDER THE CONDITIONS WE HAVE ALL
OF OTHERS.
MR. WHERRY: YES, SIR.
DEPUTY CLERK: 67 AND 71.
MS. CRAIG: GOOD AFTERNOON, MS. NICHOLSON.
CROSS-EXAMINATION
BY MS. CRAIG:
Q. HOW LONG HAVE YOU BEEN USING DRUGS, MS. NICHOLSON?

A. I GUESS SINCE I WAS ABOUT 13.
Q. HOW OLD? I'M SORRY.
A. THIRTEEN.
Q. THIRTEEN. AND IN OCTOBER OF 1989 YOU ACKNOWLEDGED THAT YOU WERE ADDICTED TO HEROIN AND VOLUNTARILY WENT TO SUBSTANCE

[NICHOLSON 304]

ABUSE TREATMENT AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION; IS THAT CORRECT?
A. CORRECT.
Q. OKAY. THE MEDICAL UNIVERSITY HAD NOTHING TO DO WITH YOUR. VOLUNTARY ADMISSION TO CHARLESTON COUNTY SUBSTANCE ABUSE; IS THAT CORRECT?
A. RIGHT.
Q. AND AS PART OF YOUR SUBSTANCE ABUSE TREATMENT AT CHARLESTON COUNTY SUBSTANCE ABUSE, YOU RECEIVED METHADONE DAILY; IS THAT CORRECT?
A. CORRECT.
Q. NOW I'M GOING TO JUMP FROM 1989 TO YOUR PREGNANCY WITH JUSTIN. YOU WERE PREGNANT IN 1983 AND THEN DELIVERED IN 1994? RIGHT?
A. RIGHT.
Q. OKAY. AND FROM 1989 THROUGH 1994 YOU CONTINUED TO TAKE METHADONE?
A. RIGHT.
Q. NOW YOU ADMITTED USING COCAINE WHILE PREGNANT WITH JUSTIN; IS THAT CORRECT?

A. CORRECT.
Q. AND YOU ALSO ADMITTED TO USING HEROIN WHILE PREGNANT WITH JUSTIN?
A. NO. PERCODAN.
Q. YOU DID NOT USE HEROIN WHEN YOU WERE PREGNANT WITH

[NICHOLSON 305]

JUSTIN?
A. NO.
Q. JUST A MINUTE, PLEASE.
MR. WHERRY: MAY I HAVE THE PAGE AND LINE NUMBER, PLEASE.
MS. CRAIG: YOU SURE MAY.
Q. (BY MS. CRAIG, CONTINUING) MS. NICHOLSON, THIS IS YOUR DEPOSITION DATED SEPTEMBER 26, 1994. OKAY? IF YOU WOULD PLEASE TURN TO PAGE 80 OF YOUR DEPOSITION. AND IF YOU WOULD PLEASE LOOK AT LINE 13, I'M GOING TO READ THE QUESTION. AND WHEN I SAY SO, WOULD YOU PLEASE ANSWER WITH YOUR RESPONSE.
LINE 13.
"YOU WERE ON THE METHADONE AND YOU WERE USING COCAINE. WERE YOU USING ANY OTHER DRUGS WHILE YOU WERE PREGNANT WITH JUSTIN?"
AND YOUR ANSWER AT LINE 16 WAS, PLEASE READ IT.
A. "I USED HEROIN DURING - HEROIN."
Q. THANK YOU.
NOW, MS. NICHOLSON YOU TESTIFIED EARLIER THAT YOU

WENT TO YOUR PRENATAL VISITS REGULARLY, IS THAT CORRECT, WHEN YOU WERE PREGNANT WITH JUSTIN?
A. YES.
Q. NOW IN ORDER TO GET YOUR METHADONE DAILY FROM CHARLESTON COUNTY SUBSTANCE ABUSE YOU WERE REQUIRED TO GO TO THOSE PRENATAL VISITS; IS THAT CORRECT?

[NICHOLSON 306]

A. DURING THE LATTER PART OF MY PREGNANCY.
Q. OKAY. ON OCTOBER 20, 1993, YOU WENT IN FOR A VISIT TO THE MUSC CLINIC AND YOU TESTED POSITIVE FOR COCAINE; IS THAT CORRECT?
A. CORRECT.
Q. AND ON THAT DATE YOU ALSO SIGNED A CONSENT FORM. WOULD YOU PLEASE VERIFY YOUR SIGNATURE? IS THAT YOUR SIGNATURE?
A. YES, IT IS.
MS. CRAIG: I WOULD LIKE TO PUT DEFENDANTS' 67 A INTO EVIDENCE.
THE COURT: HAVE YOU SEEN IT?
MR. WHERRY: YES.
THE COURT: ANY OBJECTION?
MR. WHERRY: NO.
(BY MS. CRAIG, CONTINUING) NOW, MS. NICHOLSON, YOU WERE NEXT ADMITTED TO THE MEDICAL UNIVERSITY ON DECEMBER 17, 1993. DO YOU REMEMBER THAT?
A. RIGHT.

Q. OKAY. AND AT THAT TIME YOU SIGNED A GENERAL CONSENT FORM FOR ADMISSION?
A. FOR INPATIENT?
Q. YES. IS THAT YOUR SIGNATURE?
A. YES, IT IS.
MS. CRAIG: I WOULD LIKE TO PUT 67 B INTO EVIDENCE, PLEASE.

[NICHOLSON 307]

Q. (BY MS. CRAIG, CONTINUING) NOW AT THAT TIME –
THE COURT: WITHOUT OBJECTION.
MS. CRAIG: EXCUSE ME?
THE COURT: WITHOUT OBJECTION.
MS. CRAIG: THANK YOU.
Q. (BY MS. CRAIG, CONTINUING) NOW AT THAT TIME WHEN YOU WENT TO THE MEDICAL UNIVERSITY DECEMBER 17, 1993, MS. BROWN EXPLAINED THE RISKS OF USING COCAINE WHILE YOU WERE PREGNANT? DO YOU REMEMBER THAT?
A. NO, I DO NOT.
Q. YOU DON'T REMEMBER MS. BROWN TELLING YOU THE RISKS OF USING COCAINE WHILE YOU WERE PREGNANT, THE HARM TO YOURSELF AND TO YOUR UNBORN CHILD?
A. NO, I DON'T REMEMBER HAVING THAT CONVERSATION.
Q. OKAY. IF THAT INFORMATION IS CONTAINED IN YOUR MEDICAL REPORTS, WOULD YOU DISPUTE THAT THAT HAPPENED AND THAT

CONVERSATION OCCURRED IF IT IS WRITTEN IN YOUR MEDICAL UNIVERSITY RECORD?

A. THE CONVERSATION I REMEMBER WAS THE FACT THAT SHE TOLD ME I TESTED COCAINE POSITIVE AND ASKED ME IF I WOULD BE WILLING TO GO INTO TREATMENT. THAT'S -

Q. OKAY. AT THAT SAME TIME ARRANGEMENTS WERE MADE FOR YOU TO GO TO INPATIENT SUBSTANCE ABUSE TREATMENT; IS THAT CORRECT?

A. RIGHT.

Q. NOW, MS. NICHOLSON, YOU CONTINUED TO USE DRUGS; IS THAT

[NICHOLSON 308]

CORRECT?

A. YES. PERCODAN.

Q. AND THEN IN FEBRUARY - FEBRUARY 9, 1994, YOU WENT TO THE MEDICAL UNIVERSITY CLINIC AND YOU SIGNED ANOTHER CONSENT FORM FOR TREATMENT. WOULD YOU PLEASE VERIFY YOUR SIGNATURE. IT'S RIGHT HERE?

A. (WITNESS NODS HEAD.)

MS. CRAIG: I WOULD LIKE TO OFFER DEFENDANTS' EXHIBIT 67 C INTO EVIDENCE PLEASE.

MR. WHERRY: NO OBJECTION.

Q. (BY MS. CRAIG, CONTINUING) NOW THE NEXT TIME YOU WENT TO THE MEDICAL UNIVERSITY WAS ON FEBRUARY 17, 1994, AND THIS WAS FOR A CLINIC VISIT. AT THIS TIME SHIRLEY BROWN EXPLAINED THE

HARMFUL EFFECTS OF COCAINE AND HEROIN TO YOURSELF AND TO YOUR UNBORN CHILD; IS THAT CORRECT?

MR. WHERRY: I OBJECT. SHE COULDN'T EXPLAIN IT TO HER UNBORN CHILD, AND THAT QUESTION JUST MADE NO SENSE.

MS. CRAIG: I'LL BE MORE THAN HAPPY TO REPHRASE IT.

THE COURT: GO AHEAD.

Q. (BY MS. CRAIG, CONTINUING) AT THAT TIME DID MS. BROWN EXPLAIN TO YOU THE EFFECTS OF USING COCAINE WHILE YOU WERE PREGNANT, THE EFFECT TO YOU AND TO YOUR UNBORN CHILD?

A. AT WHAT TIME WAS THIS?

Q. THIS WAS FEBRUARY 17, 1994.

NO.

[NICHOLSON 309]

Q. IF YOUR MEDICAL RECORDS INDICATE THAT MS. BROWN HAD THIS CONVERSATION WITH YOU, DO YOU DISPUTE THAT?

A. YES. YES, I DO.

Q. AT THE SAME TIME YOU SAW A VIDEO THAT SHOWED THE DANGERS OF USING COCAINE AND OTHER DRUGS DURING PREGNANCY?

A. NO, I DID NOT.

Q. YOU DID NOT SEE THAT. WOULD YOU PLEASE OPEN UP YOUR DEPOSITION. ACTUALLY IT WOULD BE VOLUME 2. THIS IS THE CONTINUATION OF YOUR DEPOSITION DATED FEBRUARY 15, 1995. MS.

NICHOLSON, IF YOU WOULD PLEASE TURN TO PAGE 44 OF YOUR DEPOSITION.

MR. WHERRY: MAY I HAVE A MOMENT, PLEASE.

(PAUSE.)

MR. WHERRY: I'M READY.

Q. (BY MS. CRAIG, CONTINUING) IF YOU WILL PLEASE LOOK AT LINE 10, I'M GOING TO ASK YOU THE QUESTION AND IF YOU WILL PLEASE RESPOND.

"DID YOU EVER SEE THE VIDEO ON SMOKING, DRINKING AND DRUGS AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?"

AND YOUR ANSWER AT LINE 12 IS?

A. "YES, WHILE I WAS INPATIENT." I'M SORRY, I DID SAY IT WHILE I WAS INPATIENT.

Q. IF WE COULD PLEASE ANSWER - IF YOU WOULD PLEASE ANSWER IT THE WAY IT WAS SAID IN THE DEPOSITION.

A. "WHILE I WAS INPATIENT, YES, I BELIEVE SO. WE WATCHED

[NICHOLSON 310]

DIFFERENT VIDEOS."

Q THANK YOU. NOW, STILL AT THAT SAME TIME, FEBRUARY 17 1994, YOU READ THE SOLICITOR'S LETTER THAT MS. BROWN HANDED TO YOU, BUT YOU REFUSED TO SIGN THAT LETTER. DO YOU REMEMBER READING THE SOLICITOR LETTER?

A. YES.

Q. AND YOU REFUSED TO SIGN THAT LETTER?
A. CORRECT.
MS. CRAIG: I WOULD LIKE TO OFFER INTO EVIDENCE DEFENDANTS' EXHIBIT 74, PLEASE.
THE COURT: HAVE YOU SEEN IT?
R. WHERRY: YES.
HE COURT: ANY OBJECTION?
R. WHERRY: NO.
Q. (BY MS. CRAIG, CONTINUING) AND THEN YOU DELIVERED YOUR SON ON FEBRUARY 21, 1994; IS THAT CORRECT?
A. CORRECT.
Q. OKAY. NOW, MS. NICHOLSON, WHILE YOU WERE PREGNANT YOU KNEW THAT USING DRUGS COULD BE DETRIMENTAL TO YOUR HEALTH AND THE MENTAL HEALTH OF YOUR CHILD IN UTERO; IS THAT CORRECT?
A. YES. MY WAY OF THINKING AT THAT TIME WAS I WAS GOING TO MY DOCTORS' APPOINTMENTS AND I THOUGHT THAT EVERYTHING WAS OKAY BECAUSE NOTHING WAS SAID, SO I FIGURED THE BABY WAS OKAY AND SO I COULDN'T SEEM TO STOP USING. AND THERE WAS NOTHING THAT I COULD DO ABOUT THE METHADONE.

[NICHOLSON 311]

Q. BUT YOU KNEW THAT USING DRUGS COULD BE DETRIMENTAL TO YOUR HEALTH AND THE HEALTH OF THE BABY; IS THAT CORRECT?

A. I'M NOT SURE HOW TO ANSWER THAT, BECAUSE I THOUGHT BECAUSE EVERYTHING WAS OKAY WITH MY PREGNANCY, I WASN'T SURE THAT IT COULD BE DETRIMENTAL.
Q. OKAY.
A. I KNEW I SHOULDN'T BE DOING IT.
Q. BUT MY QUESTION IS, WHILE YOU WERE PREGNANT, YOU KNEW THAT USING DRUGS COULD BE DETRIMENTAL TO YOUR HEALTH AND THE HEALTH AND MENTAL DEVELOPMENT OF YOUR CHILD IN UTERO?
A. YES.
Q. NO EMPLOYEE AT THE MEDICAL UNIVERSITY FORCED YOU TO UNDERGO STERILIZATION OR HAVE YOUR TUBES TIED; IS THAT CORRECT?
A. CORRECT.
Q. IN EARLY FEBRUARY, 1994, YOU WERE INVOLUNTARILY COMMITTED TO THE INSTITUTE OF PSYCHIATRY BY THE CHARLESTON COUNTY SUBSTANCE ABUSE; IS THAT CORRECT?
A. THAT IS CORRECT.
Q. NOW, THAT WAS ON FEBRUARY 7, 1994. AND YOU WERE ONLY IN THERE FOR TWO DAYS; IS THAT CORRECT?
A. CORRECT.
Q. AND A REASON WHY YOU WERE ONLY IN THERE FOR TWO DAYS BECAUSE YOUR ATTORNEY SUSAN DUNN CAME IN AND TOOK YOU INTO PROBATE COURT AND GOT YOU OUT OF SUBSTANCE ABUSE TREATMENT?

* * *

[DARLENE NICHOLS0N 314]

CONSTITUTIONAL PROCESS.
THE COURT: OKAY. I UNDERSTAND. LET ME THINK ABOUT IT.
MS. CRAIG: OKAY.
THE COURT: I'LL PERMIT IT.
MS. CRAIG: THANK YOU, YOUR HONOR.
Q. (BY MS. CRAIG, CONTINUING) MRS. NICHOLSON, I WAS ASKING YOU ABOUT YOUR FEBRUARY 7, 1994, ADMISSION INTO SUBSTANCE ABUSE TREATMENT. YOU STATED THAT YOU LEFT SUBSTANCE ABUSE TREATMENT TWO DAYS LATER, FEBRUARY 9, 1994. AND THE REASON WHY YOU LEFT IS AT THE ASSISTANCE OF YOUR ATTORNEY SUSAN DUNN; IS THAT CORRECT?
A. YES. CAN I EXPLAIN WHY I WAS COMMITTED TO BEGIN WITH?
THE COURT: CERTAINLY.
A. THAT WAS WHEN I TALKED ABOUT EARLIER AND I ALWAYS USING PERCODANS, WHICH, ARE OPIATES LIKE HEROIN, IT'S NOT FOR COCAINE. THEY WERE LOWERING MY METHADONE DOSE AND I HAD GOTTEN SCARED, I WAS GETTING SICK. I USED THE PERCODAN TO REPLACE THE METHADONE. AND MY COUNSELOR MAINE GAILLARD SPOKE WITH SHIRLEY BROWN, AND THEY DECIDED TO HAVE ME COMMITTED IS WHAT I WAS TOLD BY MAINE GAILLARD. I GOT OUT ON THE BASIS THAT IT WAS, I WAS NOT EXAMINED BY A DOCTOR. THEY DID RAISE

MY METHADONE DOSE BACK UP SO I WOULD NOT BE GETTING SICK. SO I - THAT'S HOW I GOT OUT, BECAUSE OF MY METHADONE DOSE ACTUALLY SHOULD NOT HAVE BEEN DROPPED DURING MY PREGNANCY

[NICHOLSON 315]

DURING THAT TIME TO BEGIN WITH, THEREFORE I WOULD NOT HAVE BEEN GETTING SICK.

Q. OKAY. A POINT OF CLARIFICATION. IT WAS CHARLESTON COUNTY SUBSTANCE ABUSE THAT COMMITTED YOU TO THE INSTITUTE OF PSYCHIATRY, IT WAS NOT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA; IS THAT CORRECT?

A. CORRECT.

Q. OKAY. NOW, YOU WERE ADMITTED INTO THE INSTITUTE OF PSYCHIATRY AND THEN TWO DAYS LATER THEY TOOK YOU OUT, THAT WOULD BE FEBRUARY 9, 1994. NOW FIVE DAYS LATER, FEBRUARY 14, 1994, YOU VOLUNTARILY COMMITTED YOURSELF BACK INTO THE INSTITUTE OF PSYCHIATRY?

A. RIGHT.

Q. IS THAT CORRECT?

A. THAT'S CORRECT.

MS. CRAIG: YOUR HONOR, BEFORE I GO INTO THE NEXT LINE OF QUESTIONING MAY I APPROACH TO DISCUSS IT?

THE COURT: YES.

(SIDEBAR.)

MS. CRAIG: I WOULD LIKE TO GO INTO WHETHER OR NOT SHE HAS CUSTODY.

THE COURT: WHAT?

MS. CRAIG: WHETHER SHE HAS CUSTODY OF ALL OF HER CHILDREN. SHE TESTIFIED EARLIER SHE HAS A VERY CLOSE RELATIONSHIP WITH HER CHILD AND IT WAS TRAUMATIC TO HER NOT TO

[NICHOLSON 316]

BE ABLE TO GO TO HIM BEFORE SHE WAS INVOLUNTARILY COMMITTED TO SUBSTANCE ABUSE TREATMENT, AND I WOULD LIKE TO ASK HER WHETHER SHE HAS CUSTODY OF THAT CHILD.

THE COURT: I'M NOT GOING INTO THAT.

MR. WHERRY: THANK YOU.

Q. (BY MS. CRAIG, CONTINUING) ONE LAST QUESTION, MS. NICHOLSON. YOU CONTINUE TO GO TO THE MEDICAL UNIVERSITY FOR YOUR MEDICAL TREATMENT?

A. YES, I DO.

MS. CRAIG: THANK YOU. NO FURTHER QUESTIONS.

THE COURT: ANYTHING ON REDIRECT?

MR. WHERRY: THREE REDIRECT.

REDIRECT EXAMINATION

BY MR. WHERRY:

Q. DO YOU CONTINUE TO GO TO MUSC BECAUSE THAT'S WHERE YOUR INSURANCE -

MS. CRAIG: I'M SORRY, HE IS LEADING HIS WITNESS.

THE COURT: DISREGARD THE QUESTION AND ANSWER.

Q. (BY MR. WHERRY, CONTINUING) WHY DO YOU CONTINUE TO GO TO MUSC FOR YOUR MEDICAL TREATMENT?

A. BECAUSE I HAVE MEDICAID AND I HAVEN'T BEEN ABLE TO FIND ANYONE ELSE WHO WILL ACCEPT IT.

Q. YOU INDICATED THAT DSS CAUSED YOU TO BE COMMITTED TO THE INPATIENT PSYCHIATRIC DEPARTMENT?

A. I'M SORRY.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CONYERS O'BRYAN

[O'BRYAN 596]

Q. I WANT TO ASK YOU FIVE POINTS ABOUT THIS LAWSUIT SUBJECT . MATTER, THIS INTERAGENCY POLICY.
THE SEQUENCE OF EVENTS THAT LED UP TO THE APPROVAL AND IMPLEMENTATION OF THIS POLICY AT THE MEDICAL UNIVERSITY, WAS IT WITHIN THE PROPER AND NORMAL COMMITTEE APPROVAL PROCESS?
A. YES, IT WAS.
Q. WERE THERE ANY DEPARTURES FROM THE NORMAL PROCEDURE OR SEQUENCE OF EVENTS FOR THE ADOPTION OF THIS POLICY?
A. NO.
Q. HAS THE MEDICAL UNIVERSITY ALWAYS - AND YOU HAVE BEEN CHAIRMAN FOR HOW MANY YEARS?
A. TWO AND A HALF YEARS.
Q. AND SERVED ON THE BOARD FOR HOW MANY YEARS?
A. TWENTY YEARS.
Q. SIR?
A. TWENTY YEARS.
Q. TWENTY YEARS.
IN YOUR TWENTY YEARS ON THE BOARD, HAS THE MEDICAL

UNIVERSITY ALWAYS COMPLIED WITH MANDATORY RULES AND LAWS THAT REQUIRE REPORTING CHILD ABUSE?
A. YES, TO MY KNOWLEDGE.
Q. IS THE POLICY, THIS INTERAGENCY POLICY, CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS AND STANDARD AND PHILOSOPHIES?
A. YES, IT IS.

[O'BRYAN 597]

Q. WHAT WAS THE GOAL, AS YOU UNDERSTOOD IT, OF THIS POLICY?
A. THE GOAL WAS BETTER PROTECTION FOR FETUS AND MOTHER.
Q. WAS THERE ANY INTENTION TO DISCRIMINATE AGAINST BLACK WOMEN?
A. NONE.
MR. HOOD: THANK YOU VERY MUCH, DOCTOR.

<u>CROSS-EXAMINATION</u>

BY MS. PALTROW:
Q. DR. O'BRYAN, YOU ARE A PART OF COMMITTEE THAT APPROVED THIS POLICY; IS THAT CORRECT?
A. NO.
Q. YOU'RE CURRENTLY THE HEAD OF THE COMMITTEE NOW; IS THAT CORRECT?
A. NO.
Q. THE TRUSTEE?
A. NO.
Q. TELL ME AGAIN WHAT YOUR POSITION IS.
A. BEG YOUR PARDON.
Q. TELL ME AGAIN WHAT YOUR POSITION IS?

A. I'M CHAIRMAN OF THE BOARD OF TRUSTEES.
Q. IN THAT POSITION REGARDING THIS POLICY, WERE YOU PRESENTED EVER WITH A SINGLE STUDY EVEN SUGGESTING THAT ARRESTING AND THREATENING ARREST OF PREGNANT SUBSTANCE ABUSERS WILL IMPROVE HEALTH OUTCOMES OF THE UNBORN?
A. I WAS NOT ON THAT COMMITTEE AT THAT TIME. I WAS NOT

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CELEST PATRICK

[PATRICK 3]

(TESTIMONY EXCERPT OF CELEST PATRICK, 11-25-96.)

CELEST PATRICK, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. WHERRY:

Q. DR. PATRICK, WOULD YOU TELL US, PLEASE, WHAT YOUR OCCUPATION OR PROFESSION IS.

A. I'M A NEONATOLOGIST AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA.

Q. WHAT DOES A NEONATOLOGIST DO? WHAT IS THAT?

A. A NEONATOLOGIST IS A PHYSICIAN WHO IS TRAINED IN PEDIATRICS AND GETS ADDITIONAL TRAINING IN THE CARE OF BABIES LESS THAN 30 DAYS OF AGE.

Q. WHAT IS PEDIATRICS?

A. PEDIATRICS IS THE CARE OF CHILDREN LESS THAN 18 YEARS OLD.

Q. DOCTOR, WHERE DID YOU GO TO COLLEGE?

A. I WENT TO FURMAN UNIVERSITY FOR TWO YEARS AND THEN I WENT TO THE UNIVERSITY OF SOUTH CAROLINA AND GOT MY BS IN PHARMACY.

Q. AND YOUR GRADUATE DEGREE?
A. THE MEDICAL UNIVERSITY IN 1982.
Q. AND WHAT DEGREE WAS THAT THAT YOU RECEIVED?
A. THE M.D. DEGREE.
Q. AFTER RECEIVING YOUR M.D. DEGREE, DID YOU UNDERTAKE FURTHER STUDY?
A. YES, I DID. THREE YEARS OF PEDIATRIC RESIDENCY TRAINING

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[PATRICK 6]

Q. I TAKE IT, DOCTOR, AFTER COLLEGE, WHAT YOU'RE TELLING US IS THAT YOUR EDUCATION TOOK TEN YEARS; IS THAT RIGHT?
A. THAT'S ABOUT RIGHT.
Q. AND, DOCTOR, ARE YOU PRESENTLY ENGAGED IN THE PRACTICE OF MEDICINE?
A. YES, I AM. I WORK PART-TIME AT THE MEDICAL UNIVERSITY.
Q. AND IS THAT IN THE FIELD OF PERINATAL NEONATOLOGY?
A. YES.
Q. DOCTOR, ARE YOU LICENSED TO PRACTICE MEDICINE IN ANY STATE?
A. JUST SOUTH CAROLINA.
Q. DOCTOR, DIRECTING YOUR ATTENTION TO THE FALL OF NINETEEN HUNDRED AND EIGHTY-NINE, WHERE WERE YOU EMPLOYED THEN?
A. I WAS AT THE MEDICAL UNIVERSITY.
Q. IN WHAT CAPACITY, DOCTOR?
A. I WAS WORKING FULL-TIME THEN. I WAS ASSISTANT PROFESSOR

OF PEDIATRICS.
Q. DOCTOR, DID YOU ALSO HOLD ANY DEPARTMENT POSITIONS?
A. I WAS THE MEDICAL DIRECTOR FOR THE NEONATAL INTENSIVE CARE UNIT.
Q. WHAT DOES THAT MEAN?
A. IT MEANS THAT I WAS -- IT DIDN'T MEAN THAT I WAS IN CHARGE OF INDIVIDUAL PATIENT CARE, I WAS ON SERVICE OR DOING PATIENT CARE FOR MOST OF THE YEAR, BUT IT MEANT THAT I WAS OVERSEEING THE WHOLE UNIT, WHICH IS A 36-BED INTENSIVE CARE

[PATRICK 7]

UNIT.
Q. ARE YOU AWARE, IN GENERAL TERMS ANY'HOW, OF WHAT WE HAVE BEEN CALLING THE INTERAGENCY POLICY?
A. YES, I AM.
Q. WHEN WAS THE FIRST TIME THAT YOU BECAME AWARE OF THAT POLICY? GENERALLY.
A. GENERALLY, JUST THE FALL OF 1988.
Q. AND HOW DID YOU COME TO LEARN ABOUT IT, DR. PATRICK?
A. THERE WERE A SERIES OF MEETINGS WITHIN OUR DIVISION AND WHERE WE WERE -- AND THIS IS JUST A STAFF UNIT. WHEN I SAY WE, THAT WE WERE PRESENTED WITH A POLICY THAT THAT WOULD BE WHERE WE WERE GOING.
Q. YOU SAID WITHIN OUR DIVISION?
A. RIGHT.
Q. WHAT IS YOUR DIVISION?

A. THE DIVISION OF NEONATALOGY. I THINK AT THE TIME THERE WERE ELEVEN OF US IN THE DIVISION.
Q. WHEN YOU SAY ELEVEN OF YOU, IS THAT DOCTORS?
A. YES.
Q. WOULD YOU TELL THE JURY -- WELL, FIRST OF ALL, WHO INTRODUCED YOU TO THE POLICY?
A. I REALLY DON'T RECALL SPECIFICALLY WHO IT WAS. I'M SORRY.
Q. FOLLOWING BEING INTRODUCED TO THE POLICY, WAS THERE OR WAS THERE NOT DISCUSSION AMONG THE PHYSICIANS AND STAFF IN THE

[PATRICK 8]

NEONATAL DEPARTMENT OR DIVISION CONCERNING THE POLICY?
A. YES, THERE WAS.
Q. AS A RESULT OF THAT, DID YOU TAKE ANY PARTICULAR ACTION AS THE MEDICAL DIRECTOR?
A. I DISCUSSED THE POLICY WITH DR. PITTARD, WHO IS OUR DIVISION CHIEF. AND THEN I DISCUSSED THE POLICY WITH DR. DARBY, WHO IS THE CHAIRMAN OF THE DEPARTMENT OF PEDIATRICS.
Q. AS A RESULT OF DISCUSSING THE POLICY WITH DR. DARBY, AND AS A RESULT OF WHAT HE TOLD YOU, DID YOU TAKE ANY FURTHER ACTION?
A. YES, I DID.
Q. AND WHAT WAS THAT? JUST IN GENERAL TERMS?

A. I WROTE A LETTER THAT I SENT TO SEVERAL OF THE CLINICAL HEADS OF THE HOSPITAL THAT I THOUGHT WERE PERTINENT TO THE POLICY, AND JUST EXPRESSED MY CONCERN ABOUT IT.
Q. DOCTOR, LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFFS' EXHIBIT NUMBER 26 FOR IDENTIFICATION. AND ASK WHETHER YOU RECOGNIZE THIS AS BEING THE LETTER THAT YOU WROTE?
A. YES; IT IS.
Q. DOES IT BEAR YOUR SIGNATURE?
A. YES, IT DOES.
Q. WHO DID YOU SEND IT TO?
A. THIS PARTICULAR COPY WENT TO DR. EDWARDS.
Q. WHO IS DR. EDWARDS?
A. HE IS THE PRESIDENT OF THE MEDICAL UNIVERSITY.

[PATRICK 9]

Q.DR. PATRICK, LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFFS' EXHIBIT 27 FOR IDENTIFICATION, AND ASK WHETHER YOU CAN RECOGNIZE THIS DOCUMENT?
A. YES, I DO.
Q. WHAT IS THAT DOCUMENT, JUST AS TO GENERAL TYPE INSOFAR AS IT RELATES TO PLAINTIFFS' EXHIBIT 26.
A. IT WAS A REPLY FROM DR. EDWARDS SAYING THAT HE APPRECIATED ME SHARING MY VIEWS.
Q. DON'T TELL US WHAT IT SAID YET.
A. I'M SORRY.

Q. THAT'S A REPLY FROM DR. EDWARDS TO YOUR LETTER?
A. YES.
MR. WHERRY: YOUR HONOR, AT THIS TIME POINT IN TIME I WOULD MOVE INTO EVIDENCE PLAINTIFFS' EXHIBIT 26 AND 27.
THE COURT: ANY OBJECTION?
MR. HOOD: UNDER 602, 701 AND 403. AND THE DETAILS ARE SET FORTH IN THE MEMORANDUM THAT WE FILED WITH THE COURT.
THE COURT: I SUSTAIN THE OBJECTION AT THIS TIME. THE DOCUMENT IS CLEARLY HEARSAY.
HEARSAY, LADIES AND GENTLEMEN OF THE JURY, WE HAVE DISCUSSED IT BEFORE, THE CONTEXT IN WHICH I HAVE DISCUSSED IT HAS BEEN WHERE ONE WITNESS ATTEMPTS TO TESTIFY WHAT SOMEBODY ELSE SAID. THAT'S NOT EXACTLY WHAT WE HAVE GOT HERE, BUT THE DEFINITION OF HEARSAY IS A STATEMENT OTHER THAN ONE MADE BY THE DECLARANT, THE DOCTOR HERE, WHILE TESTIFYING AT TRIAL OR

[PATRICK 10]

HEARING OFFERED IN EVIDENCE TO PROVE THE TRUTH OF THE MATTER ASSERTED.
THE LETTER IS A STATEMENT MADE BY HER AT A TIME OTHER THAN WHEN SHE IS IN COURT TESTIFYING UNDER OATH, AND THEREFORE IT'S HEARSAY WITHIN THE DEFINITION OF THE FEDERAL

RULES OF EVIDENCE. WHETHER IT HAS ANY RELEVANCE OR PROBATIVE VALUE FOR ANYTHING OTHER THAN THE TRUTH OF THE MATTER I'LL JUST HAVE TO WAIT UNTIL I HAVE HEARD MORE OF HER TESTIMONY. BUT IT IS HEARSAY. IT APPEARS TO ME THAT IT IS ALSO CONTAINS HEARSAY WITHIN HEARSAY.

MR. HOOD MAKES THE OBJECTION UNDER RULE 602. I THINK THAT PROBABLY THAT'S SOMEONE TESTIFYING ABOUT SOMETHING ABOUT WHICH THEY DON'T HAVE KNOWLEDGE. I THINK SAYING IT'S HEARSAY WITHIN HEARSAY IS BASICALLY ADDRESSING THE SAME OBJECTION. BUT FOR THE TIME BEING, I'M GOING TO SUSTAIN THE OBJECTION ON THE GROUNDS OF HEARSAY. OBVIOUSLY I'LL PERMIT YOU TO LAY WHATEVER ADDITIONAL FOUNDATION YOU WISH TO DO, BUT -- YOU WISH TO MAKE, BUT SINCE IT IS OFFERED FOR ITS TRUTH I THINK WE NEED TO DEAL WITH THAT FIRST.

MR. WHERRY: IT REALLY, YOUR HONOR, WAS BEING OFFERED FOR THE TRUTH IN ONE RESPECT, BUT IN ANOTHER IT WAS BEING OFFERED FOR THE FACT THAT THERE WAS A COMMUNICATION TO DR. EDWARDS.

THE COURT: WELL, AS OF RIGHT NOW I'M NOT PREPARED TO RULE THAT IT'S ADMISSIBLE FOR ANYTHING OTHER THAN ITS

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[PATRICK 22]

YOU HAD STAFF PRIVILEGES AT THREE OTHER HOSPITALS?
A. YES.
Q. SAINT FRANCIS, ROPER AND TRIDENT?
A. YES.
Q. WAS THE INTERAGENCY POLICY AS YOU KNEW IT APPLIED AT THOSE HOSPITALS?
A. NO.
Q. DID YOU MAKE AN INQUIRY, DOCTOR, AS TO WHY NOT?
MR. HOOD: THE ANSWER WOULD HAVE TO BE HEARSAY, YOUR HONOR.
THE COURT: THIS ONE THEORETICALLY WOULD NOT. THIS ONE CALLS FOR A YES OR NO.
THE WITNESS: COULD YOU REPEAT THE QUESTION?
Q. (BY MR. WHERRY, CONTINUING) DID YOU MAKE AN INQUIRY AS TO WHY IT WAS NOT?
A. YES, I DID.
Q. WHO DID YOU MAKE THE INQUIRY OF?
A. MY DIVISION CHIEF, BILL PITTARD.
Q. BILL PITTARD?
A. YES.
Q. AND DR. PITTARD WAS YOUR DIVISION CHIEF AT THE MEDICAL UNIVERSITY?
A. YES.
Q. WAS DR. PITTARD AFFILIATED WITH THE OTHER HOSPITALS ALSO?
A. MAYBE -- COULD I EXPLAIN WHAT OUR POSITION IS WITH THE

[PATRICK 23]

HOSPITAL? WOULD THAT BE HELPFUL?
Q. WELL, LET ME ASK THE QUESTION. EXPLAIN, PLEASE, WHAT YOUR POSITION IS WITH RESPECT TO THE OTHER THREE HOSPITALS, SAINT FRANCIS, TRIDENT AND ROPER?
A. OKAY. WE ARE CONSULTANTS AT THOSE HOSPITALS. ALL THE NEONATOLOGISTS WITHIN OUR DIVISION HAVE PATIENTS AT THOSE HOSPITALS, BUT WE STILL CONSIDER OUR BOSS, WHATEVER, DOCTOR PITTARD OUR DIVISION HEAD, AND THAT'S WHO WE REPORT TO. NOW HE DOESN'T HAVE A POSITION AT THE OTHER HOSPITALS AS, YOU KNOW, LIKE A DIRECTOR OR ANYTHING LIKE THAT.
Q. WHAT DID DR. PITTARD SAY TO YOU WHEN YOU INQUIRED ABOUT WHY THE INTERAGENCY POLICY IS NOT APPLIED AT THE OTHER HOSPITALS?
THE COURT: LET ME SEE YOU UP HERE JUST SIC MINUTE.
(SIDEBAR AS FOLLOWS:)
THE COURT: NOW WHAT IS HER ANSWER GOING TO BE?
MR. WHERRY: IN SUBSTANCE IT IS THAT IT WOULD CAUSE TOO MUCH HAVOC, THERE WOULD BE TOO MUCH OF AN UPROAR, AND THEY WEREN'T JUST GOING TO DO IT. DR. PITTARD IS A NAMED DEFENDANT.

THE COURT: I UNDERSTAND THAT.
TELL ME WHAT THE ANSWER IS GOING TO BE.
MR. WHERRY: IT WILL CAUSE TOO MUCH OF AN UPROAR TO APPLY THAT POLICY AT THE OTHER HOSPITALS.

[PATRICK 24]

THE COURT: OKAY.
MR. WHERRY: AND THE WORD UPROAR MIGHT NOT HAVE BEEN THE WORD THAT WAS USED. THAT WOULD CAUSE TOO MUCH TROUBLE, TOO MUCH OF A PROBLEM, SOMETHING OF THAT NATURE.
THE COURT: OKAY.
MR. HOOD: WE HAD A 403 AREA. ARE WE GOING TO HAVE TO BRING AN ADMINISTRATOR AND CHAIRMAN OF THE DEPARTMENT ALL OVER TOWN TO TALK ABOUT THIS.
THE COURT: I DON'T KNOW.
MR. HOOD: THIS IS PURE HEARSAY AND HAS NOTHING TO DO WITH WHAT THE MEDICAL UNIVERSITY IS TRYING TO ACCOMPLISH.
THE COURT: I DON'T KNOW WHY IT'S HEARSAY. HE IS A NAMED DEFENDANT.
MR. HOOD: APPARENTLY THERE IS NOT AN INTERAGENCY POLICY QUESTION HERE. ONLY SOME INFERENCE THAT YOU GET FROM WHAT IS NOT AN ISSUE IN THE CASE ABOUT IT.
THE COURT: ABOUT WHAT?

MR. HOOD: ABOUT THE WHOLE SUBJECT MATTER HERE. THEY'RE TRYING TO CREATE SOMETHING THAT DOESN'T EXIST, HAS NOTHING TO DO WITH THIS LAWSUIT. WE'RE DEALING WITH ONE INSTITUTION, ONE STATE ENTITY.

THE COURT: OKAY. I UNDERSTAND. INDULGE ME JUST A MINUTE.

(PAUSE IN PROCEEDINGS.)

THE COURT: LET ME SEE YOU BACK UP HERE ONE MORE

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[PATRICK 27]

QUESTION ASKED.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, WHEN YOU WORKED AT TRIDENT, AND AT ROPER AND SAINT FRANCIS, WHO PAID YOUR SALARY?

A. THE MEDICAL UNIVERSITY OF SOUTH CAROLINA.

Q. DID YOU ATTEND A MEETING, DOCTOR, OF THE NEONATOLOGY STAFF AND REPRESENTATIVES OF THE SOLICITOR'S OFFICE AND OTHER MEMBERS OF THE HOSPITAL STAFF CONCERNING THIS POLICY?

A. YES, I DID.

Q. APPROXIMATELY WHEN WAS THAT?

A. I -

Q. A SEASON IS FINE.

A. THE LATE FALL OF '89.

Q. WHO WAS AT THAT MEETING, AS BEST YOU RECALL?

A. AS I RECALL ALMOST ALL OF THE NEONATOLOGISTS WERE THERE.

THERE WERE SEVERAL MEMBERS OF THE NURSING STAFF OF THE VARIOUS UNITS THAT WERE INVOLVED, THE OBSTETRICS AND NEONATAL INTENSIVE CARE UNIT AND NEWBORN NURSERY. THERE WERE SOME REPRESENTATIVES FROM SOCIAL SERVICES WITHIN THE HOSPITAL. THERE WAS A REPRESENTATIVE FROM THE POLICE DEPARTMENT.

Q. WHAT POLICE DEPARTMENT?

A. CHARLESTON POLICE DEPARTMENT. I BELIEVE THAT MR. JOE GOOD, WHO IS THE HOSPITAL ATTORNEY, WAS THERE.

Q. WAS MR. CONDON THERE?

A. I DON'T RECALL.

Q. DO YOU RECALL WHETHER OR NOT THERE WAS A REPRESENTATIVE

[PATRICK 28]

OF THE SOLICITOR'S OFFICE THERE?

A. I BELIEVE THERE WAS.

Q. WHAT WAS THE PURPOSE OF THAT MEETING?

A. TO -- TO REVIEW THE INTERAGENCY POLICY WITH ALL OF THE DIFFERENT MEDICAL PERSONNEL.

Q. WHEN YOU SAY REPRESENTATIVES OF THE NURSING DEPARTMENTS WERE THERE, WAS SHIRLEY BROWN THERE?

A. YES, SHE WAS.

Q. LET ME HAND YOU WHAT HAS BEEN MARKED PLAINTIFFS' EXHIBIT NUMBER 23 FOR IDENTIFICATION, AND ASK YOU WHETHER OR NOT SAYING THIS DOCUMENT, PLAINTIFFS NUMBER 23 FOR

IDENTIFICATION, REFRESHES YOUR MEMORY AS TO THE SPECIFIC DATE OF THAT MEETING?
A. YES, IT DOES.
Q. WHAT WAS THE SPECIFIC DATE OF THAT MEETING?
A. IT WAS DECEMBER THE 7, 1989.
Q. WHO WAS THE PRINCIPAL SPEAKER AT THAT MEETING?
A. I REALLY DON'T RECALL ANY ONE PERSON.
Q. THE DOCUMENT THAT YOU HAVE BEFORE YOU, WAS THAT PROVIDED TO YOU AT THE MEETING?
A. IT WAS PROVIDED TO ME BEFORE THE MEETING THROUGH OUR SECRETARY FROM DR. PITTARD.
Q. DID YOU LEARN AT THE MEETING WHAT THAT DOCUMENT WAS, PLAINTIFFS' EXHIBIT 23?
A. YES.

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[PATRICK 31]

MR. WHERRY: YES, SIR.
Q. (BY MR. WHERRY, CONTINUING) DO YOU, DOCTOR, RECALL EACH OF THE THINGS DISCUSSED AT THAT DECEMBER 7TH MEETING?
A. YES, I DO.
Q. DO YOU RECALL THE CIRCUMSTANCES UNDER WHICH PREGNANCIES WERE TO BE SCREENED BY URINE DRUG SCREENS?
A. I RECALL THAT THERE WAS A LIST OF CRITERIA THAT WE WERE

SUPPOSED TO USE TO FOLLOW THAT PROTOCOL, BUT I COULDN'T NAME THEM ALL.

Q. IS THERE ANYTHING THAT WOULD REFRESH YOUR RECOLLECTION ABOUT WHAT THEY WERE?

A. WELL, I CAN TRY TO LIST THEM, BUT --

Q. OKAY.

A. ONE OF THEM WAS THE ABSENCE OF PRENATAL CARE, LATE PRENATAL CARE, UNEXPLAINED CONGENITAL ANOMALIES, PAST HISTORY OF DRUG ABUSE, ABRUPTIO PLACENTA, WHICH IS WHERE THE PLACENTA SEPARATES EARLY FROM THE UTERINE WALL. I GUESS A POSITIVE PREVIOUS URINE DRUG SCREEN. THAT'S REALLY ALL I CAN REMEMBER.

Q. IF THAT -- ONE OF THOSE CIRCUMSTANCES WAS PRESENT, DOCTOR, DO YOU REMEMBER -- DO YOU REMEMBER WHAT, IF ANYTHING, THE POLICY SAID TO DO ONCE THE URINE WAS TAKEN FROM THE PATIENT?

A. THERE WAS A PROCEDURE TO BE FOLLOWED BY THE OBSTETRICS STAFF THAT I REALLY DON'T FEEL COMFORTABLE EXACTLY ADDRESSING

[PATRICK 32]

BECAUSE THAT WASN'T THE PROCEDURE WE WERE USING. I CAN ADDRESS THE PART ABOUT THE NEWBORN.

Q. WITH RESPECT TO THE NEWBORN, WHAT WAS THE POLICY WITH

RESPECT TO WHAT WAS TO HAPPEN TO THE URINE AFTER IT WAS COLLECTED FROM THE PATIENT? THE BABY?

A. IT WAS TO BE SUBMITTED TO THE MEDICAL UNIVERSITY LAB THROUGH A CHAIN OF CUSTODY, AND THEN TESTED AND REPORTED BACK TO THE DOCTOR.

Q. PRIOR TO THE INTERAGENCY POLICY, DID THE NEONATOLOGY DEPARTMENT USE CHAIN OF CUSTODY IN SENDING URINE DRUG SCREENS OF THE BABY TO THE LABORATORY?

A. NOT TO MY KNOWLEDGE.

Q. DID YOU INQUIRE AT THIS MEETING AS TO WHY IT WAS GOING TO BE DONE PURSUANT TO THE POLICY?

A. NO, I DID NOT.

Q. DO YOU KNOW WHETHER THAT WAS DISCUSSED AT THE MEETING?

A. I DON'T RECALL.

Q. IF A POSITIVE SCREEN CAME BACK FROM THE LABORATORY FROM ONE OF THESE CHAIN OF CUSTODY URINE SCREENS, WHAT WAS IT - YOUR UNDERSTANDING THAT YOU WERE TO DO AT THAT TIME?

A. WE WERE TO REPORT THEIR -- THE POSITIVE SCREEN TO THE CITY POLICE DEPARTMENT OR THE SOLICITOR'S OFFICE.

Q. PRIOR TO THE INTERAGENCY POLICY, WAS THAT EVER DONE IN THE NEONATOLOGY DEPARTMENT?

A. NO, IT WASN'T.

Q. WAS THAT DONE, DOCTOR, IN THE OTHER THREE HOSPITALS INSOFAR AS YOUR FUNCTIONING IN THOSE HOSPITALS WAS CONCERNED?

MR. HOOD: IF THE COURT PLEASE, AS TO THE OTHER HOSPITALS UNDER SKINNER, 316 UNITED STATES 535, I BELIEVE IT'S IRRELEVANT.

THE COURT: I THINK I HAVE ALREADY RULED ON IT, AND I'LL BE GLAD TO LOOK AT THAT CASE.

MR. HOOD: THANK YOU.

THE COURT: GO AHEAD.

THE WITNESS: I'M SORRY.

A. NO, IT WAS NOT.

Q. WERE YOU TOLD AT THIS MEETING WHETHER OR NOT YOU WERE TO REPORT TO THE POLICE THE FATHER OF THE CHILDREN WHO HAD THE POSITIVE DRUG SCREENS?

A. I DON'T THINK THAT QUESTION CAME UP.

Q. WERE YOU TOLD AT THAT MEETING WHO WAS COORDINATING THE APPLICATION OF THE INTERAGENCY POLICY AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. I DON'T RECALL THAT.

Q. DOCTOR, IN THE NEONATOLOGY UNIT, WERE ANY OTHER DRUGS OTHER THAN COCAINE SCREENED FOR IN NEONATAL URINE?

A. YES.

Q. SUCH AS, DOCTOR? AND BY THE WAY, I'M TALKING ABOUT DURING THE POLICY PERIOD?

[PATRICK 34]

A. WHEN WE SENT A URINE DRUG SCREEN OFF IT GETS SCREENED FOR SEVERAL THINGS. IT GETS SCREENED FOR AMPHETAMINES, OPIATES, BARBITUATES AND COCAINE.

Q. WERE ANY DRUGS OTHER THAN COCAINE REPORTED TO THE CHARLESTON POLICE?

A. NOT TO MY KNOWLEDGE.

Q. WERE YOU INSTRUCTED OR WERE YOU NOT INSTRUCTED AT THIS MEETING WITH RESPECT TO THE OTHER DRUGS?

A. I REALLY DON'T RECALL.

Q. DOCTOR, WHAT IS YOUR UNDERSTANDING OF THE FORMS OF PAYMENT FOR PATIENT CARE ACCEPTED AT MUSC DURING THE POLICY PERIOD? HOW COULD PATIENTS PAY? WHAT WAS ACCEPTED BY MUSC, BESIDES CASH?

A. WELL OBVIOUSLY INSURANCE PAYMENTS, IF THERE WAS PRIVATE INSURANCE. MEDICADE SIC PAYMENTS. I SUPPOSE CHECKS AND CREDIT CARDS.

Q. WOULD YOU EXPLAIN MEDICADE, DOCTOR?

A. MEDICADE IS THE GOVERNMENT RUN INSURANCE PROGRAM THAT CERTAIN PEOPLE -- PEOPLE APPLY FOR WHO ARE QUALIFIED.

MR. HOOD: YOUR HONOR, THIS HAS NOTHING TO DO WITH THE POLICY.

THE COURT: WHAT DOES IT HAVE TO DO WITH?

MR. WHERRY: THE AVAILABILITY OF RESOURCES WITHIN THIS GEOGRAPHIC AREA FOR THE TREATMENT OF CERTAIN CLASSES OF PEOPLE. AND THE NON-ACCEPTANCE OF THIS PAYMENT FORM BY OTHER

* * *

[PATRICK 41]

PLACEMENT, FOR DSS PLACEMENT FOR A DECISION.

Q. DOCTOR, DID THE CIRCUMSTANCES, OR DID THEY NOT, UNDER WHICH YOU WOULD TEST THE URINE OF THESE BABIES, CHANGE FROM BEFORE THE POLICY TO AFTER THE POLICY?

A. YES.

Q. WHY DID YOU TEST THE URINE OF THE BABIES BEFORE THE POLICY?

A. WE WOULD GENERALLY TEST THEM IF WE FELT THAT THE BABIES WERE HAVING SOME CLINICAL SYMPTOMS WHERE THEY WERE ACTUALLY ACTING AS IF THEY WERE GOING INTO WITHDRAWAL OR IF THEY WERE ESPECIALLY JITTERY OR IRRITABLE.

Q. SO BEFORE THE POLICY THEY WERE DONE FOR MEDICAL REASONS?

A. YES.

Q. AFTER THE POLICY, DOCTOR, WHAT WAS THE DIFFERENCE AFTER THE POLICY BEGAN?

A. WELL, WE JUST TESTED BASED ON THE CRITERIA THAT WAS IN THAT POLICY.

Q. WERE THE TESTS, AFTER THE POLICY WAS ADOPTED, FOR MEDICAL

PURPOSES?

MR. HOOD: IF THE COURT PLEASE, SHE HAS NO KNOWLEDGE OF THAT AND I OBJECT TO IT AS IRRELEVANT AND INAPPROPRIATE FOR THIS WITNESS. SHE HAS NO FOUNDATION UPON WHICH TO HAVE ONE. SHE WAS A LAY WITNESS.

MR. WHERRY: SHE WAS DOING THE TESTING, SHE KNOWS WHY SHE DID IT.

* * *

[PATRICK 46]

A. YOU MEAN WHEN THE POLICY STARTED TO BE CHANGED?

Q. UNDER THE POLICY ORIGINALLY, WAS THERE ANY -- WAS THERE ANY PROVISION FOR TESTING THE INFANTS?

A. I REALLY DON'T RECALL.

Q. OKAY. IN '88 AND '90, IN THAT TIME FRAME, DOCTOR, DID YOU SEE ANY INCREASE IN NEWBORN HEALTH PROBLEMS IN THE NEONATAL INTENSIVE CARE UNIT?

A. I DON'T THINK SO.

Q. DOCTOR, DOES THE TERM OUTBORN BABIES MEAN ANYTHING TO YOU?

A. YES.

Q. WHAT DOES THAT MEAN?

A. IT MEANS A BABY THAT WAS NOT BORN IN OUR HOSPITAL. THAT WAS TRANSFERRED IN FROM ANOTHER PLACE WHERE IT WAS BORN.

Q. JUST TO GIVE US SOME BACKGROUND, WHAT WOULD BE THE

CIRCUMSTANCES UNDER WHICH THAT WOULD GENERALLY HAPPEN?
A. JUST AS AN EXAMPLE, SAY IF A BABY WAS BORN AT ROPER WHO REQUIRED, SAY, A VENTILATOR OR SOME EXTRAORDINARY SURGERY, THAT KIND OF THING, THEY WOULD BE TRANSFERRED TO US FOR OUR CARE BECAUSE THEY DON'T HAVE IT AT THOSE HOSPITALS.
Q. WAS THERE ANY POLICY AT MUSC WITH RESPECT TO TESTING BABIES FOR COCAINE OF OUTBORN BABIES?
A. I DON'T RECALL THERE BEING A POLICY ADDRESSING THAT.
Q. WERE OUTBORN BABIES TESTED FOR COCAINE IN THE NEONATAL INTENSIVE CARE UNIT WHILE YOU WERE THE MEDICAL DIRECTOR OR

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[PATRICK 49]

MERELY INEFECTUAL IN ACHIEVING THE STATE'S GOAL, BUT ACTUALLY COUNTERPRODUCTIVE, THE FOCUS ON NOTIFYING THE SECOND PARENT DISTRACTED BOTH THE PARENT AND MINOR FROM THE MINOR'S IMMINENT ABORTION DECISION.
SO I THINK WHAT I HAVE READ IN THIS CASE THAT THE EVIDENCE THAT THE POLICY WAS INEFFECTIVE OR COUNTERPRODUCTIVE IS RELEVANT. THE SUPREME COURT CONSIDERED RELEVANCE IN THAT CASE. NOW TO THE EXTENT THAT THIS DOES THAT, WHAT IS THE

OTHER EVIDENCE IN THIS OTHER AREA GOING TO BE? IS THERE GOING TO BE SOME STATISTICAL EVIDENCE AS TO WHAT HAPPENED AFTER THE POLICY WAS IMPLEMENTED AS OPPOSED TO BEFORE, OR ARE WE GOING TO HAVE THIS TYPE TESTIMONY?

MS. SHOWERS: YES, SIR.

MR. HOOD: WE'RE JUST GOING TO FOCUS ON THE POLICY.

THE COURT: I THINK BASED ON THIS DECISION AND THIS STATEMENT, I'M GOING TO LET HER ANSWER THE QUESTION.

MR. WHERRY: THANK YOU, SIR.

MR. HOOD: WHAT PAGE?

THE COURT: I'M QUOTING FROM 2945. IT'S HODGSON AGAINST MINNESOTA.

THE COURT: ALL RIGHT.

Q. (BY MR. WHERRY, CONTINUING) DR. PATRICK, DID THERE COME A TIME WHEN THE INTERAGENCY POLICY WITH RESPECT TO ARRESTS STOPPED?

MR. HOOD: OBJECT ON THE GROUNDS DISCUSSED.

[PATRICK 50]

Q. (BY MR. WHERRY, CONTINUING) YOU MAY ANSWER.

A. OKAY. YES. BUT I DON'T KNOW WHEN EXACTLY.

Q. I UNDERSTAND. AFTER THAT CONDUCT STOPPED, WAS THERE ANY INCREASE IN --

THE COURT: AND, LADIES AND GENTLEMEN, LET ME SAY

THAT THAT EVIDENCE IS RELEVANT ONLY TO THE FACT THAT IT STOPPED. THE FACT THAT IT STOPPED HAS NOTHING TO DO WITH THIS CASE AS FAR AS THE RIGHTS OF THESE PLAINTIFFS' DIRECTLY IS CONCERNED. AND YOU SHOULDN'T TRY TO SPECULATE WHEN IT STOPPED OR WHY IT STOPPED, BECAUSE THAT REALLY DOESN'T MAKE ANY DIFFERENCE. BUT IS DOES, AS FAR AS THE TESTIMONY THEY'RE GETTING READY TO ASK HER ABOUT, CREATE WHAT MIGHT BE RELEVANT AND SOMETHING THAT YOU MIGHT WANT TO CONSIDER. BUT DON'T WORRY ABOUT WHY IT STOPPED OR WHEN IT STOPPED, BECAUSE THAT REALLY DOESN'T HAVE ANYTHING TO DO WITH THE CASE AND YOU SHOULDN'T CONSIDER THAT.

OKAY. YOU MAY PROCEED.

Q. (BY MR. WHERRY, CONTINUING) AFTER IT STOPPED, DOCTOR, WAS THERE ANY INCREASE IN SICK BABIES IN THE NEONATAL INTENSIVE CARE UNIT?

A. NOT TO MY KNOWLEDGE.

Q. DURING THE COURSE OF THE POLICY, DR. PATRICK, WHAT WAS YOUR UNDERSTANDING REGARDING THE TESTING OF OUTBORN CHILDREN?

A. AS I RECALL, WHICH I DON'T REMEMBER THIS COMING UP VERY

OFTEN, BUT THAT WE -- AS I RECALL WE DIDN'T TEST THEM. BUT I DON'T KNOW -- I DIDN'T TEST THEM. LIKE I SAY, I CAN'T REMEMBER.

MR. WHERRY: YOUR HONOR, I ONLY HAVE ONE OTHER AREA OF QUESTIONING OF DR. PATRICK. I HAVE ADVISED MR. HOOD OF IT AND I THINK WE SHOULD BE HEARD AT SIDEBAR.

THE COURT: ALL RIGHT, OKAY.

(SIDEBAR AS FOLLOWS:)

THE COURT: ALL RIGHT, SIR.

MR. WHERRY: JUDGE, I HAVE ADVISED MR. HOOD THAT I'M GOING TO ASK THIS WITNESS, BASED UPON HER OBSERVATIONS, HER LAY OPINION AS TO WHETHER OR NOT THIS POLICY WAS DISCRIMINATORY AGAINST POOR BLACK WOMEN. YOU KNOW WHAT HER ANSWER IS --

MR. HOOD: IF THE COURT PLEASE, I'M SCARED THE JURY CAN HEAR HIM.

MR. WHERRY: JUDGE, I APOLOGIZE. I'M NOT DOING THAT ON PURPOSE, I HAD MOUTH CANCER 12 YEARS AGO I DON'T SPEAK CLEARLY, SO I HAVE A HABIT OF SPEAKING LOUDER.

THE COURT: WHAT IS YOUR POSITION?

MR. HOOD: YOUR HONOR, IT'S ABSOLUTE SPECULATION BY THIS WITNESS, AND IT'S NOT BASED ON ANYTHING THAT RISES TO THE

LEVEL OF DALBERT OR DORSEY. IT ALLOWS A LAY WITNESS TO COME IN AND ADD SOMETHING TO THE CASE THAT SHE IS NOT QUALIFIED TO ADD. IT INVADES THE PROVINCE OF THE JURY TO TRY THE ISSUE.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF PAMELA PEAR

[PAMELA PEAR 253]

(TESTIMONY OF PAMELA PEAR, DECEMBER 4, 1996.)

- - -

PAMELA PEAR, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. DUNN:

Q. WHAT IS YOUR NAME?

A. PAMELA COLLEEN PEAR.

Q. WHERE DO YOU LIVE?

A. 29-G FRANKLIN STREET.

Q. WHERE IS THAT?

A. IN DOWNTOWN CHARLESTON.

Q. HOW OLD ARE YOU?

A. TWENTY-NINE YEARS OF AGE.

Q. WHAT IS YOUR DATE OF BIRTH?

A. 1/2/67.

Q. DID YOU HAVE OCCASION IN THE SUMMER OF 1990 TO GO TO THE MEDICAL UNIVERSITY FOR PRENATAL CARE?

A. YES.

Q. CAN YOU TELL US WHAT HAPPENED?

A. I WAS SENT THERE FROM FRANKLIN C. FETTER HEALTH CENTER. BECAUSE I WOULD ALWAYS GO INTO PRE-TERM LABOR EARLY AND I WAS A HIGH-RISK PATIENT AND - AND WITH MY DAUGHTER I WAS USING.

AND I MET SHIRLEY BROWN. THE FIRST TIME THAT I WENT THERE AND
THEY FOUND MY URINE DIRTY.

[PAMELA PEAR 254]

Q. MS. PEAR, ABOUT HOW FAR ALONG IN YOUR PREGNANCY WERE YOU
WHEN YOU WENT TO THE MEDICAL UNIVERSITY PRENATAL CARE THE
FIRST TIME?
A. ABOUT SIX, SEVEN MONTHS PREGNANT.
Q. OKAY. AND WHAT PART OF THE MEDICAL UNIVERSITY DID YOU GO
TO?
A. IT'S THE - IT'S A LITTLE SHORT STREET IN THE BACK, THE
CLINIC.
Q. DO YOU KNOW THE NAME OF THE CLINIC?
A. NO.
Q. AND DID YOU CONTINUE TO GET PRENATAL CARE THERE?
A. YES.
Q. DESCRIBE, YOU KNOW, WHEN YOU WERE SPEAKING BEFORE THAT
YOU MET SHIRLEY BROWN, DID YOU MEET HER ON YOUR FIRST MEETING,
FIRST TIME THAT YOU WENT TO PRENATAL CARE?
A. NO.
Q. WHEN DID YOU MEET HER?
A. WHEN I WENT IN ONE DAY FOR HAVING PRE-TERM LABOR I WENT
AT THE HOSPITAL. AND THEY CAME INTO THE ROOM AFTERWARD AND
TOLD ME THAT THEY FOUND COCAINE IN MY SYSTEM.

Q. WHAT ELSE DID SHE TELL YOU, IF ANYTHING?
A. IF I DIDN'T - IF I USED AGAIN, THAT I WOULD GO TO JAIL.
Q. DID SHE GIVE YOU ANY INFORMATION AT THAT MEETING?
A. NO. NO. THAT THIS WAS THE OUTCOME IF I USE AGAIN OR IF
1 COME BACK IN WITH ANOTHER DIRTY URINE THAT I WOULD GO TO

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[PAMELA PEAR 256]

THAT PREGNANCY?
A. YES.
Q. AND WHEN DID YOU RECALL GOING BACK?
A. PROBABLY ABOUT MAYBE A MONTH LATER.
Q. A MONTH LATER THAN WHAT?
A. I GOT BACK AND THEN THEY PUT ME IN PRE-TERM LABOR.
Q. WHEN YOU SAY YOU STARTED LABOR, WHAT DOES THAT MEAN?
WHATWERE YOU EXPERIENCING?
A. EARLY LABOR.
Q. WHAT DID YOU FEEL WHEN THAT HAPPENS?
A. PAIN. CONTRACTIONS.
Q. AND THIS NEXT TIME THAT YOU'RE GOING INTO THE HOSPITAL,
HOW FAR ALONG IN YOUR PREGNANCY WOULD YOU SAY YOU WERE?
A. SEVEN AND A HALF TO EIGHT MONTHS PREGNANT.
Q. OKAY. AND DID YOU GO BACK IN THE HOSPITAL OR DID YOU GO
BACK TO THE CLINIC?

A. THE HOSPITAL.
Q. AND WHAT HAPPENED AT THAT TIME THAT YOU PRESENTED AT THE HOSPITAL?
A. UMM, NURSE SHIRLEY BROWN CAME IN AGAIN AND SAID THAT MY URINE WAS DIRTY AGAIN. AND THEY ADMITTED ME. I STAYED IN THE HOSPITAL FOR ABOUT TWO DAYS. AND IT WAS ON A SATURDAY.
Q. AND THEN WHAT HAPPENED ON THAT SATURDAY?
A. IT WAS ABOUT 12 O'CLOCK AND I WAS A SECURITY GUARD FROM DOWNSTAIRS AND THERE WAS A DEPUTY CAME AND PULLED MY CURTAIN

[PAMELA PEAR 257]

AND TOLD ME THAT HE HAD A WARRANT FOR MY ARREST. AND HE READ ME MY RIGHTS.
Q. WAS THIS IN YOUR ROOM THAT THIS HAPPENED?
A. YES. THE OTHER PATIENT IN THE ROOM WITH ME AND ABOUT THREE OTHER PEOPLE IN THE ROOM, OR TWO OTHER PEOPLE IN THE ROOM.
Q. AND WHO - DESCRIBE THE PEOPLE WHO CAME IN TO SAY THAT THEY WERE GOING TO ARREST YOU?
A. IT WAS JUST ONE DEPUTY SHERIFF. HE HAD ON A BLUE COAT AND A SLACK PANTS, YOU KNOW. AND LIKE A DEPUTY. AND THE SECURITY GUARD WAS FROM DOWNSTAIRS. I THINK IT WAS LIKE A

BEIGE BROWN RUST COLOR UNIFORM THAT HE HAD ON. THE SECURITY GUARD.

Q. AND WHAT HAPPENED THEN? AFTER THEY TOLD YOU THEY WERE GOING TO ARREST YOU, WHAT HAPPENED?

A. OKAY. I ASKED THE MAN THAT READ ME MY RIGHTS, WHICH WAS THE DEPUTY, I ASKED HIM IF I COULD PLEASE PUT ON MY CLOTHES.

Q. WHAT DID YOU HAVE ON?

A. A HOSPITAL GOWN.

Q. PARDON?

A. THE HOSPITAL GOWN.

Q. DESCRIBE THE HOSPITAL GOWN?

A. IT SNAPS ON THE SHOULDERS AND TIES TO THE NECK AND THE BACK AND THE MIDDLE PART OF MY BACK.

* * *

[PAMELA PEAR 260]

A. IT WAS KIND OF SMALL. COMMODE THERE AND EVERYTHING WAS, LIKE THEY SAY, DIRTY. IT WAS VERY DIRTY. YOU WOULDN'T WANT TO USE IT. YOU HAVE NO PRIVACY. NOTHING CLEAN. THE BLANKET LOOK LIKE SOMEBODY ELSE DONE USED THE BLANKETS AND WIPED THEIR BACK SIDES WITH THEM OR WHATEVER. AND THEY LEAVE THEM THERE AND IT SMELLS BAD. AND THEY DIDN'T HAVE ANY COAT OR ANYTHING.

Q. HOW DID YOU FEEL WHEN YOU WERE IN THE -- IN THAT CELL?

A. WELL, I WAS REAL COLD. I WAS REAL NERVOUS. I AIN'T NEVER BEEN IN JAIL BEFORE. I WAS TRYING TO STICK MY HEAD BETWEEN THE BAR SO I COULD BREATH BECAUSE I COULDN'T BREATH. CLAUSTROPHOBIA. AND WHILE I SIT ON THE BED AND I KEEP FEELING MY STOMACH HURTING AGAIN, AND I BEAT ON THE BAR AND I ASKED THE MATRON TO CALL AMBULANCE BECAUSE I'M BACK IN PAIN AGAIN. AND SO SHE CALLED THE AMBULANCE AND THEY TOOK ME BACK TO THE HOSPITAL AND I WAS IN LABOR AGAIN.

Q. WHO TOOK YOU BACK TO THE HOSPITAL?

A. AN AMBULANCE CAME AND PICK ME UP FROM THE JAIL.

Q. DID YOU HAVE ANY HANDCUFFS OR ANYTHING ON WHEN YOU WERE TRANSPORTED?

A. YES.

Q. WHEN THEY TOOK YOU BACK TO THE HOSPITAL, WHERE DID THEY TAKE YOU BACK?

A. BACK IN LABOR AND DELIVERY.

Q. AT WHICH HOSPITAL?

* * *

[PAMELA PEAR 262]

A. WHEN I WAS DISCHARGE I WENT BACK AND LIVE WITH MY UNCLE. I WENT HOME. AT THE TIME I WAS IN MY HOME.

Q. AT THE TIME WHEN YOU WERE TRANSPORTED TO THE JAIL, WERE

YOU OFFERED ANY SUBSTANCE ABUSE TREATMENT AROUND THAT TIME?
A. YES.
Q. AND WHEN DID YOU GET AN OFFER OF SUBSTANCE ABUSE TREATMENT IN CONNECTION WITH THE ACTUAL ARREST?
A. IT WAS AFTER.
Q. PARDON?
A. IT WAS AFTER I GOT OUT OF JAIL. I BELIEVE IT WAS AFTER I GOT OUT OF JAIL.
Q. AND FROM WHOM DID YOU GET THAT INFORMATION?
A. I THINK IT WAS A LETTER THAT CAME SAYING THAT I HAD TO GO TO SUBSTANCE ABUSE AND BECAUSE I DIDN'T GO BACK TO THE HOSPITAL OR ANYTHING.
Q. PARDON?
A. I DIDN'T HAVE ANOTHER APPOINTMENT OR ANYTHING TO GO BACK TO THE DOCTOR, SO I THINK IT WAS A LETTER THAT CAME IN THE MAIL, IF I'M NOT MISTAKEN, TO GO TO CHARLESTON COUNTY SUBSTANCE ABUSE, BUT I DIDN'T FEEL COMFORTABLE WITH IT BECAUSE OF THE PEOPLE AROUND ME, THEY WERE CHEATING IN THE PROGRAM. EVEN THOUGH I KNEW I WAS SUPPOSED TO BE GOING FOR MYSELF, I READ -- I CAN'T SEE MYSELF BEING IN A PROGRAM IF I CAN'T BE HONEST. AND YOU GOT TO BE HONEST IN THE PROGRAM. YOU GOT TO. THAT'S THE ONLY WAY THAT YOU CAN GET THROUGH.

[PAMELA PEAR 263]

Q. MS. PEAR, DO YOU CONTINUE TO HAVE ANY FEELINGS ABOUT THE ARREST AND THE EVENTS SURROUNDING THE ARREST?
A. YEAH.
Q. WHAT ARE THEY?
A. I WAS SCARED, AND I DIDN'T KNOW WHAT WAS GOING TO HAPPEN. SO - IT'S ON MY RECORD FOR THE REST OF MY LIFE. AND I WORRY ABOUT THAT BECAUSE I DON'T KNOW IF IT CAN STOP ME FROM GETTING A JOB OR WHATEVER. SOME PEOPLE DON'T HIRE YOU WHEN YOU GOT A RECORD LIKE THAT.
Q. MS. PEAR, PRIOR TO YOUR ARREST, WERE YOU REFERRED TO SUBSTANCE ABUSE TREATMENT BY ANY OF THE PERSONNEL AT THE MEDICAL UNIVERSITY?
THE COURT: REPHRASE THE QUESTION. DON'T USE THE WORD PRIOR.
MS. DUNN: OKAY.
Q. (BY MS. DUNN, CONTINUING) BEFORE, BEFORE YOU WERE ARRESTED, WERE YOU REFERRED FOR SUBSTANCE ABUSE TREATMENT BY ANYONE WORKING AT THE MEDICAL UNIVERSITY?
A. YES.
Q. WHEN DID THAT HAPPEN?
A. THE SECOND TIME THAT I WENT IN THE HOSPITAL BEFORE I GOT LOCKED UP.
Q. OKAY. DID YOU KEEP YOUR APPOINTMENT?

A. I DON'T THINK THAT I WENT. IT TOOK ME AWHILE BEFORE I
WENT THERE. I GUESS I DIDN'T WANT TO ACCEPT THE FACT, BUT

[PAMELA PEAR 264]

THEN I DID MAKE UP MY MIND TO GO TO COUNTY SUBSTANCE ABUSE.
Q. I DON'T UNDERSTAND WHAT YOU MEAN BY DIDN'T WANT TO ACCEPT
THE FACTS?
A. I REALLY DIDN'T WANT TO GO BECAUSE I DIDN'T FEEL LIKE I
HAD A PROBLEM AT THAT TIME.
Q. WELL, DID YOU GO?
A. I DID GO. I WAITED AWHILE, A COUPLE OF WEEKS OR
WHATEVER, THEN I WENT TO CHARLESTON COUNTY SUBSTANCE ABUSE
BECAUSE I DIDN'T KNOW WHAT MY OUTCOME WOULD HAVE BEEN.
Q. I'M SORRY. YOU DIDN'T KNOW WHAT?
A. AFTER I GOT OF JAIL I WENT TO CHARLESTON COUNTY SUBSTANCE
ABUSE AWHILE AFTERWARD. IT TOOK ME AWHILE BEFORE I GOT TO
GO.
Q. MS. PEAR, DO YOU KNOW WHAT YOU WERE ARRESTED FOR?
A. YEAH.
Q. WHAT?
A. DISTRIBUTION FOR A MINOR – DISTRIBUTION TO A MINOR.
MS. DUNN: BEG THE COURT'S INDULGENCE.
(PAUSE.)
MS. DUNN: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: CROSS-EXAMINATION.
MS. COMPANION: FIRST OF ALL I WOULD LIKE TO MOVE PLAINTIFF'S MEDICAL RECORDS, SUBSTANCE ABUSE RECORD AND ARREST RECORD INTO EVIDENCE.
MS. DUNN: THE PAMELA PEAR RECORDS ARE SUBJECT TO

[PAMELA PEAR 265]

THE SAME, BUT I HAVE ACTUALLY REVIEWED PART OF THESE. SEVERAL OF THESE MEDICAL UNIVERSITY HAVE NOTHING TO DO WITH ANY TREATMENT THAT IS CONNECTED WITH THIS POLICY.
THE COURT: WELL THE SAME RULE I MADE BEFORE I'M GOING TO MAKE IN REGARD TO ALL OF THE SUBSTANCE ABUSE RECORDS AND ALL OF THE HOSPITAL RECORDS.
MS. COMPANION: 86 FOR THE ARREST RECORD, 83 FOR THE SUBSTANCE ABUSE RECORD, AND 81 FOR THE MEDICAL RECORD.
DEPUTY CLERK: THANK YOU.
CROSS-EXAMINATION
BY MS. COMPANION:
Q. GOOD AFTERNOON, MS. PEAR.
A. GOOD AFTERNOON.
Q. YOU STARTED USING COCAINE AROUND AGE 21 OR 22, DIDN'T YOU?
A. YES.
Q. AND YOU ADMIT THAT YOU USED COCAINE DURING YOUR PREGNANCY

WITH THE CHILD THAT YOU JUST SPOKE ABOUT?
A. YES.
Q. AND YOU WERE AWARE THAT WHEN YOU WERE PREGNANT AND YOU WERE USING COCAINE, THAT DRUGS WERE BAD FOR YOUR BABY IN UTERO, WEREN'T YOU?
A. YES.
Q. AND IN FACT YOU KNEW THAT USING COCAINE WHILE YOU WERE PREGNANT COULD CAUSE YOU TO GO INTO EARLY LABOR, DIDN'T YOU?

[PAMELA PEAR 266]

A. YES.
Q. BUT YOU USED COCAINE DURING YOUR PREGNANCY ANYWAY, DIDN'T YOU?
A. YES.
Q. AND YOU WERE HAVING PROBLEMS WITH PRE-TERM LABOR DURING THAT PREGNANCY, WEREN'T YOU?
A. YES.
Q. IN FACT YOUR DOCTOR PUT YOU ON BEDREST WHEN YOU WERE ABOUT 33 WEEKS PREGNANT, DIDN'T HE?
A. YES.
Q. YOU DIDN'T STAY IN BED, DID YOU?
A. MOST OF THE TIME, YES.
Q. BUT IN FACT YOU CONTINUED TO GET OUT OF BED TO GO GET COCAINE TO USE, DIDN'T YOU?
A. I DIDN'T HAVE TO GO GET IT.
MS. COMPANION: MAY WE HAVE A SIDEBAR DISCUSSION?
THE COURT: YEAH, SURE.
(SIDEBAR AS FOLLOWS:)

MS. COMPANION: I HAVE, I'M GOING TO IMPEACH HER WITH THIS TESTIMONY. WITHIN THE DEPOSITION IT WOULD IMPEACH HER, IT TALKS ABOUT SELLING DRUGS. SHE GOT OUT OF BED 33 WEEKS PREGNANT TO GO SELL DRUGS. IMPEACH HER WITH HER DEPOSITION.

THE COURT: YOU ASKED HER THE QUESTION, YOU GOT OUT OF BED TO GO GET DRUGS. SHE SAID THAT SHE DIDN'T HAVE TO GET

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[PAMELA PEAR 268]

A. YES.
Q. AND YOU SIGNED CONSENT FORMS FOR YOUR TREATMENT AT THE MEDICAL UNIVERSITY, DIDN'T YOU?
A. YES.
Q. IS THIS YOUR SIGNATURE?
A. UMM-HMM.
Q. AND IS THIS YOUR SIGNATURE?
A. YES.
Q. AND IS THIS YOUR SIGNATURE?
A. YES.
Q. AND IS THIS YOUR SIGNATURE HERE?
A. YES.

MS. COMPANION: I WOULD LIKE TO MOVE 81, B, C, D AND E INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MS. DUNN: NO, YOUR HONOR.

DEPUTY CLERK: THAT'S DEFENDANTS' EXHIBIT 81.

MS. COMPANION: B, C, D AND E.

Q. (BY MS. COMPANION, CONTINUING) MS. PEAR, YOU AGREE THAT YOU SAW A VIDEO REGARDING THE DANGERS OF SUBSTANCE ABUSE AND DRINKING AND SMOKING AND USING DRUGS DURING YOUR PREGNANCY AT THE MEDICAL UNIVERSITY?
A. YES.
Q. AND YOU SIGNED A LETTER ACKNOWLEDGING THAT YOU HAD SEEN THAT VIDEO, DIDN'T YOU?

[PAMELA PEAR 269]

A. YES.
Q. IS THAT YOUR SIGNATURE?
A. YES.
Q. I WOULD LIKE TO MOVE DEFENDANTS' EXHIBIT NUMBER 88 INTO EVIDENCE?
MS. DUNN: WITHOUT OBJECTION.
DEPUTY CLERK: THANK YOU.
Q. (BY MS. DUNN, CONTINUING) AND YOU ALSO AGREE THAT WHEN YOU WERE AT THE MEDICAL UNIVERSITY YOU SIGNED THE LETTER FROM THE SOLICITOR'S OFFICE INFORMING YOU THAT YOU NEEDED TO GO TO SUBSTANCE ABUSE TREATMENT SINCE YOU WERE PREGNANT AND USING DRUGS, AND IF YOU DIDN'T THAT YOU COULD BE ARRESTED; ISN'T THAT TRUE?
A. YES.
Q. AND IS THIS YOUR SIGNATURE?
A. YES.
MS. COMPANION: I WOULD LIKE TO MOVE DEFENDANTS'

EXHIBIT 87 INTO EVIDENCE.
THE COURT: WITHOUT OBJECTION.
MS. DUNN: WITHOUT OBJECTION.
Q. (BY MS. COMPANION, CONTINUING) MS. PEAR, YOU AGREE THAT SOMEONE AT THE MEDICAL UNIVERSITY HELPED MAKE AN APPOINTMENT FOR YOU AT THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION TO RECEIVE SUBSTANCE ABUSE TREATMENT WHILE YOU WERE PREGNANT; ISN'T THAT TRUE?

[PAMELA PEAR 270]

A. YES.
Q. AND THAT PERSON WHO HELPED YOU MAKE THAT SUBSTANCE ABUSE APPOINTMENT WAS NOT SHIRLEY BROWN, WAS IT?
A. I DON'T KNOW WHO IT WAS.
Q. BUT IT WASN'T SHIRLEY BROWN, WAS IT?
A. I DON'T KNOW.
Q. IS THAT YOUR SIGNATURE?
A. UMM-HMM.
MS. COMPANION: I WOULD LIKE TO MOVE DEFENDANTS' EXHIBIT NUMBER 91 INTO EVIDENCE.
MS. DUNN: WITHOUT OBJECTION.
DEPUTY CLERK: DEFENDANTS' EXHIBIT 91 IN EVIDENCE.
Q. (BY MS. COMPANION, CONTINUING) AND YOU AGREE THAT YOU DIDN'T HAVE ANY PROBLEMS WITH CHILDCARE AT THE TIME THAT YOU

WERE SUPPOSED TO BE ATTENDING SUBSTANCE ABUSE TREATMENT AT CHARLESTON COUNTY SUBSTANCE ABUSE, DID YOU?
A. NO, I DIDN'T.
Q. AND YOU AGREED THAT YOU DID NOT HAVE ANY DIFFICULTIES WITH TRANSPORTATION WITH THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION, DID YOU?
A. NO, I DIDN'T.
Q. AND YOU ATTENDED CHARLESTON COUNTY SUBSTANCE ABUSE FOR A LITTLE WHILE, DIDN'T YOU?
A. YES, I DID.
Q. YOU DIDN'T STAY WITH THE PROGRAM, DID YOU?

[]PAMELA PEAR 271]

A. NO, I DIDN'T.
Q. AND YOU AGREE THAT YOU CONTINUED TO USE COCAINE AT THAT TIME?
A. YES, I DID.
Q. AND YOU ALSO AGREE THAT YOU WERE ARRESTED DURING YOUR PREGNANCY?
A. YES.
Q. AND DURING THE PREGNANCY, THIS PREGNANCY WE HAVE BEEN DISCUSSING TODAY, BEFORE GOING TO MUSC FOR YOUR PRENATAL CARE YOU WERE AWARE THAT MUSC WAS TESTING PREGNANT WOMEN FOR ILLEGAL DRUGS, WEREN'T YOU?
A. YES.
Q. AND WHILE YOU WERE PREGNANT AND BEFORE YOU EVEN WENT TO

MUSC FOR PRENATAL CARE, YOU WERE AWARE THERE WAS A POLICY REGARDING ARRESTING WOMEN IF YOU USED ILLEGAL DRUGS DURING YOUR PREGNANCY?

A. YES.

Q. BUT YOU WENT TO MUSC FOR YOUR PRENATAL CARE?

A. I WAS REFERRED THERE BY FRANKLIN C. FETTER.

Q. YOU DIDN'T TRY TO GO ANYPLACE ELSE, DID YOU?

A. WHY SHOULD I IF I WAS REFERRED THERE.

Q. PLEASE ANSWER THE QUESTION.

A. NO, I DIDN'T.

Q. AND ISN'T IT TRUE THAT THIS ARREST FOR DISTRIBUTION TO A MINOR WAS NOT THE FIRST TIME THAT YOU HAD EVER BEEN

[PAMELA PEAR 272]

ARRESTED?

A. NO. NO, IT'S NOT THE FIRST TIME I HAVE BEEN ARRESTED.

Q. AND AFTER YOUR ARREST FOR DISTRIBUTION YOU WERE ARRESTED ANOTHER TIME AND SPENT THE NIGHT IN JAIL; ISN'T THAT TRUE?

A. YES.

Q. AND WHILE YOU WERE USING COCAINE AND WERE PREGNANT YOU KNEW IT WAS ILLEGAL TO POSSESS AND DISTRIBUTE COCAINE, DIDN'T YOU?

A. CAN YOU REPEAT THE QUESTION?

Q. WHEN YOU WERE USING COCAINE WHILE YOU WERE PREGNANT, YOU

WERE AWARE THAT IT WAS ILLEGAL TO POSSESS AND TO DISTRIBUTE COCAINE, DIDN'T YOU?

A. YES.

Q. AND YOU AGREE THAT THE ONLY ILLEGAL DRUG THAT YOU USED DURING YOUR PREGNANCY WAS COCAINE; ISN'T THAT TRUE?

A. YES.

Q. AND. ISN'T IT TRUE THAT YOU DO NOT USE COCAINE ANYMORE?

A. NO, I DON'T.

Q. AND YOU HAVE NOT USED IT IN YEARS, HAVE YOU?

A. IT'S BEEN AWHILE.

Q. CONGRATULATIONS.

MS. COMPANION: ONE MOMENT, PLEASE.

Q. (BY MS. COMPANION, CONTINUING)YOUR ARREST - YOUR ARREST BEFORE YOUR PREGNANCY AND AFTER THE PREGNANCY; THEY WEREN'T DUE TO THE POLICY, WERE THEY?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF CLAUDIA PEOPLES

[PEOPLES 603]

Q. TELL US WHERE YOU'RE FROM, PLEASE?
A. BARNWELL, SOUTH CAROLINA.
Q. AND WHAT IS YOUR HUSBAND'S NAME?
A. RODNEY.
Q. AND YOU - AND WHAT DOES RODNEY DO FOR A LIVING?
A. HE IS A CIRCUIT JUDGE FOR THE STATE OF SOUTH CAROLINA.
Q. AND JUDGE PEOPLES HAS BEEN A JUDGE FOR HOW LONG?
A. SINCE 1974.
Q. AND DO YOU WORK OUTSIDE OF THE HOME, MS. PEOPLES?
A. I'M A HOMEMAKER, BUT ALSO THE EXECUTIVE DIRECTOR PART-TIME FOR THE BARNWELL COUNTY UNITED WAY.
Q. AND DO YOU ALSO SERVE ON THE BOARD OF TRUSTEES OF THE MEDICAL UNIVERSITY?
A. YES, I DO.
Q. HOW DID YOU OBTAIN YOUR BOARD SEAT?
A. I WAS APPOINTED BY THE GOVERNOR.
Q. HOW LONG HAVE YOU BEEN ON THE BOARD OF THE MEDICAL UNIVERSITY?

A. SINCE 1988.
Q. AND IN YOUR CAPACITY AS A BOARD MEMBER AND IN THIS CASE YOU ARE A NAMED DEFENDANT, AS YOU KNOW, HAVE THE SPECIFIC SEQUENCE OF EVENTS THAT LED UP TO THE APPROVAL AND IMPLEMENTATION OF THIS INTERAGENCY POLICY BEEN THE SAME AS THEY HAVE FOR OTHER POLICIES THAT YOU HAVE SEEN ADOPTED AND APPROVED BY THE BOARD?

[PEOPLES 604]

A. YES, THEY HAD.
Q. WERE THERE ANY DEPARTURES FROM THE NORMAL PROCEDURES AND SEQUENCE OF EVENTS IN THE ADOPTION OF THIS POLICY AT THE MEDICAL UNIVERSITY?
A. NONE AT ALL.
Q. HAS THE MEDICAL UNIVERSITY, IN YOUR YEARS AS A BOARD MEMBER, COMPLIED WITH MANDATORY REPORTING OF SUSPECTED CHILD ABUSE?
A. AS FAR AS I KNOW.
Q. IS THIS POLICY, THIS INTERAGENCY POLICY, CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS, STANDARDS AND PHILOSOPHY?
A. YES.
Q. AS YOU UNDERSTOOD IT AS A LAY PERSON, NOT A MEDICAL MEMBER OF THE BOARD OF TRUSTEES, WHAT WAS THE GOAL OF THIS POLICY, MS. PEOPLES?

A. THE GOAL WAS TO PROTECT THESE UNBORN CHILDREN AND ALSO TO GET THE MOTHERS OFF OF DRUGS IF THEY WOULD AGREE.

Q. AND WAS THERE ANY INTENT TO DISCRIMINATE AGAINST BLACK MOTHERS?

A. NONE.

MR. HOOD: MS. PEOPLES, THANK YOU FOR COMING TODAY.

CROSS-EXAMINATION

BY MR. WHERRY:

Q. NOW MR. HOOD ASKED YOU WHETHER YOU WERE A NAMED DEFENDANT. HE HAS ASKED THE OTHER TRUSTEES. YOU UNDERSTAND

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF WILLIAM PITTARD

[PITTARD 208]

A. YES.
Q. AND THEN YOU WENT TO THE UNIVERSITY OF VIRGINIA MEDICAL SCHOOL. AND YOU ARE CURRENTLY A PROFESSOR OF PEDIATRICS, CORRECT?
A. YES.
Q. AND YOU ARE THE HEAD OF THE DEPARTMENT OF THE DEPARTMENT OF PEDIATRICS AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. WELL, I'M THE DIRECTOR OF THE DIVISION OF NEONATOLOGY, NOT THE CHAIRMAN OF THE DEPARTMENT OF PEDIATRICS.
Q. WE HAVE HEARD FROM DR. ANNIBALE AND DR. PATRICK AND DR. HULSEY. YOU'RE THEIR BOSS; IS THAT RIGHT?
A. I DON'T REFER TO IT THAT WAY, BUT YES.
Q. OKAY. OKAY. AND, DOCTOR, WHEN YOU WERE AT WAKE FOREST IN 1968, WHERE YOU AWARDED PHI BETTA KAPPA?
A. YES.
Q. AND HAVE YOU RECEIVED OTHER AWARDS?

A. I AM NOT SURE WHAT SPECIFIC AWARD YOU MIGHT BE THINKING ABOUT, BUT PERIODICALLY.
Q. I'M SORRY.
A. PERIODICALLY THERE WERE SOME.
Q. 1993 WERE YOU LISTED IN THE BEST DOCTORS IN AMERICA?
A. YES
Q. YOU HAVE HAD NUMEROUS PUBLICATIONS AND PEER REVIEW LITERATURE; IS THAT RIGHT?
A. YES, SIR.

[PITTARD 209]

Q. I HAVE GOT THE BENEFIT OF YOUR CURRICULUM VITAE IN FRONT OF ME AND IT IS SOME 20 PAGES LONG. IS THAT AN ACCURATE LISTING OF ALL OF THE PUBLICATIONS YOU HAVE IN THE LITERATURE, DOCTOR?
A. I'M ASSUMING THIS IS AN UPDATED CV.
Q. JUST TAKE A LOOK AT IT FOR A MINUTE.
A. THERE IS - THERE SHOULD BE A LITTLE OVER A HUNDRED PUBLICATIONS.
Q. A HUNDRED PUBLICATIONS?
A. YES, ALTOGETHER.
Q. AND CHAPTERS AND BOOKS AS WELL?
A. YES.
Q. DOCTOR, ARE YOU FAMILIAR WITH WHAT HAS BECOME KNOWN AS THE INTERAGENCY POLICY?
A. YES, I AM.
Q. WERE YOU INVOLVED IN THE INITIAL MEETINGS WHEN THE

INTERAGENCY POLICY WAS DEVELOPED?
A. YES, I WAS.
Q. WHY WAS PEDIATRICS INVOLVED IN THE DEVELOPMENTAL MEETINGS OF THE INTERAGENCY POLICY?
A. PEDIATRICS I GUESS TO MOST PEOPLE
THE COURT: ARE YOU HAVING ANY PROBLEM HEARING HIM DOWN THERE ON THE END?
JURY: JUST A LITTLE BIT.
THE COURT: WE HAVE BEEN HAVING TROUBLE WITH THAT

[PITTARD 210]

BUT IT MAY WORK FOR YOU.
A. PEDIATRICS IS A SPECIALTY WHICH CLEARLY LOOKS AT THE GROWTH AND DEVELOPMENT OF CHILDREN. BUT A MAJOR COMPONENT PEDIATRICS IS EDUCATION AND PREVENTATIVE MEDICINE. AND A MAJOR ROLE OF ANY PEDIATRICIAN IS TO FACILITATE THE CARE OF CHILDREN VIA THE PARENTS PRIMARILY. SUCH THAT THE CHILD WILL GROW AND DEVELOP INTO A HEALTHY, PRODUCTIVE MEMBER OF OUR SOCIETY.
AND WHEN THIS INTERAGENCY POLICY WAS BEING PUT TOGETHER, IT WAS VERY APPARENT THAT CHILDREN WHO ARE EXPOSED TO VARIOUS DRUGS, TO ALMOST ANY KIND OF ENVIRONMENTAL FACTOR YOU MIGHT THINK OF, THAT CAUSES HARM TO THEIR DEVELOPMENT WOULD BE SOMETHING THAT ANY PEDIATRICIAN WOULD LIKE TO LIMIT.

AND AS A MATTER OF FACT IN THIS PARTICULAR CASE, WE HAPPEN TO BE TALKING ABOUT A SPECIFIC DRUG, WE'RE TALKING ABOUT COCAINE. AND THERE WAS MORE THAN A SMALL AMOUNT OF DATA SUGGESTING THAT BABIES IN UTERO EXPOSED TO COCAINE DEVELOPED ABNORMALLY. AND THEREFORE IT WAS VERY EASY FOR ME TO SAY WHEN THE QUESTION AROSE, HOW CAN WE DO SOMETHING ABOUT THIS.

AND WE TRIED TO GET A GROUP TOGETHER TO SAY HOW IS THE BEST WAY TO LIMIT THIS EXPOSURE, THAT THE - I WANTED TO BE A PART OF THAT PROCESS. IT WAS ALMOST ENTIRELY, IF THE IDEA IS WE COULDN'T, AS I RECALL, WE COULDN'T DO ANYTHING ABOUT A CHILD WHO HAS ALREADY BEEN EXPOSED AND INJURED, BUT IF WE COULD FACILITATE GETTING A MOTHER WHO USES COCAINE IN SOME

[PITTARD 211]

FORM OF REHABILITATION, THEN CONCEIVABLY SUBSEQUENT CHILDREN THAT THIS LADY MIGHT HAVE WOULD BE LESS LIKELY TO BE EXPOSED AND THEREFORE MORE LIKELY TO DEVELOP NORMALLY.

AND PRETTY MUCH I THINK THAT WAS THE GIST OF EVERYONE AROUND THE GROUP THAT WAS TRYING TO COME UP WITH A WAY OF SUPPORTING THESE CHILDREN.

Q. AND WHAT WAS, AS YOU UNDERSTOOD IT, THE GOAL OF THE INTERAGENCY POLICY, DOCTOR?
A. WELL, YOU KNOW, TO TRY TO TELL YOU EXACTLY WHAT THE GOAL IS SEVERAL YEARS LATER IS NOT ALTOGETHER CLEAR TO ME. BUT THE GOAL FOR ME PER SE, AND I THINK MOST OF THE PEOPLE, WAS HOW CAN WE FACILITATE A BENEFICIAL OUTCOME TO A CIRCUMSTANCE WHICH IS NOT PARTICULARLY GOOD RIGHT NOW, I.E. THE MOTHER IS CLEARLY ADDICTED, SHE WOULDN'T BE USING THE DRUG IF SHE WEREN'T, AND HOW CAN WE FACILITATE HER WELL-BEING BY GETTING HER OUT OF THIS ADDICTIVE CIRCUMSTANCES WHICH WOULD THEN SUBSEQUENTLY BENEFIT THE BABY. IF NOT THE CURRENT BABY, THEN ANY SUBSEQUENT PREGNANCIES THIS MOTHER MIGHT HAVE.
AND SO PREVENTION WAS PERHAPS THE MOST OBVIOUS OBJECTIVE.
Q. DOCTOR, THE DEVELOPMENTAL MEETINGS THAT YOU ATTENDED, DO YOU RECALL A SOCIAL WORKER BY THE NAME OF MARTHA WILLIAMS BEING PRESENT?
A. SHE WAS A SOCIAL WORKER IN THE NICU.
Q. I'M SORRY?

* * *

[PITTARD 213]

THAT DEVELOPED THE INTERAGENCY POLICY OR DISCUSSED ITS IMPLEMENTATION?

A. RACIAL SLURS WEREN'T A PART OF THE MEETING.

Q. WERE YOU AWARE OF ANY RACIAL MOTIVATION BEHIND THIS POLICY?

A. THE POLICY WAS ALMOST ENTIRELY AN EFFORT TO KEEP THE MOTHERS AND BABIES TOGETHER AND TO PREVENT SUBSEQUENT INJURY TO FUTURE PREGNANCIES AND PERHAPS LIMIT SOME OF THE INJURY TO THE CURRENT PREGNANCY. I DON'T THINK THERE WAS ANY - THIS WAS INTENDED FOR ANY PREGNANT WOMEN. I'M NOT SURE WHY YOU WOULD THINK IT WOULD BE RACIAL.

Q. I DON'T, DOCTOR, DON'T WORRY.

MR. WHERRY: I OBJECT.

THE COURT: OBJECTION SUSTAINED. LADIES AND GENTLEMEN, PLEASE DISREGARD THE COMMENTS BY THE ATTORNEY. IT'S IMPROPER FOR HER TO EXPRESS A COMMENT ON THE EVIDENCE.

MS. SHOWERS: I APOLOGIZE, YOUR HONOR.

THE COURT: IT'S ALL RIGHT.

Q. (BY MS. SHOWERS, CONTINUING) DID YOU EVER HEAR SHIRLEY BROWN MAKE RACIST STATEMENTS?

A. NO.

Q. DOCTOR, AS A PEDIATRICIAN, DID YOU HAVE OCCASION TO TEST BABIES UNDER THE INTERAGENCY POLICY?

A. YES, WE DID.

Q. WHAT TRIGGERED ARREST, DOCTOR?

* * *

[PITTARD 216]

TESTIFYING FROM.

MS. SHOWERS: OKAY.

Q. (BY MS. SHOWERS, CONTINUING) DOCTOR, DO YOU RECALL THE CRITERIA UPON WHICH THE TESTS WERE DONE, THE URINE DRUG SCREENS?

A. WELL, AS I SORT OF INDICATED THERE WERE SEVEN OR EIGHT CRITERIA. I'LL BE HARD PRESSED TO COME UP WITH EACH ONE OF THEM. I CAN TELL YOU THAT THE ONES THAT COME TO MIND WERE PREMATURE LABOR IS STIMULATED BY THE USE OF COCAINE. THEREFORE WOMEN WHO ARE PREGNANT AND USE COCAINE DURING THE PREGNANCY ARE MUCH MORE LIKELY TO PRESENT WITH THE EARLY ONSET OF LABOR. I.E. THEY WILL DELIVER PREMATURELY. SIMILARLY, UTERINE CONTRACTIONS WILL RESULT IN ABRUPTION OF THE PLACENTA. SO FREQUENTLY WHEN WOMEN PRESENT WITH ABRUPTIO PLACENTAE, THEY MAY BE WOMEN WHO HAVE BEEN USING COCAINE. WOMEN WHO TELL ME THAT THEY USE COCAINE, MAY BE WOMEN WHO WERE USING COCAINE. AND BELIEVE IT OR NOT THERE ARE PATIENTS THAT COME IN AND SAY THEY USE COCAINE.

ON THE OTHER HAND, THERE ARE A SERIES OF SIX OR

SEVEN THINGS WHICH WE USED AS A MARKERS FOR WOMEN WHO MIGHT BE USING COCAINE. AND THEREFORE MIGHT HAVE A CHILD WITH CERTAIN ABNORMALITIES. IF A CHILD HAD ONE OF THOSE ABNORMALITIES, WE MIGHT LOOK FOR DRUG ABUSE OR SCREEN THAT CHILD FOR THE SAME REASON. IT WAS - THESE CRITERIA WERE WRITTEN DOWN IN BLACK AND WHITE. FOR THAT MATTER THEY MAY HAVE EVEN BEEN POSTED, I

[PITTARD 217]

DON'T KNOW. BUT THEY WERE WRITTEN DOWN VERY CLEARLY SO ALL OF THE HOSPITAL PERSONNEL KNEW, I MEAN THE NURSES AND PHYSICIANS THAT WERE CARING FOR THE PATIENTS KNEW WHAT THESE CRITERIA WERE. IF ANY WOMEN HAD ONE OF THESE CRITERIA, THEY WERE CLEARLY SCREENED.

I DON'T KNOW IF THAT ANSWERS YOUR QUESTION.

Q. YES, SIR. THANK YOU. YOU WERE INVOLVED IN TESTING OF THE NEWBORNS; IS THAT RIGHT?

A. YES. I WASN'T CARING FOR THE MOTHERS. I TOOK CARE OF THE BABIES.

Q. COULD YOU DESCRIBE TO THE JURY THE MEDICAL NECESSITY OF WHY THIS WAS DONE? WHY THE TEST WAS PERFORMED?

A. WHY IS IT PERFORMED? IT'S SORT OF LIKE MANY OF THE TESTS

THAT YOU HAVE WHEN YOU GO TO YOUR PHYSICIAN FOR ANY PARTICULAR PROBLEM, THERE IS, FOR INSTANCE IN A CHILD WHO IS BEEN EXPOSED TO COCAINE IN UTERO, ONE OF THE MANY THINGS THAT YOU MIGHT SEE IS THE CHILD COULD BE UNDERGROWN OR HE COULD BE JUST NOT FEEDING VERY WELL. AND IN FACT THEY'RE VERY IRRITABLE ON OCCASION. ALL CHILDREN WHO ARE VERY IRRITABLE ARE NOT EXPOSED TO COCAINE AND ALL CHILDREN WHO ARE EXPOSED TO COCAINE ARE NOT VERY IRRITABLE. SO IT'S A MATTER, YOU LOOK AT THE SERIES OF CLINICAL SYMPTOMS THE CHILD PRESENTS WITH AND THEN YOU SAY WHAT IS THE - WHAT IS THE DIFFERENTIAL DIAGNOSIS.

IN OTHER WORDS, WHAT ARE THE POSSIBILITIES THAT MIGHT EXPLAIN WHY THIS CHILD IS ACTING THE WAY HE OR SHE IS

[PITTARD 218]

ACTING. WE'RE LOOKING AT A BABY THAT IS DOING SOMETHING ABNORMAL, OF COURSE. AND WITH THAT IN MIND, YOU MAY NARROW IT DOWN TO A SERIES OF LET'S SAY SIX OR SEVEN CRITERIA, NOT UNLIKE TRYING TO FIGURE OUT WHAT IS WRONG WITH YOUR AUTOMOBILE IF THERE IS SOMETHING WRONG WITH IT AND THERE ARE SEVERAL THINGS THAT IT MIGHT BE, AND THEN YOU SAY THIS IS THE MOST

LIKELY OR THESE ARE THE MOST LIKELY. AND THEN TRYING TO FIGURE OUT WHICH ONE OF THOSE SIX OR SEVEN POSSIBILITIES MIGHT BE CAUSING THIS CHILD TO ACT THIS WAY.

AND WITH THAT IN MIND, WOULD BE OF THE STUDIES YOU MIGHT DO, WOULD BE A URINE DRUG SCREEN SAYING THIS COULD BE EXPLAINED BY BEING EXPOSED TO DRUGS IN UTERO. WITH AN UNDERSTANDING OF WHAT IS WRONG, WE CAN THEN MUCH BETTER DEAL WITH HOW TO CORRECT IT.

Q. DOCTOR, WERE ONLY BLACK BABIES TESTED UNDER THE POLICY OR DID IT APPLY -

MR. WHERRY: OBJECT TO THE LEADING NATURE OF THE QUESTION.

MS. SHOWERS: I HADN'T COMPLETED MY QUESTION.

THE COURT: THE FORM OF THE QUESTION IS LEADING FROM THE VERY BEGINNING.

Q. (BY MS. SHOWERS, CONTINUING) WHAT BABIES WERE TESTED UNDER THE POLICY, DOCTOR?

A. WELL THE BABIES AND MOTHERS BOTH WERE TESTED IF THE MOTHER PRESENTED OR BABIES PRESENTED WITH ANY OF THAT

[PITTARD 219]

OF SIX OR SEVEN CRITERIA. IT HAD NOTHING TO DO - IT HAD ABSOLUTELY NOTHING, THEY COULD BE ANYTHING, AND IF YOU GOT ONE

OF THOSE CRITERIA, THEY GET SCREENED. I'M NOT SURE WHY YOU KEEP COMING BACK TO WHAT COLOR OF THE MOTHER.

MR. WHERRY: I OBJECT TO THAT, YOUR HONOR. ASK THAT BE STRICKEN.

THE COURT: I OVERRULE THE OBJECTION.

MS. SHOWERS: CAN I HAVE A MOMENT, YOUR HONOR.

THE WITNESS: WHY SHE ASKED ME THAT.

THE COURT: SAY WHAT?

THE WITNESS: WHY SHE ASKED ME THAT.

MS. SHOWERS: NOTHING FURTHER.

THE WITNESS: CAN I LEAVE?

THE COURT: NO, NO, WE HAVE CROSS-EXAMINATION.

CROSS-EXAMINATION

BY MR. WHERRY:

Q. DOCTOR, YOU SAID THAT ONE OF THE THINGS THAT YOU WERE CONCERNED ABOUT WAS EXPOSURE OF THESE BABIES TO ANYTHING THAT WOULD CAUSE THEM HARM; IS THAT FAIR?

A. I THINK THAT THAT IS A REASONABLE CONCERN, YES.

Q. AND, DOCTOR, EXPOSURE OF THESE BABIES TO ALCOHOL AND TOBACCO CERTAINLY HAVE GREAT POTENTIAL FOR CAUSING HARM, DIDN'T THEY?

A. I THINK EXPOSURE TO A NUMBER OF CRITERIA CERTAINLY, INCLUDING NICOTINE AND EHTYL ALCOHOL AND ANY OF THE VARIETY OF

[PITTARD 220]

DRUGS SUCH AS COCAINE HAVE AN - COULD HAVE AN ADVERSE EFFECT,
SURE.
Q. THIS INTERAGENCY POLICY, DOCTOR, WAS LIMITED TO COCAINE,
WASN'T IT?
A. THIS PARTICULAR POLICY WAS RELATED TO COCAINE, YES.
Q. DOCTOR, EXPOSURE OF THE FETUS TO HEROIN, AND
AMPHETAMINES, BARBITURATES AND OTHER SIMILAR SUBSTANCES HAS
THE POTENTIAL FOR CAUSING HARM TO THE FETUS, DOESN'T IT?
A. I WOULD ASSUME THAT ALL OF THOSE DRUGS HAVE - COULD HAVE
AN ADVERSE AFFECT.
Q. YOU ASSUME, DOCTOR, OR YOU KNOW AS A PEDIATRICIAN?
A. I'M QUITE SATISFIED THAT ALL OF THOSE DRUGS COULD CAUSE
AN ADVERSE EFFECT ON THE BABY, IF THAT'S WHAT YOU'RE ASKING
ME.
Q. YOU TALKED A LITTLE BIT ABOUT THE DEVELOPMENT OF THE
POLICY, DOCTOR. IN FACT, THE IDEA FOR THIS POLICY CAME FROM
SHIRLEY BROWN, DIDN'T IT?
A. I'M SORRY, I DON'T KNOW THE ANSWER TO THAT QUESTION. IT
CAME AT A TIME WHEN THERE WAS AN INCREASING AWARENESS OF THE
USE OF COCAINE IN OUR SOCIETY AND PARTICULARLY IN OUR

HERE IN CHARLESTON. AND IT WAS REALLY A MULTIGROUP CONCERN. CERTAINLY THAT'S WHY THE COMMITTEE THAT CAME UP WITH THIS POLICY WAS MADE UP OF OBSTETRICIANS AND PEDIATRICIANS AND PSYCHIATRISTS, AND EVEN THE SOLICITOR.

Q. SO I TAKE IT THE ANSWER TO MY QUESTION IS: YOU DON'T

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[PITTARD 232]

A. THAT'S THE POINT.

Q. DOCTOR, IF A CHILD, A NEWBORN TESTS POSITIVE FOR COCAINE, THROUGH A URINE DRUG SCREEN, THERE IS NO PARTICULAR TREATMENT FOR THAT CHILD, IS THERE?

A. THAT'S CORRECT.

Q. DOCTOR, YOU AGREE WITH ME THAT ADDICTION IS A DISEASE, ISN'T IT, RATHER THAN - WELL, YOU WOULD AGREE WITH ME THAT THAT IS TRUE?

A. WHAT AM I AGREEING TO?

Q. THAT ADDICTION IS A DISEASE?

A. SOME PSYCHIATRISTS WOULD CALL IT THAT.

Q. WHAT DO YOU CALL IT?

A. I'M NOT GOING TO PLAY THAT GAME. I DON'T KNOW HOW YOU WOULD DEFINE DISEASE. ON THE OTHER HAND ADDICTION IS CERTAINLY SOMETHING THAT IS VERY PROBLEMATIC.

Q. WHAT DO YOU CALL IT?

A. ME? ADDICTION?

Q. YES.

A. I CALL IT A VERY DIFFICULT CONCERN. IT'S SORT OF LIKE YOU MENTION SMOKING AND ALCOHOL AND DRUGS, THEY'RE DRUGS THAT CAUSE ELICIT BEHAVIOR AND ALSO ABERRANT HEALTH PROBLEMS.
Q. ILLICIT BEHAVIOR, ALCOHOL AND TOBACCO?
A. DO YOU NOT AGREE WITH THAT?
Q. PARDON ME?
A. DO YOU NOT AGREE WITH THAT?

[PITTARD 233]

Q. I'M NOT ALLOWED TO TAKE A POSITION AGREEING OR NOT, DOCTOR, MY ROLE IS TO QUESTION THE WITNESS IN A COURTROOM.
ARE YOU AWARE OF ANY OTHER CIRCUMSTANCES IN MEDICINE WHERE A PERSON IS ARRESTED FOR NOT GETTING THE TREATMENT THAT A DOCTOR SUGGESTS OR FEELS IS APPROPRIATE?
A. I DON'T KNOW OF ANY CIRCUMSTANCES, INCLUDING THIS ONE, WHERE THEY WERE ARRESTED FOR NOT DOING WHAT THE DOCTORS SAID IS APPROPRIATE. REHABILITATION IS SOMETHING THAT WE SUGGEST TO THE MOTHER WHO IS ABUSING DRUGS. ON THE OTHER HAND, THE SOLICITOR SAID IF IN FACT YOU IDENTIFY SOMEONE WHO HAS BROKEN THE LAW, YOU WILL NOT HAVE TO REPORT THEM - YOU WILL NOT HAVE TO REPORT THEM AND WE WILL NOT ARREST THEM IF IN FACT YOU WILL

GET THEM ON REHABILITATION. SO OUR SUGGESTION WAS, TO THE MOTHER, GEE, YOU KNOW, WE DON'T WANT YOU TO BE ARRESTED, WE CERTAINLY DON'T WANT YOU TO BE SEPARATED FROM YOUR BABY, BUT WE WOULD LIKE VERY MUCH FOR YOU TO DO IS TO GET ON REHABILITATION, THEREBY FACILITATING YOUR HEALTH AND THAT OF YOUR SUBSEQUENT PREGNANCIES AND PERHAPS EVEN BENEFITING THE CURRENT PREGNANCY.

Q. DOCTOR, YOU DON'T KNOW OF ANY OTHER HOSPITAL IN THE CHARLESTON AREA WHERE THE PHYSICIANS TOOK THAT POSITION, DO YOU?

MS. SHOWERS: YOUR HONOR, I OBJECT. HE HASN'T LAID A PROPER FOUNDATION FOR THAT QUESTION.
ANY OTHER -

THE COURT: FROM THE WORD WHERE ON I

[PITTARD 234]

COULDN'T UNDERSTAND WHAT YOU SAID.

Q. (BY MR. WHERRY, CONTINUING) YOU'RE NOT AWARE OF ANY OTHER HOSPITALS IN THE CHARLESTON AREA WHERE THE PHYSICIANS TOOK THAT POSITION, ARE YOU?

THE COURT: AND WHAT POSITION ARE YOU SPEAKING OF?

MR. WHERRY: THAT THE PATIENTS WERE TOLD THAT IF

THEY GOT TREATMENT, FROM THE DOCTOR WORDS, THAT THEY WOULD NOT BE REPORTED TO THE SOLICITOR AS HAVING COMMITTED A CRIME.

THE COURT: I SUSTAIN THE OBJECTION. THE WORD OTHER IN THE QUESTION INDICATES THAT HE HAS ADMITTED THAT THAT WAS DONE AT ONE HOSPITAL, AND I THINK - I'M NOT SURE THAT I-I PROPERLY CHARACTERIZES HIS TESTIMONY. THEREFORE I GUESS THAT THE OBJECTION IS THAT THE QUESTION IS ARGUMENTATIVE. IN ANY EVENT, I SUSTAIN THE OBJECTION.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, WITH THE GOAL OF THE POLICY AS YOU PERCEIVED IT TO BE TO PROTECT THE HEALTH AND WELFARE OF POTENTIAL NEWBORN CHILDREN, AND IN SUBSEQUENT PREGNANCIES OF THESE WOMEN, DOCTOR, WOULD IT NOT HAVE BEEN IMPORTANT TO APPLY THE POLICY TO NONPREGNANT SUBSTANCE ABUSING WOMEN THROUGHOUT THE HOSPITAL?

A. IT WOULD BE APPROPRIATE TO APPLY IT TO ANYONE, AND I WOULD THINK THE ANSWER TO THAT IS YES.

Q. WITHIN THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, THAT WAS NOT DONE WAS IT, DOCTOR?

A. I REALLY DON'T KNOW THE ANSWER TO THAT. I DIDN'T TAKE

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[PITTARD 238]

MAY I HAVE A MOMENT, PLEASE.
Q. (BY MR. WHERRY, CONTINUING) DOCTOR JUST ONE LAST QUESTION. FROM YOUR UNDERSTANDING OF THE POLICY, THE SOLICITOR RECEIVED INFORMATION ABOUT THE POSITIVE UDS, THE POSITIVE DRUG SCREENS FROM THE MEDICAL UNIVERSITY OF SOUTH CAROLINA; ISN'T THAT RIGHT?
A. I HONESTLY DON'T REMEMBER THE MECHANISM BY WHICH IT WAS DONE. WHO ACTUALLY CALLED WHOM, ETCETERA. THE UNDERSTANDING WAS, THAT IF THE PATIENT APPEARED A SECOND TIME, AND DIDN'T RECEIVE REHABILITATIVE SUPPORT, THEN THEY WOULD BE REPORTED TO - I'M NOT SURE WHETHER IT WAS THE POLICE DEPARTMENT OR TO WHOM. I DON'T THINK IT WAS TO THE SOLICITOR'S OFFICE, BUT MAYBE IT WAS. I'M NOT SURE.
Q. TO SOMEONE IN LAW ENFORCEMENT, FAIR?
A. YES, THAT'S FAIR.
Q. AND THAT INFORMATION CAME FROM THE HOSPITAL?
A. YES, IT DID.
Q. AND THE INFORMATION WAS ABOUT THEIR MEDICAL TEST RESULTS, FAIR?
A. NO. YOU COULD SAY THAT, BUT IT WAS MY UNDERSTANDING AND THE UNDERSTANDING OF THE COMMITTEE WHO PUT THIS PROPOSAL TOGETHER THAT IT WAS A LAW THAT IF SOMEONE WAS IDENTIFIED AS

HAVING BEEN ABUSING COCAINE, WE WERE OBLIGED TO REPORT THAT.
Q. SURE. BUT MY QUESTION WAS, DOCTOR. IT WAS THEIR
MEDICAL TEST RESULTS, NOT WHAT THE LAW SAID. MY QUESTION WAS,

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EXCERPT FROM DEPOSITION OF WILLIAM PITTARD

[DR. PITTARD 84]

A. I'M SURE ALL THOSE QUESTIONS CAME UP AT SOME
POINT IN TIME.
Q. IN THE DISCUSSIONS AT THE TIME THAT THE POLICY
WAS FORMULATED, HAD THERE BEEN AN INCREASE OF
BABIES WHO HAD BEEN BORN WHO WERE BEING TREATED AT THE
MEDICAL UNIVERSITY IN THE PERIOD OF TIME IMMEDIATELY
PRECEDING THE INSTITUTION OF THE POLICY IN WHICH THERE
WAS A KNOWN HISTORY OF DRUG OR ALCOHOL ABUSE?
A. WERE WE AWARE THAT THE USE OF ILICIT DRUGS
WAS INCREASING IN THE AREA, IS THAT WHAT YOU'RE
SAYING?
Q. UM-HUM, IN THE TIME PERIOD IMMEDIATELY PRIOR
TO THE INSTITUTION OF THE POLICY.
A. WE WERE AWARE THAT THAT WAS INCREASING.
Q. HOW WERE YOU AWARE OF THAT?

A. JUST FROM LOOKING AT THE LITERATURE, THERE WAS LOTS OF DATA SUGGESTING THAT. AND THEN WE HAD DOCUMENTED IT IN A NUMBER OF MOTHERS AND INFANTS ALSO.
Q. HOW WOULD YOU DOCUMENT IT?
A. WITH URINE DRUG SCREENS MOSTLY.
Q. PRIOR TO THE INTRODUCTION OF THE POLICY IN THE FALL OF 1989 HOW WERE URINE DRUG SCREENS DOCUMENTED IN THE NEONATOLOGY?
A. IN A HAPHAZARD SORT OF WAY, IT WAS NOT VERY ORGANIZED, AS WE MENTIONED EARLIER, SOME PEOPLE

[DR. PITTARD 85]

CHECKED FOR ONE REASON AND OTHERS FOR ANOTHER, SOME DIDN'T CHECK AT ALL.
Q. WAS THERE ANY ATTEMPT TO ORGANIZE THAT INFORMATION IN THE PROCESS OF FORMULATING THE POLICY?
A. THAT'S VERY DIFFICULT TO DO BECAUSE SINCE IT'S DONE IN A HAPHAZARD SORT OF FASHION - I COULD LOOK AT THE DATA AND TELL YOU HOW MANY WERE CHECKED, IF THAT'S WHAT YOU'RE ASKING, IN ANY GIVEN YEAR, BUT IT'S ABOUT - AND I MIGHT NOT EVEN BE ABLE TO DO THAT, AS WE MENTIONED ALSO, I'M NOT SURE THAT WAS ONE OF THE

11 PARAMETERS THAT WAS MONITORED.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF KAREN POLS

[POLS 318]

DIRECT EXAMINATION

BY MS. DUNN:

Q. WOULD YOU STATE YOUR FULL NAME FOR THE COURT, PLEASE.

A. CERTAINLY. KAREN BRIGIT POLS.

Q. WHAT DO YOU DO?

A. I'M A PHYSICIAN. FAMILY PRACTICE PHYSICIAN.

Q. AND WHERE DO YOU WORK AT THIS TIME?

A. I'M MEDICAL DIRECTOR OF THE COMMUNITY HEALTH PROJECT IN NEW YORK CITY.

Q. AND WHERE DID YOU WORK BEFORE YOU TOOK THAT JOB?

A. PRIOR TO THAT I WAS MEDICAL DIRECTOR OF THE SUBSTANCE ABUSE TREATMENT CENTER AT THE V.A. HOSPITAL HERE IN CHARLESTON.

Q. AND WHEN YOU SAY YOU'RE A PHYSICIAN, DOES THAT MEAN YOU'RE A MEDICAL DOCTOR?

A. YES, I AM.

Q. WHERE DID YOU GET YOUR MEDICAL TRAINING?

A. I WAS IN MEDICAL SCHOOL AT BROWN UNIVERSITY IN PROVIDENCE, RHODE ISLAND.

Q. DID YOU DO AN INTERNSHIP AND RESIDENCY?
A. YES, I DID A FAMILY PRACTICE INTERNSHIP AND RESIDENCY AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA HERE IN CHARLESTON.
Q. IN CONNECTION WITH YOUR WORK AT THE MEDICAL UNIVERSITY, DID YOU HAVE OCCASION TO WORK IN THE OB&GYN HIGH RISK CLINIC?

[POLS 319]

A. I DID WORK IN THE OB&GYN HIGH RISK CLINIC, YES.
Q. WHEN WAS THAT?
A. I AM THINKING THAT IT IS IN LATE SPRING OR EARLY SUMMER OF 1989.
Q. WAS IT PRIOR TO OCTOBER OF 1989?
A. I BELIEVE SO, YES.
Q. AT THE TIME THAT YOU WORKED WITHIN HIGH RISK OB&GYN, WAS THERE A CRITERIA IN PLACE FOR SCREENING PARTICULAR PATIENTS ACCORDING TO THE - PARTICULAR CRITERIA IN RELATIONSHIP TO URINE DRUG SCREENS?
MR. HOOD: OBJECT TO RELEVANCY, ALL OF THIS IS BEFORE THE POLICY.
THE COURT: GO AHEAD.
Q. (BY MS. DUNN, CONTINUING) IT'S JUST HE
THE COURT: REPEAT THE QUESTION IF YOU WILL.
MS. DUNN: I ASKED HER IF SHE WAS FAMILIAR WITH THE

CRITERIA THAT WAS IN PLACE FOR URINE DRUG SCREENING DURING THE TIME THAT SHE WAS WORKING THERE.

THE COURT: OKAY.

A. THERE WAS URINE DRUG SCREENING THAT WAS DONE DURING THE TIME THAT I WAS THERE. THERE WERE SPECIFIC CRITERIA FOR OBTAINING THOSE URINE DRUG SCREENS.

Q. HOW WERE YOU INFORMED OF THOSE CRITERIA?

A. WELL, THE PRIMARY WAY THAT I WAS INFORMED, WHEN YOU'RE A FAMILY PRACTICE DOCTOR YOU WORK WITH THE OTHER SERVICES IN THE

* * *

[POLS 321]

YOU MAY PROCEED.

Q. (BY MS. DUNN, CONTINUING) AT TEE TIME THAT YOU WORKED AT THE OB&GYN CLINIC?

A. YES.

Q. DURING YOUR TRAINING AT THE MEDICAL UNIVERSITY, DID YOU HAVE ANY SPECIFIC CONTACT WITH SHIRLEY BROWN?

A. YES. THAT IS WHAT I WAS TRYING TO EXPLAIN. PRIMARILY I WORK WITH THE RESIDENTS. I OFTEN WATCHED THE INTERACTION BETWEEN THE RESIDENTS AND SHIRLEY BROWN.

THE COURT: DID YOU HAVE ANY CONTACT WITH SHIRLEY BROWN?

THE WITNESS: YES. I -

THE COURT: YES OR NO.

THE WITNESS: I'M SORRY.
Q. (BY MS. DUNN, CONTINUING) AND WHAT WAS THAT CONTACT?
A. THE DIRECT CONTACT THAT I HAD WITH SHIRLEY BROWN WAS ON AN OCCASION WHEN I HAD FAILED TO OBTAIN A URINE DRUG SCREEN ON A PATIENT.
Q. OKAY.
A. I HAD BEEN CALLED AT NIGHT AND MY JOB WAS -
MR. HOOD: IF THE COURT PLEASE, THIS WAS BEFORE THE POLICY.
THE COURT: I UNDERSTAND THAT AND I OVERRULE THAT OBJECTION.
MR. HOOD: YES, SIR. MY OBJECTION NOW ABOUT THIS

[POLS 322]

SUBJECT MATTER IS IT'S IRRELEVANT TO THIS CASE.
THE COURT: YOU SAID THAT BEFORE AND I OVERRULE THAT AND I'LL BE GLAD TO EXPLAIN WHY IT IS. BUT I EXPLAINED IT EARLIER. AS A MATTER OF FACT THIS IS SOMETHING THAT I WENT INTO IN QUESTIONING A WITNESS MYSELF EARLIER BECAUSE I THOUGHT IT WAS SOMETHING THAT SHOULD BE IN THE RECORD.
MR. HOOD: YES, SIR.
Q. (BY MS. DUNN, CONTINUING) AND WHAT WAS THAT CONTACT WITH NURSE BROWN?

A. CERTAINLY. I HAD NOT OBTAINED A URINE DRUG SCREEN ACCORDING TO ONE OF THE CRITERIA FOR THE POLICY. AND I WAS WITH A GROUP OF RESIDENTS IN A HALLWAY AND SHE CONFRONTED ME WAS VERY CLOSE TO ME AND RAISED HER VOICE AT ME AND SAID WHERE I HAD DONE SOMETHING WRONG, I HADN'T ATTAINED A URINE DRUG SCREEN THAT I WAS SUPPOSED TO.

Q. AND IN WHAT RELATIONSHIP WAS SHE - WHAT WAS SHIRLEY BROWN TO YOU IN TERMS OF GIVING THAT YOU DIRECTION?

A. I'M NOT REALLY SURE. SHE WAS NOT INVOLVED DIRECTLY IN MY TRAINING. I NEVER MET WITH HER ON ANY OCCASION OTHER THAN THAT. SHE NEVER EVALUATED ME NOR DID SHE EVER TEACH ME. I DON'T KNOW, BUT SHE DID GET UPSET WITH ME ABOUT THIS.

Q. WAS YOUR UNDERSTANDING THAT THE CRITERIA FOR TESTING IN TERMS OF YOU URINE DRUG SCREENS THAT YOU WERE FAMILIAR WITH AT THE OB&GYN HIGH RISK CLINIC, SPECIFIC TO TESTING FOR COCAINE?

A. THE SITUATION WHERE I WAS CONFRONTED BY MS. BROWN WAS

[POLS 323]

SPECIFICALLY ABOUT NOT HAVING OBTAINED A COCAINE URINE DRUG SCREEN.

Q. DURING THE PERIOD THAT YOU WORKED IN THE OB&GYN HIGH RISK

CLINIC?
A. YES.
Q. IF A PATIENT THAT YOU WERE TREATING HAD BEEN GIVEN A URINE DRUG SCREEN THAT CAME BACK POSITIVE, WAS THERE SOMETHING THAT YOU WERE SUPPOSED TO DO WITH THAT INFORMATION?
A. I NEVER WAS THERE FOR THE POSITIVE RESULTS. SO, I DON'T HAVE ANY RECOLLECTION OF POSITIVE OR NEGATIVE RESULTS. MY RESPONSIBILITY WAS TO ORDER THE URINE DRUG SCREENS BUT - SO I DON'T KNOW. AND CERTAINLY I WASN'T DOING ANYTHING AS A MEDICAL DOCTOR TAKING CARE OF THESE PATIENTS WITH THOSE RESULTS.
Q. DID THE - DID THE INFORMATION GET BACK TO YOU IN A FASHION IN ORDER THAT YOU COULD USE THE INFORMATION IN TREATING THE PATIENT?
A. I NEVER GOT THE RESULTS POSITIVE OR NEGATIVE ON THE PATIENTS. USUALLY THE PATIENT WOULD HAVE DELIVERED ALREADY OR WOULD BE, YOU KNOW, OUT OF MY CARE, SO I DIDN'T MAKE ANY CLINICAL DECISION BASED ON THAT.
Q. WAS THERE ANYONE WITHIN THE OB&GYN CLINIC THAT WAS COLLECTING INFORMATION CONCERNING COCAINE USE?
A. MY UNDERSTANDING WAS THAT MS. BROWN WAS.
Q. DID YOU HAVE OCCASION IN CONNECTION WITH YOUR TRAINING AT

[POLS 324]

THE MEDICAL UNIVERSITY TO ALSO WORK IN THE NEONATAL CLINIC OR THE NEONATAL NURSERIES?

A. I WORKED IN THE NEWBORN NURSERY, YES, I DID.

Q. AND AT THE MEDICAL UNIVERSITY?

A. AT THE MEDICAL UNIVERSITY, YES.

Q. AND IN WHAT CAPACITY WERE YOU IN THE NEWBORN NURSERY?

A. I WAS A RESIDENT THERE ALSO JUST LIKE I WAS A RESIDENT WITH THE OBSTETRICS - OBSTETRICIANS AND GYNECOLOGISTS, I WOULD TRAIN WITH PEDIATRICIANS ALSO. AND PEDIATRICIANS RAN THE NEWBORN NURSERY AND I ALONGSIDE THEM ALSO.

Q. WHAT TIME FRAME DID YOU WORK IN THE NEWBORN NURSERY?

A. I WORKED IN THE NEWBORN NURSERY INTENSIVELY I BELIEVE SOMETIME IN WINTER OF 1989 OR 1990. I'M NOT EXACTLY SURE OF THE MONTH, BUT I SPENT A MONTH THERE. I ALSO WORKED IN THE NEWBORN NURSERY WHENEVER ONE OF MY FAMILY PRACTICE PATIENTS DELIVERED, BECAUSE THEY WOULD ALSO BE CARED FOR IN THE NEWBORN NURSERY AND I WOULD SEE THEM THERE.

Q. I GOT CONFUSED IN TERMS OF TIME FRAME.

A. I'M SORRY.

Q. DEFINE THAT? WINTER '89, '90?

A. OH, DECEMBER '89, JANUARY 1990 IS MY BEST RECOLLECTION.

Q. AND WAS PART OF THAT TIME FRAME YOU WERE ACTUALLY A RESIDENT IN THE NURSERY?
A. YES.
Q. AND THEN ANOTHER TIME FRAME YOU WERE WORKING IN FAMILY

[POLS 325]

PRACTICE, BUT YOU WOULD COME OVER THERE SOMETIME?
A. THROUGH MY THREE YEARS I WOULD COME OVER THERE.
Q. WHEN DID THAT THREE YEAR PERIOD BEGIN?
A. I'M SORRY. I STARTED MY FAMILY PRACTICE RESIDENCY ON JULY 1, 199 - '88, EXCUSE ME. AND I COMPLETED THAT RESIDENCY ON JUNE 30, 1991. AND THROUGHOUT THAT TIME I WOULD BE IN BOTH, THE OBSTETRICS WARD AND NEWBORN NURSERY TAKING CARE OF FAMILY PRACTICE PATIENTS. AND AS FAR AS SPECIFIC INTENSIVE TRAINING MONTHS, I WOULD BE WORKING WITH THE RESIDENTS.
Q. WHEN YOU WERE ACTUALLY WORKING IN THE LATTER PART OF 1989 AND '90 IN THE NURSERIES AT THE MEDICAL UNIVERSITY?
A. YES.
Q. WAS THERE A CRITERIA IN PLACE FOR SCREENING INFANTS FOR - TO GET A URINE DRUG SCREEN FOR COCAINE?
A. IF YOU MEAN BY SCREENING INFANTS WITHOUT ANY CLINICAL

SYMPTOMS OR CONCERNS, THERE WAS NONE THAT I WAS AWARE OF THEN.

MR. HOOD: IF THE COURT PLEASE, SHE IS QUALIFYING THE QUESTION THAT IS ASKED. AND THE QUESTION THAT WAS ASKED WASN'T ANSWERED. AND I OBJECT TO THE WITNESS CONTROLLING THE QUESTION.

THE COURT: WELL, I WASN'T FOLLOWING IT CLOSELY. AND I HAVE FOLLOWED SOME OF THE QUESTIONING AND I THINK WHAT YOU SAY IS PROBABLY ACCURATE AS TO SOME OF THE QUESTIONS. SO IF YOU WILL, JUST ANSWER THE QUESTION THAT IS ASKED.

YOU MAY PROCEED.

[POLS 326]

MS. DUNN: YOU WANT ME TO REASK THAT QUESTION?

THE COURT: DO THAT.

Q. (BY MS. DUNN, CONTINUING) IN THE TIME FRAME OF WELL, LATE 1989 AND EARLY '90 WHEN YOU WERE WORKING IN YOUR TRAINING IN THE NURSERY AT THE MEDICAL UNIVERSITY, WAS THERE AN ESTABLISHED CRITERIA FOR WHEN YOU SHOULD SCREEN INFANTS TO DETERMINE IF THEY WERE POSITIVE FOR COCAINE?

A. NOT THAT I WAS - EXCUSE ME. NOT THAT I WAS AWARE OF.

Q. DURING THE TIME FRAME THAT YOU WERE A RESIDENT AT FAMILY

MEDICINE, REFRESH OUR MEMORY AS TO WHEN THAT TIME FRAME WAS?
A. FROM JULY OF 1988 TO JUNE OF 1991.
Q. OKAY. DURING THAT TIME FRAME, WHEN YOU WERE AT FAMILY MEDICINE, WERE YOU PROVIDED ANY TRAINING AS A RESIDENT IN RELATIONSHIP TO THE INTERAGENCY POLICY?
A. NO, I WAS NOT.
Q. DID, IN THE TIME FRAME THAT YOU WORKED AT FAMILY MEDICINE, DID YOU APPLY THE POLICY TO ANY OF YOUR PATIENTS AT FAMILY MEDICINE THAT MIGHT HAVE MET THE CRITERIA OF THE POLICY?
A. NO, I DID NOT.
Q. IN THE TIME FRAME THAT YOU WORKED AT FAMILY MEDICINE, WERE YOU AWARE OF A VIDEO BEING AVAILABLE TO PROVIDE TO YOUR PRENATAL PATIENTS?
A. THERE WERE VIDEOS AVAILABLE I BELIEVE ON NUTRITIONAL ISSUES, AND THAT'S THE ONLY SUBJECT IN WHICH I'M AWARE OF

[POLS 327]

VIDEOS BEING AVAILABLE.
Q. IN YOUR WORK AT FAMILY MEDICINE, DID YOU HAVE ANY FORMS PROVIDED FOR YOU TO USE WITH PRENATAL PATIENTS THAT MIGHT HAVE TESTED POSITIVE FOR COCAINE?
A. NO, I DID NOT.
Q. DID YOU HAVE ANY ACCESS TO A LETTER FROM THE SOLICITOR'S

OFFICE?
A. NO, I DID NOT.
Q. AT THE TIME THAT YOU WORKED AT FAMILY MEDICINE, WERE YOU AWARE THAT THERE WAS SOMEONE AT FAMILY MEDICINE WHO ACTUALLY HAD SPECIFIC TRAINING IN SUBSTANCE ABUSE COUNSELING?
A. YES. AND I OFTEN REFERRED PATIENTS TO HER OR WORKED WITH HER TO HELP TAKE CARE OF MY PATIENTS.
Q. WERE ANY OF THOSE PATIENTS PRENATAL PATIENTS?
A. NOT IN MY RECOLLECTION, NO.
Q. WHAT TIME FRAME DID YOU KNOW THIS PERSON WAS AVAILABLE AT FAMILY MEDICINE?
A. I WORKED WITH HER THROUGHOUT MY THREE YEARS AT FAMILY MEDICINE.
Q. WAS SHE AVAILABLE WHEN YOU GOT THERE?
A. YES.
Q. WAS SHE STILL THERE WHEN YOU LEFT?
A. YES.
Q. IN THE TIME FRAME THAT YOU WORKED AT THE V.A. HOSPITAL, DID YOU WORK - YOU SAID - TELL ME AGAIN WHAT YOUR JOB WAS AT

[POLS 328]

THE V.A. HOSPITAL?
A. I WAS MEDICAL DIRECTOR OF THE SUBSTANCE ABUSE TREATMENT CENTER AT THE V.A. HOSPITAL.
Q. IN THAT CAPACITY, DID YOU EVER HAVE OCCASION TO WORK WITH

PREGNANT WOMEN?
A. ON OCCASION, YES.
Q. WAS THERE ANY WORKING ARRANGEMENTS BETWEEN THE V.A. HOSPITAL AND THE CITY POLICE AND SOLICITOR'S OFFICE CONCERNING THE REPORTING OR ARREST OF PREGNANT WOMEN WHO TESTED POSITIVE FOR COCAINE?
A. NOT THAT I'M AWARE OF.
MS. DUNN: BEG THE COURT'S INDULGENCE.
(PAUSE IN PROCEEDINGS.)
Q. (BY MS. DUNN, CONTINUING) DR. POLS, DURING THE TIME FRAME THAT YOU WORKED AT FAMILY MEDICINE.
A. YES.
Q. PART OF THE MEDICAL UNIVERSITY, WAS THERE A PROTOCOL IN PLACE FOR REPORTING SUSPECTED CHILD ABUSE?
A. NO SPECIFIC PROTOCOL, BUT WE DID, YOU KNOW, ADHERE TO THE LAW WITH REGARD TO CHILD ABUSE REPORTING AS WE UNDERSTOOD IT, YEAH.
Q. AND WAS THERE PROTOCOL IN PLACE AT THE V.A. HOSPITAL TO REPORT SUSPECTED CHILD ABUSE?
A. IN ADDITION AT THE V.A. HOSPITAL, YES, WE DID COMPLY WITH THE LAW TO REPORT CHILD ABUSE, YEAH.

[POLS 329]

MS. DUNN: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: CROSS-EXAMINATION.

CROSS-EXAMINATION

BY MR. HOOD:

Q. YOU MENTIONED SHIRLEY BROWN.

A. YES.

Q. SHE POINTED OUT TO YOU THAT YOU HAD FAILED TO OBTAIN A URINE DRUG SCREEN ON A PATIENT THAT YOU WERE SUPPOSED TO OBTAIN ONE ON. YOU WERE EMBARRASSED BY NOT HAVING DONE IT SINCE SHE BROUGHT IT UP IN FRONT OF OTHER RESIDENTS, AND YOU WENT AHEAD AND DID IT LIKE YOU WERE SUPPOSED TO DO?

A. I DID NOT AT THAT TIME. I BELIEVE SOMEONE ELSE DID IT OR - I HAD NOT DONE IT. BUT SHE POINTED OUT THAT I NEGLECTED TO DO IT.

Q. YOUR INVOLVEMENT WITH OBSTETRICS WAS FOR TWO MONTHS?

A. MY INVOLVEMENT IN - I DON'T -

Q. THE DEPARTMENT OF OBSTETRICS?

A. WAS FOR TWO MONTHS.

Q. AND IT WAS BEFORE OCTOBER OF 1989?

A. THAT'S CORRECT.

Q. AND VERY RARELY WOULD YOU AS A FAMILY PRACTICE RESIDENT BE INVOLVED IN THE CARE OF HIGH RISK OBSTETRIC PATIENTS WITH PRETERM LABORS, ABRUPTION OF PLACENTAS, FETAL DEATHS, CORRECT?

A. I WAS VERY RARELY INVOLVED WITH THE LIST OF PATIENTS YOU JUST MENTIONED, YES.

[POLS 330]

Q. EXACTLY. WHEN YOU WERE AT THE V.A. YOU SAW WOMEN VERY RARELY, MAYBE ONE A MONTH OR SO?
A. YEAH, SOMEWHERE AROUND THAT.
Q. AND YOU'RE NOT HERE TO SAY THAT YOU'RE AN EXPERT IN THE FIELD OF OBSTETRICS OR GYNECOLOGY OR PEDIATRICS?
A. I AM NOT.
Q. IN FACT, YOU DON'T KNOW IF YOU HAVE EVER EVEN SEEN A COPY OF THE POLICY THAT THIS LAWSUIT IS ABOUT?
A. OF THE POLICY?
Q. YES.
A. YES, I DON'T KNOW IF I HAVE EVER SEEN THE POLICY.
Q. YOU HAVE NOT TREATED ANY OF THE TEN PLAINTIFFS IN THIS LAWSUIT?
A. NOT TO MY KNOWLEDGE.
Q. AND THE TWO MONTHS THAT YOU WERE AT THE OB CLINIC DURING TRAINING, BEFORE OCTOBER OF '89, YOUR SOLE ROLE WAS TO MAKE SURE PATIENTS HAD URINE DRUG SCREENS THAT WERE SUPPOSED TO HAVE THEM?
A. THAT WAS NOT MY SOLE ROLE, NO.
Q. OKAY. BUT THAT WAS ONE OF YOUR ROLES?
A. IT WAS EXPLAINED TO ME THAT THAT WAS ONE OF MY RESPONSIBILITIES, YES, SIR.
Q. AND OF COURSE WHATEVER THE RESULTS WERE, LIKE ON ANY

PATIENT, THEY WOULD BE PUT IN THE PATIENT'S CHART?
A. THAT'S CORRECT, YES.

[POLS 331]

MR. HOOD: THANK YOU.
REDIRECT EXAMINATION
BY MS. DUNN:
Q. IN YOUR WORK AT FAMILY MEDICINE DID YOU HAVE OCCASION TO SEE PREGNANT WOMEN WHO HAD HAD INCOMPLETE OR LATE PRENATAL CARE?
A. YES, I DID.
Q. AND WOULD THAT HAVE HAPPENED AFTER OCTOBER OF 1989?
A. YES, IT WOULD HAVE.
MS. DUNN: NO FURTHER QUESTIONS, YOUR HONOR.
THE COURT: ANY FURTHER QUESTIONS OF THIS WITNESS?
MR. HOOD: NO THANK YOU, YOUR HONOR.
THE COURT: LET ME ASK YOU JUST ONE QUESTION. DENA CLAIR TESTIFIED.
THE WITNESS: YES.
THE COURT: SHE WAS IN THE SAME FAMILY PRACTICE PLACE THAT YOU WERE.
THE WITNESS: YES.
THE COURT: THE CORNER OF CALHOUN AND HASELL, THAT'S THE SAME UNIT THAT YOU WERE WITH?
THE WITNESS: YES IT IS.
THE COURT: THAT'S THE SAME PLACE YOU WERE DOING YOUR RESIDENCY?

THE WITNESS: YES IT IS.
THE COURT: ANYTHING FURTHER OF THIS WITNESS?

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF SANDRA POWELL

[SANDRA POWELL 149]

A. DOCTOR FOUCHER.
Q. DO YOU KNOW WHY YOU WERE REFERRED TO MUSC?
A. EVE' TIME I GET PREGNANT MY BLOOD PRESSURE GO UP AND DOWN, AND IT GOT HIGH SO THAT WHY HE CATEGORIZED ME AS HIGH RISK, THAT'S WHY HE SENT ME TO THE MEDICAL UNIVERSITY.
Q. APPROXIMATELY WHEN DID YOU BEGIN TO HAVE YOUR PRENATAL CARE AT MUSC? IF YOU REMEMBER.
A. THIS WAS IN MY SECOND MONTH THAT I FOUND OUT I WAS PREGNANT. THAT'S WHEN I WENT TO FOUCHER. I THINK I STARTED TO GO TO MEDICAL PROBABLY IN MAYBE THE THIRD OR FOURTH MONTH OF MY PREGNANCY.
Q. FROM THE TIME YOU BEGAN TO RECEIVE PRENATAL TREATMENT AT MUSC, UNTIL THE BIRTH OF YOUR CHILD DESMOND, DID YOU RECEIVE ANY INFORMATION AT ALL ABOUT SUBSTANCE ABUSE WHILE PREGNANT?
A. NOT THAT I CAN REMEMBER, NO.
Q. WERE YOU SHOWN A MOVIE?
A. NOT THAT I CAN REMEMBER, NO.

Q. DID ANYONE TELL YOU ABOUT A POSITIVE UDS OR POSITIVE URINE DRUG SCREEN?
A. NO.
Q. WOULD YOU TELL THE JURY PLEASE ABOUT THE - WELL, FIRST OF ALL WHAT DAY WAS YOUR CHILD BORN?
A. OCTOBER 13TH.
Q. OF WHAT YEAR?
A. '89.

[SANDRA POWELL 150]

Q. TELL THE JURY PLEASE ABOUT THAT DAY, HOW DID YOU GET TO THE HOSPITAL AND WHAT HAPPENED?
A. WELL, IT WAS RIGHT AFTER HUGO, CUZ I - AFTER HUGO CAME IN SEPTEMBER, SINCE I LOST EVERYTHING THAT I HAD, I DIDN'T HAVE ANY HOME OR NO TRANSPORTATION TO KEEP UP WITH MY APPOINTMENT BACK AND FORTH TO MEDICAL. EVERYBODY IN THE AREA HAD LOST EVERYTHING THEY HAD, TOO.
Q. LET ME STOP YOU THERE. DID YOU EVENTUALLY, FROM WHAT .YOU'RE SAYING, STOP GETTING PRENATAL CARE AFTER HUGO?
A. YES, I DIDN'T HAVE NO WAY TO GET TO MEDICAL AND MC CLELLANVILLE WAS TORN UP WORSE THAN BUCK HALL WAS, SO THERE WAS NOTHING OPEN.
Q. WHAT HAPPENED ON THE 13TH OF OCTOBER?
A. I WENT INTO LABOR ABOUT MAYBE FOUR OR FIVE O'CLOCK THAT

MORNING. AND I THINK MY SISTER RAN TO THE NEIGHBOR'S HOUSE TO TRY TO CALL EMS BECAUSE NO ONE HAD NO TRANSPORTATION. AND I WENT IN EMS. THEY TOOK ME.

Q. WHAT IS THE EMS? IS THAT THE AMBULANCE?

A. YES. YES.

Q. AND DID THEY TAKE YOU DIRECTLY TO MUSC?

A. YES, THEY DID, DIRECTLY THERE.

Q. WHEN YOU WERE IN THE HOSPITAL, WERE YOU STILL IN LABOR?

A. YES. THE MINUTE THEY TAKE ME THROUGH THE DELIVERY ROOM, THAT'S WHERE IT JUST CAME RIGHT OUT. THAT WAS IT.

Q. AFTER YOU DELIVERED THE BABY, WHERE DID YOU GO?

[SANDRA POWELL 151]

A. TO THE RECOVERY ROOM. AND THEN

Q. AND THEN?

A. I FED DESMOND A COUPLE OF TIME. THEY BROUGHT DESMOND TO ME AND I FED HIM A COUPLE OF TIMES. AND THE LAST TIME THE NURSE CAME.

Q. WAS DESMOND BREAST FED OR BOTTLE FED?

A. BOTTLE FED. THE LAST TIME I SAW THE NURSE CAME IN WITH EVERYBODY ELSE BABY AND NOT MINE. I SEEN HER LOOKING AT ME, YOU KNOW, FUNNY.

Q. LET ME STOP YOU FOR A MOMENT. WERE YOU STILL IN THE

RECOVERY ROOM WHEN THAT HAPPENED, OR IN YOUR OWN ROOM?
A. I WAS THERE WITH ANOTHER WOMEN, YOU KNOW - YOU KNOW, AFTER YOU HAVE A BABY.
Q. AND WHAT HAPPENED THEN WHEN DESMOND WASN'T BROUGHT IN TO YOU?
A. I ASKED THE NURSE WHERE IS MY BABY. AND I CAN'T REMEMBER WHATSHE SAID. THEN LATER ON SHIRLEY -
Q. DO YOU REMEMBER WHO THAT NURSE WAS?
A. NO.
Q. OKAY. GO AHEAD.
A. THEN LATER ON SHIRLEY BROWN CAME IN WITH TWO - TWO MEN. I THINK THEY WERE TWO BLACK MEN DRESSED IN SUITS. AND THAT'S WHEN SHE HAD A LETTER OR SOMETHING IN HER HAND AND SHE SAID, MS. POWELL, YOU AND YOUR BABY HAVE BEEN - YOUR URINE HAVE BEEN TESTED POSITIVE FOR COCAINE AND YOU WILL BE LOCK UP.

[SANDRA POWELL 152]

Q. WAS THAT THE FIRST TIME THAT YOU HEARD ABOUT THAT?
A. THAT'S THE FIRST TIME. AND I ASKED, I SAID, PLEASE, WHAT COULD I DO TO STOP THIS OR COULD YOU HELP ME, I MEAN, BECAUSE, YOU KNOW, WHAT IS GOING ON. AND THEN SHE JUST SAID YOU WILL BE LOCKED UP. AND I SAID COULD I AT LEAST CALL MY FAMILY TO

BRING ME SOME CLOTHES. AND SHE SAID YOU CAN MAKE A CALL BUT YOU WILL BE LOCKED UP.

Q. HOW WERE YOU DRESSED AT THAT TIME?

A. THE GOWN THAT THEY WOULD GIVE YOU AFTER YOU HAVE HAD A BABY. I CAME RIGHT FROM THE BED TO THE WHEELCHAIR AND WAS PUSHED OUT.

Q. WE HAVE ALL HEARD THIS BEFORE, BUT I THINK IT'S NECESSARY FOR YOU TO DESCRIBE THAT GOWN SO WE KNOW EXACTLY WHAT GOWN YOU WERE WEARING. WOULD YOU DESCRIBE THAT GOWN FOR THE JURY PLEASE?

A. THE GOWN HAD A TIE TO THE NECK AND A TIE TO THE BACK. SLIP THROUGH AND TIE TO THE NECK AND THE BACK WAS OPEN UP.

Q. WERE YOU ALLOWED TO MAKE THAT PHONE CALL THAT YOU REQUESTED TO HAVE SOMEONE BRING YOU CLOTHING?

A. YES.

Q. DID YOU MAKE THE CALL?

A. YES.

Q. DID CLOTHING COME?

A. NO.

Q. WHY?

[SANDRA POWELL 153]

A. BECAUSE THEY TOOK ME BEFORE.

Q. WHO IS THEY?

A. THE TWO MEN AND SHIRLEY BROWN.

Q. I WOULD LIKE YOU, MS. POWELL, TO DESCRIBE HOW THEY TOOK

YOU. DESCRIBE FOR THE JURY EXACTLY WHAT HAPPENED TO YOU WHEN THEY TOOK YOU?

A. AFTER I GOT OFF THE TELEPHONE I WAS HELPED INTO THE WHEELCHAIR.

Q. WHY WERE YOU HELPED?

A. I JUST HAD A BABY, I WAS STILL BLEEDING, I WAS STILL IN PAIN.

Q. HOW LONG BEFORE THIS HAD YOU HAD THE BABY, IN HOURS OR DAYS?

A. I THINK IT WAS HOURS, BECAUSE I WENT THERE ABOUT FOUR OR FIVE O'CLOCK THAT MORNING, AND I FED DESMOND A COUPLE OF TIMES. BEFORE THAT DAY WAS OVER, I WAS AT THE JAIL.

Q. NOW YOU SAID THAT YOU WERE IN PAIN. NEVER HAVING HAD A BABY, WOULD YOU DESCRIBE THAT PAIN? WHERE WERE YOU IN PAIN?

A. TO MY LOWER PART. THEN I WAS, YOU KNOW, STILL BLEEDING AND -

Q. OKAY. UP TO THAT TIME, HAD THE HOSPITAL SUPPLIED YOU WITH SANITARY NAPKINS AND OTHER THINGS TO TAKE CARE OF YOURSELF AFTER HAVING HAD THE BABY?

A. NO, SIR. WHEN I LEFT THAT DAY?

Q. PRIOR TO LEAVING, WHILE YOU WERE IN THE HOSPITAL?

[SANDRA POWELL 154]

A. IF THEY DID, I DON'T REMEMBER.

Q. OKAY. WHEN YOU WERE PUT IN THE WHEELCHAIR, HOW MANY HOSPITAL GOWNS WERE YOU WEARING?
A. ONE.
Q. WERE YOU HANDCUFFED?
A. YES.
Q. WERE YOU SHACKLED?
A. NOT THEN.
Q. DESCRIBE THE HANDCUFFS, WERE THEY IN FRONT OF YOU OR BEHIND YOUR BACK?
A. IN FRONT OF ME.
Q. AND THERE WERE NO LEG SHACKLES ON YOU AT THAT TIME?
A. NO.
Q. WAS A SHEET PLACED OVER YOU BEFORE YOU WERE TAKEN OUT?
A. YES. SHIRLEY BROWN TOLD THEM TO THROW THE SHEET OVER ME I GUESS TO HIDE THE CUFF. I WAS JUST TO HIDE THE CUFF. AND SHE SAY TAKE HER THROUGH THE BACK ENTRANCE BECAUSE REPORTERS MAY BE IN THE FRONT.
Q. WERE YOU TAKEN THAT WAY?
A. YES.
Q. WERE YOU GIVEN A BOX OF PERSONAL CARE ITEMS TO TAKE WITH YOU?
A. NO, SIR.
Q. DID YOU HAVE ANY PERSONAL CARE ITEMS AVAILABLE TO YOU BY YOURSELF TO TAKE WITH YOU?

[SANDRA POWELL 155]

A. NO, SIR. BECAUSE I COME IN THE AMBULANCE, I MESSED UP MY

CLOTHES PRETTY BAD, THE DRESS I HAD ON, SO I HAD NOTHING ELSE. I DON'T BELIEVE THEY WOULD GIVE ME THAT MESSED UP DRESS TO PUT BACK ON.

Q. WHEN YOU GOT OUTSIDE THE BACK DOOR OF THE HOSPITAL, DESCRIBE FOR THE JURY, PLEASE, GETTING INTO WHATEVER CAR YOU WERE PUT IN TO TAKE YOU?

A. IT WAS A POLICE CAR. AND I BELIEVE IT WAS UP ON THE GROUND. AND FROM THE WHEELCHAIR THEY HELPED ME GET INTO THE BACK OF THE CAR.

Q. WHO HELPED YOU GET IN?

A. ONE OF THE OFFICER GRABBED ME UNDERNEATH MY ARM AND HELP ME GET INTO THE BACK OF THE CAR.

Q. WHY WERE YOU HELPED?

A. AT THAT POINT I PRETTY MUCH COULDN'T MOVE TOO MUCH ON MY OWN.

Q. WAS SHIRLEY BROWN OUT THERE WHEN YOU WERE TAKEN AWAY?

A. NO, I DON'T REMEMBER SEEING HER ALL THE WAY DOWN, IT WAS JUST THE TWO OFFICERS.

Q. DO YOU KNOW WHAT POLICE DEPARTMENT THEY WERE FROM?

A. I THINK IT WAS THE CITY, BECAUSE WE WENT DOWN TO LOCKWOOD BOULEVARD I BELIEVE IT WAS.

Q. CHARLESTON CITY?

A. YES.

Q. AS YOU WERE TAKEN FROM YOUR ROOM, OUT OF THE HOSPITAL,

DID YOU PASS OTHER PEOPLE AS YOU WERE IN THE WHEELCHAIR GOING OUT?

A. YES.

Q. HOW DID YOU FEEL AT THAT POINT IN TIME? DESCRIBE FOR THE JURY WHAT YOUR EMOTIONAL CONDITION WAS AND YOUR PHYSICAL CONDITION?

A. WELL, MY MIND WAS A LOT ON THE PAIN THAT I WAS HAVING. AND I JUST LOOKING AROUND BECAUSE I FELT SO ASHAMED BECAUSE I DON'T KNOW WHAT I HAD DONE, YOU KNOW, FOR THEM TO TREAT ME LIKE THAT. AND FROM THERE, TOOK ME TO THE JAILHOUSE.

Q. WHAT JAILHOUSE?

A. THE CITY.

Q. WERE YOU TAKEN FROM THE CAR?

A. YES, THEY HELPED ME FROM THE CAR.

Q. AT THAT TIME, MS. POWELL, WAS THAT SHEET STILL OVER YOU?

A. NO.

Q. WHEN - WHEN DID YOU LOSE THE SHEET, FOR LACK OF BETTER WORD? WHEN DID THE SHEET STOP BEING OVER YOU?

A. FROM THE HOSPITAL FROM - FROM THEM HELPING ME OUT OF THE WHEELCHAIR INTO THE CAR, THE SHEET WAS LEFT THERE IN THE WHEELCHAIR.

Q. THESE POLICE OFFICERS THAT TOOK YOU, WERE THEY MALE OR FEMALE?

A. THEY WERE MALE.

Q. WHEN YOU WERE PUT IN THE CAR, WERE YOU WEARING ONE

[SANDRA POWELL 157]

HOSPITAL GOWN OR TWO?
A. ONE.
Q. WAS THE BACK STILL OPEN?
A. YES. I WAS TAKING MY HAND TO TRY TO KEEP IT CLOSED.
Q. WHEN YOU GOT TO THE JAIL AND YOU WERE TAKEN OUT OF THE CAR, SAME TWO POLICE OFFICERS?
A. YES.
Q. SAME GOWN?
A. YES.
Q. WAS THE BACK STILL OPEN?
A. YES.
Q. WAS THERE A WHEELCHAIR TO TAKE YOU INTO THE JAIL?
A. NO, THERE WASN'T.
Q. HOW DID YOU GET INTO THE JAIL?
A. WE WALKED IN SLOWLY. THE OFFICER WAS STILL HELPING ME A LITTLE TO GET IN THERE.
Q. WHEN YOU WENT INSIDE THE JAIL, WHERE WAS THE FIRST PLACE YOU WENT?
A. IT'S A ROOM WHERE THEY ASKED ME TO PUT MY HAND - TAKE FINGERPRINT. AND FROM THAT I WALKED INTO ANOTHER LITTLE ROOM.
Q. LET ME STOP YOU THERE FOR A MOMENT, MS. POWELL. HAD YOU EVER BEEN FINGERPRINTED BEFORE?
A. NOT IN MY LIFE.
HAD YOU EVER BEEN ARRESTED BEFORE?
A. NOT IN MY LIFE.

* * *

[SANDRA POWELL 160]

THIS BUILDING?
A. YES. I WAS PLACED INTO A CELL.
Q. DESCRIBE THAT CELL FOR ME, PLEASE. DESCRIBE IT FOR THE JURY, PLEASE.
A. WHEN THEY TOOK ME THERE, THERE WERE TWO OTHER YOUNG LADIES IN THERE. AND THEY TOLD ME THAT THEY WERE FROM GEORGIA, TWO PROSTITUTES SHE SAID THEY WAS, OR WHATEVER. BUT 1 REMEMBER SITTING ON THE EDGE OF A COT, BECAUSE I WAS SO COLD AND SHAKING, BECAUSE I DIDN'T HAVE MY CLOTHES ON AND EVERYTHING AROUND THERE WAS LIKE IRON AND CEMENT AND THEY WERE JUST TALKING AND TALKING, CUSSING UP THE SYSTEM HERE OR WHATEVER.
Q. WHEN YOU WERE SITTING ON THAT COT, WHAT WERE YOU WEARING?
A. SAME GOWN WHAT I CAME UP FROM MEDICAL WITH.
Q. HOW LONG WERE YOU IN THAT CELL?
A. MAYBE FOUR OR FIVE HOURS, SOMETHING LIKE THAT. I'M NOT SURE.
Q. WHILE YOU WERE IN THAT CELL, WERE YOU PROVIDED WITH ANY PERSONAL CARE ITEMS SUCH AS SANITARY NAPKINS?
A. NO, SIR.
Q. DESCRIBE THE LAVATORY FACILITIES IN THAT JAIL CELL? WAS

THERE A TOILET?
A. I CAN'T EVEN REMEMBER. I WAS JUST ON THE EDGE OF THE BED JUST SHAKING, COLD.
Q. WERE YOU CRYING?

[SANDRA POWELL 161]

A. YES, I WAS.
Q. WHY?
A. BECAUSE I LOOKED AROUND AND I NEVER BEEN HERE BEFORE. I ASKED MYSELF WHAT AM I DOING IN HERE. I THOUGHT IT WAS A JOKE. AND I WAS STILL BLEEDING. I DIDN'T FEEL GOOD AT ALL.
Q. MS. POWELL, WHAT HAPPENED NEXT, WERE YOU TAKEN FROM THAT JAIL CELL?
A. YES.
Q. WHERE DID YOU GO?
A. TO LEED AVENUE TO A BIGGER PLACE.
Q. WHEN YOU WENT FROM THAT JAIL CELL TO LEEDS AVENUE, WERE YOU GIVEN CLOTHES?
A. FINALLY MY MOM LIKE DID BRING ME SOME CLOTHES TO THE JAILHOUSE.
Q. DID THEY BRING YOU ANY PERSONAL ITEMS?
A. NO, JUST - THEY JUST BROUGHT ME A PANTS AND A SHIRT, THAT WAS IT.
Q. TO WHICH JAIL DID THEY BRING THOSE THINGS?
A. TO COUNTY JAIL.
Q. OKAY. WAS THAT THE FIRST ONE YOU WERE IN?
A. YES, THAT WAS THE FIRST ONE.

Q. WHEN YOU WERE TRANSPORTED FROM THE COUNTY JAIL TO LEEDS AVENUE, WERE YOU HANDCUFFED?
A. YES.
Q. DESCRIBE THAT?

[SANDRA POWELL 162]

A. WHEN I LEFT FROM THAT JAIL AND. WENT TO THE BIG ONE, I WAS STILL IN HANDCUFF AND I WAS SHACKLED THEN. AND THERE WERE TWO MEN WITH ME. I CAN'T REMEMBER, WE ALL WERE HOOKED ON TOGETHER. BUT I WAS PUT INTO THE CAR WITH TWO MEN AND I DON'T EVEN KNOW IN THE BACK SEAT OF THAT CAR, AND FROM THERE WE WENT TO LEEDS AVENUE.
Q. DESCRIBE THE SHACKLES FOR ME OR FOR THE JURY?
A. MY HANDS WERE HANDCUFFED AND MY FEET WAS CUFFED WITH JUST ENOUGH ROOM TO MAKE SHORT WALKS. AND IT WAS A LONG CHAIN FROM HERE TO THERE. THAT'S WAY I WAS SHACKLED DOWN FROM THE LITTLE JAILHOUSE TO THE BIG ONE.
Q. YOU SAID SOMETHING THAT I WOULD LIKE YOU TO DESCRIBE FURTHER. I THINK YOU SAID WITH JUST ENOUGH CHAIN TO WHAT?
A. TO MAKE SHORT STEPS.
Q. OKAY. WHAT CHAIN WAS THAT, MS. POWELL? WAS THAT A CHAIN BETWEEN THE SHACKLES ON YOUR LEG OR WAS THAT THE CHAIN THAT WENT DOWN THE BOTTOM?

A. IT SEEMED LIKE THERE WAS A LONG ONE FROM HERE TO THERE.
Q. HERE TO THERE, INDICATING FOR THE RECORD FROM ABOUT HER CHEST AREA DOWN TO THE FEET.
A. FROM MY HAND DOWN TO THERE. AND IN BETWEEN MY LEG THERE WAS ANOTHER ONE THERE, LONG ENOUGH TO MAKE SHORT STEPS.
Q. DESCRIBE, IN RELATION TO YOUR PHYSICAL CONDITION, WHAT IT WAS NECESSARY FOR YOU TO DO IN ORDER TO WALK? WERE YOU EXPERIENCING ANY PAIN THEN?

* * *

[SANDRA POWELL 164]

PUT ME IN ANOTHER CELL.
Q. WERE YOU SEARCHED AT THAT JAIL?
A. I DON'T REMEMBER.
Q. OKAY. WHEN YOU CHANGED INTO THE BLUE DRESS, WERE YOU GIVEN PRIVACY TO CHANGE?
A. I DON'T REMEMBER GIVEN PRIVACY TO CHANGE.
Q. WERE YOU GIVEN PERSONAL CARE ITEMS LIKE SANITARY NAPKINS?
A. NO, SIR.
Q. BY THE TIME YOU WERE PROCESSED INTO LEEDS AVENUE, HOW LONG HAD IT BEEN SINCE YOU WERE GIVEN OR ALLOWED TO GET A FRESH, CLEAN SANITARY NAPKIN?
A. AT NO TIME. I HAD THAT SAME ONE NAPKIN THAT I LEFT THE HOSPITAL WITH.
Q. HOW LONG BEFORE CHECKING INTO LEEDS AVENUE DID YOU LEAVE

THE HOSPITAL APPROXIMATELY?
A. IT MIGHT HAVE BEEN 30 MINUTES FROM THERE TO UP THERE.
Q. IT TOOK 30 MINUTES TO GET FROM THE HOSPITAL TO THE LEEDS AVENUE JAIL?
A. NO, SIR. FROM THE LITTLE JAIL TO THE BIG JAIL I THINK IT WAS.
Q. OKAY. AFTER YOU GOT THE JAIL DRESS, WERE YOU PUT IN THE CELL THERE AT THE JAIL?
A. YES, SIR.
Q. DESCRIBE THAT CELL FOR THE JURORS, PLEASE.
A. IT WAS BIG.

* * *

[SANDRA POWELL 166]

A. THAT WAS FROM AFTER HUGO AFTER MY HOUSE WAS DESTROYED, AND THAT WAS THE INSURANCE MONEY THAT WE HAD THING INSURED IN THE HOUSE. SO SHE HAD TO USE THAT.
Q. HOW MUCH DID YOU HAVE TO PAY THE BONDSMAN?
A. IT WAS A THOUSAND DOLLARS. AND WE ONLY COLLECTED THREE THOUSAND AND THE OTHER TWO THOUSAND SHE HAD TO USE TO GET A LAWYER.
Q. DID YOUR FAMILY HIRE A LAWYER FOR YOU ON THIS CASE?
A. YES, SIR.
Q. WHO WAS THAT LAWYER? DO YOU REMEMBER HIS OR HER NAME?
A. ROBERT HOWE.

Q. OKAY. AFTER YOU WERE RELEASED FROM JAIL, HAVING POSTED THE BAIL, DID YOU EVER GO TO COURT FOR THESE CRIMINAL CHARGES?
A. I WENT TO SEE A JUDGE.
Q. AND WHAT HAPPENED WHEN YOU WENT TO SEE THE JUDGE?
A. IN ORDER TO - THEY PUT ME UNDER HOUSE ARREST OR SOMETHING. I COULDN'T COME OUT TO TALK WITH NOBODY OR DO ANYTHING. AND THEY SAID IN ORDER FOR ME TO GET MY CHILD BACK I HAD TO GO TO A DRUG REHAB PLACE.
Q. MS. POWELL, AT THE TIME WHEN THIS ALL HAPPENED TO YOU, WERE YOU WORKING?
A. NO.
Q. WHAT DRUG REHAB PROGRAM DID YOU GO THROUGH?
A. I WENT TO SUBSTANCE ABUSE FOR MAYBE TWO DAYS OUT OF A WEEK.

[SANDRA POWELL 167]

Q. NOW IS THAT CHARLESTON COUNTY SUBSTANCE ABUSE?
A. YES.
Q. YOU WENT TWO DAYS A WEEK?
A. YES.
Q. AND THEN WHAT?
A. AFTER THAT THEY SEND ME TO ANOTHER PLACE, WAY WEST OF THE ASHLEY. I HAD TO CATCH A RIDE EVERY DAY. I THINK ABOUT THREE OR FOUR DAYS OUT OF THE WEEK.
Q. DID YOU HAVE A CAR AT THAT POINT IN TIME?

A. NO, SIR.
Q. WAS PUBLIC TRANSPORTATION AVAILABLE TO YOU?
A. NO, SIR.
Q. DO YOU REMEMBER THE NAME OF THE PLACE THAT YOU WENT THREE OR FOUR DAYS A WEEK THAT THEY SENT YOU TO?
A. ALL I REMEMBER WAS IT WAS NUMBER 1 CARRIAGE LANE.
Q. HOW LONG DID YOU GO TO THAT PROGRAM?
A. I THINK IT WAS 6 MONTHS. I BELIEVE IT WAS.
Q. DID IT WORK?
A. TO A CERTAIN POINT IT DID.
Q. WHAT POINT? DESCRIBE TO THE JURY WHAT THE PROGRAM WAS AND WHAT YOU WENT THROUGH AND HOW IT WORKED.
A. WELL, FOR EVERY TIME I WENT I WOULD HAVE TO CATCH A RIDE, LIKE AN IN-AND-OUT THING. I WOULD GO THERE FROM TEN UNTIL MAYBE FOUR IN THE AFTERNOON. AND FROM THERE CATCH A RIDE HOME. IT WORK TO A CERTAIN DEGREE, BECAUSE ONE THING THEY DID

TAUGHT ME IN ORDER TO LOVE ANYBODY, FIRST YOU GOT TO LOVE YOURSELF. THAT WAS THE MAIN THING THEY TAUGHT ME. I FIRST GOT TO LOVE MYSELF. AND TO THAT THE HIGHER PART, EVERYTHING FROM ME TO GOD, IT HAD WORKED FOR ME FOR THE DRUGS BECAUSE I

BEEN CLEAN OFF OF IT. EVERY YEAR MY CHILD GETS OLDER, I BEEN CLEAN. BUT IT TURNED ME INTO SOMETHING ELSE.

Q. WHAT DID IT TURN YOU INTO?

A. EVER SINCE THIS ORDEAL, SINCE I BEEN LOCKED UP, IT'S HARD FOR ME TO SLEEP AT NIGHT ANYMORE BECAUSE I'M SO AFRAID SOMEBODY IS COMING TO GET ME. SO I HAVE TO DRINK JUST TO GO TO SLEEP TO GO THROUGH WITH IT. AND WHEN I DO WAKE UP I'M SO AFRAID, I GOT SUCH A PAIN IN MY CHEST. AND SO I WENT TO MY DOCTOR AND I TOLD HIM I CANNOT SLEEP AT NIGHT. SO HE PRESCRIBED VALIUM FOR ME. AND I DON'T WANT TO TAKE THAT BECAUSE I DON'T WANT TO GET HOOKED ON ANYTHING ELSE. AND I PRAY EVERY NIGHT, PLEASE GOD TO HELP ME BECAUSE WHY IS IT THAT I CANNOT SLEEP. AND JUST BEEN LIKE THIS EVER SINCE I WAS LOCKED UP. I JUST CANNOT SLEEP AT NIGHT.

Q. SO RATHER THAN USING COCAINE, OR VALIUM, YOU'RE USING ALCOHOL TO SLEEP?

A. YES.

Q. HAVE YOU SOUGHT HELP FOR THAT?

A. SIR?

Q. HAVE YOU SOUGHT HELP FOR YOUR USE OF ALCOHOL?

A. NO. IN THE DAYTIME I DON'T EVEN WANT IT, JUST WHEN NIGHT

COME BECAUSE I KNOW I GOT TO GO TO SLEEP.
Q. WHAT HAPPENED, MS. POWELL, IF YOU KNOW, WHAT HAPPENED TO THE CRIMINAL CHARGES THAT WERE BROUGHT AGAINST YOU? DID YOUR LAWYER EVER TELL YOU?
A. NO. AFTER I COMPLETED THE PROGRAM, THEY - THEY GAVE ME BACK MY CHILD AND THERE WAS NOTHING ELSE WAS SAID ABOUT IT.
Q. AFTER YOU COMPLETED THE PROGRAM, DESMOND WAS GIVEN BACK TO YOU?
A. AFTER I COMPLETE THE PROGRAM, I HAD TO GO FIND A JOB.
AND THEN BETWEEN MY - THE LAWYERS OR WHATEVER HE DID, THEN I GOT BACK DESMOND. FOUR MONTHS.
Q. DURING ALL OF THIS TIME WHEN YOU DIDN'T HAVE DESMOND, WHEN YOU WERE GOING THROUGH THE PROGRAM, DID YOU HAVE YOUR OTHER CHILD?
A. UMM-HMM. YES.
Q. DID DSS OR THE SOLICITOR'S OFFICE OR ANYONE EVER COME TO SEE ABOUT THE OTHER CHILD AND TAKE THE OTHER CHILD FROM YOU?
A. NO, SIR.
Q. DO YOU WORK NOW?
A. YES.
Q. WHERE DO YOU WORK?
A. SANDPIPER VILLAGE IN MOUNT PLEASANT.
Q. WHAT DO YOU DO THERE?
A. I'M A COOK.

Q. DO YOU HAVE CHILD CARE FOR DESMOND AND YOUR OTHER CHILD

* * *

[SANDRA POWELL 171]

AND WE'LL PUT THE BURDEN ON YOU TO BRING TO THE COURT'S ATTENTION ANY PORTIONS THEREOF THAT YOU WOULD LIKE TO STRIKE.

MR. WHERRY: SURE.

THE COURT: BEFORE THEY'RE ACTUALLY SENT IN TO - TO THE JURY.

MR. WHERRY: SURE.

CROSS-EXAMINATION

BY MS. CRAIG:

Q. GOOD MORNING, MS. POWELL. YOU FIRST STARTED USING COCAINE IN THE 1970'S; IS THAT CORRECT?

A. I'M NOT SURE. SEVENTIES? NO.

Q. THAT'S NOT CORRECT?

A. IT MIGHT BE. I'M NOT SURE. I'M NOT SURE.

Q. WOULD YOU LIKE TO SEE YOUR DEPOSITION TO REFRESH YOUR RECOLLECTION?

A. THAT WOULD BE FINE.

Q. MS. POWELL, IF YOU WILL TURN TO PAGE 36, PLEASE. YOUR DEPOSITION WAS TAKEN ON AUGUST 16, 1995, BEFORE A COURT REPORTER IN THE PRESENCE OF YOUR ATTORNEYS; IS THAT CORRECT?

A. YES.

Q. BY THE WAY, ON PAGE 36 OF YOUR DEPOSITION, LINE 9, I'LL READ THE QUESTION. IF YOU WILL PLEASE FOLLOW WITH THE

ANSWER.

QUESTION, "WHEN WAS THE FIRST TIME YOU USED OR CONSUMED COCAINE?"

[SANDRA POWELL 172]

ANSWER?

A. "IT WAS, I THINK IT WAS AFTER I CAME FROM" - WHERE IS IT?

Q. YOU'RE CORRECT, IF YOU WILL JUST CONTINUE READING WHERE YOU LEFT OFF?

A. THAT'S WHERE, NUMBER 11?

Q. LINE 11.

A. OKAY. "THERE WAS, I THINK IT WAS AFTER I CAME FROM DENMARK TECH."

Q. "WOULD THAT STILL BE IN THE 1970'S?"AND YOUR RESPONSE?

A. "YES."

Q. THANK YOU. SO YOU CONTINUED TO USE COCAINE IN THE 1970'S IS THAT CORRECT?

A. FOR A CERTAIN PORTION OF IT, YES.

Q. IN FACT, YOUR COCAINE USE INCREASED IN THE 1970'S FROM ONCE A DAY OR TO EVERY OTHER DAY; IS THAT CORRECT?

A, MAYBE.

Q. IS THAT A YES?

A. YES.

Q. OKAY. NOW, MS. POWELL, YOU WERE PREGNANT, AS YOU TESTIFIED EARLIER, WITH DESMOND IN 1989; IS THAT CORRECT?

A. YES.

Q. AND AT THIS TIME YOU WERE USING APPROXIMATELY A DIME BAG OF COCAINE A WEEK WHEN YOU WERE PREGNANT WITH DESMOND; IS THAT CORRECT?

[SANDRA POWELL 173]

A. I BELIEVE SO.
Q. IN MAY OF 1989, YOU CAME TO THE MEDICAL UNIVERSITY, THE OUTPATIENT CLINIC FOR PRENATAL CARE. DO YOU REMEMBER THAT?
A. I REMEMBER COMING THERE, YES.
Q. YOU DO. I'M GOING TO SHOW YOU WHAT WE WOULD LIKE TO MARK AS DEFENDANT EXHIBIT 95-A. THIS IS A CONSENT FORM WHICH YOU SIGNED AT THE MEDICAL UNIVERSITY WHEN YOU WENT FOR PRENATAL MEDICAL CARE ON MAY 24, 1989. IS THAT YOUR SIGNATURE?
A. IT LOOKS LIKE IT.
Q. THAT'S YOUR SIGNATURE?
A. YEAH, IT LOOKS LIKE IT.
Q. THANK YOU.
MS. CRAIG: DEFENDANTS WOULD LIKE TO ADMIT EXHIBIT 95-A INTO EVIDENCE.
MR. WHERRY: YOUR HONOR, I WOULD OBJECT TO THIS, NOT TO THE AUTHENTICITY OF IT, BUT ACCORDING TO THE DATE THAT HAS BEEN TESTIFIED TO, THIS IS WELL PRE-POLICY.
THE COURT: COULD I SEE IT, PLEASE.
MS. CRAIG: YOUR HONOR, SHE TESTIFIED THAT SHE HAD

PRENATAL CARE AT THE MEDICAL UNIVERSITY.
THE COURT: YOUR OBJECTION IS ON WHAT GROUND?
MR. WHERRY: RELEVANCE, SIR, BECAUSE IT'S WELL BEFORE THE POLICY WAS ESTABLISHED, ACCORDING TO ALL OF THE EVIDENCE AND ACCORDING TO ANYONE'S POSITION.
THE COURT: WELL, DOESN'T THIS RELATE TO THE

[SANDRA POWELL 174]

PREGNANCY OF DESMOND, THE BIRTH OF DESMOND?
MR. WHERRY: YES, SIR, IT DOES.
THE COURT: OKAY.
MR. WHERRY: YOUR HONOR, I GUESS WHAT I'M SAYING IS, THAT INSOFAR AS IT MIGHT BE CONSTRUED TO BE A CONSENT FOR URINE DRUG SCREENING, WHICH I THINK IS THE POSITION THAT DEFENDANTS' TAKE, IF THERE WAS NO POLICY IN EXISTENCE AT THE TIME WHEN THIS DOCUMENT WAS SIGNED, THERE CAN BE NO POSITION OF THE HOSPITAL WITH RESPECT -
THE COURT: I OVERRULE THE OBJECTION. I THINK IT'S RELEVANT.
MS. CRAIG: THANK YOU, YOUR HONOR.
Q. (BY MS. CRAIG, CONTINUING) MS. POWELL, YOU RETURNED TO THE MEDICAL UNIVERSITY IN OCTOBER OF 1989 AND DELIVERED YOUR

SON DESMOND; IS THAT CORRECT?
A. YES.
Q. AT THAT TIME DID ANYONE ACCOMPANY YOU TO THE HOSPITAL?
A. NO.
Q. WHO IS JOSEPHINE MILLER?
A. MY MOTHER.
Q. THIS IS A CONSENT FORM WHEN YOU WERE ADMITTED TO THE HOSPITAL TO DELIVER YOUR SON DESMOND. IS THAT YOUR MOTHER'S SIGNATURE AT THE BOTTOM?
A. IT LOOKS LIKE IT.
MS. CRAIG: DEFENDANTS' WOULD LIKE TO ADMIT EXHIBIT

[SANDRA POWELL 175]

95-B INTO EVIDENCE.
MR. WHERRY: MAY I SEE IT, PLEASE?
MS. CRAIG: CERTAINLY.
MR. WHERRY: NO OBJECTION, YOUR HONOR.
MS. CRAIG: THANK YOU.
Q. (BY MS. CRAIG, CONTINUING) ON THE DAY THAT YOU DELIVERED DESMOND, THAT WOULD BE OCTOBER 13, 1989?
A. YES.
Q. YOU TESTED POSITIVE FOR COCAINE; IS THAT CORRECT?
A. THAT'S WHAT SHIRLEY BROWN TOLD ME.
Q. IF IN YOUR MEDICAL RECORD IT INDICATES THAT YOU TESTED POSITIVE FOR COCAINE, WOULD YOU DISPUTE THAT, MS. POWELL?
A. IF MY MEDICAID

Q. IF YOUR MEDICAL RECORD FROM THE MEDICAL UNIVERSITY INDICATED THAT YOU TESTED POSITIVE FOR COCAINE, WOULD YOU DISPUTE THAT?
A. NO, MA'AM.
Q. ON OCTOBER 13, 1989, THE DAY YOU DELIVERED DESMOND, HE ALSO TESTED POSITIVE FOR COCAINE; IS THAT CORRECT?
A. THAT'S WHAT WAS SAID.
Q. AND ISN'T IT TRUE THAT YOU ADMITTED TO USING COCAINE EITHER THE DAY OR TWO DAYS BEFORE DELIVERING DESMOND?
A. YES, I DID.
Q. NOW, MS. POWELL, YOU WERE ARRESTED ON OCTOBER 14, 1989, AND CHARGED WITH UNLAWFUL NEGLECT OF A CHILD; IS THAT CORRECT?

[SANDRA POWELL 176]

A. YES.
Q. AND THEN A FEW WEEKS LATER YOU WERE ADMITTED INTO SUBSTANCE ABUSE TREATMENT AT THE CHARLESTON COUNTY SUBSTANCE ABUSE OUTPATIENT CLINIC; IS THAT CORRECT?
A. YES.
Q. YOU HAVE TESTED EARLIER THAT YOU HAD SOME DIFFICULTY WITH TRANSPORTATION GETTING TO YOUR SUBSTANCE ABUSE APPOINTMENTS; IS THAT CORRECT?
A. I HAD TO CATCH A RIDE TO GET THERE.

Q. WOULD YOU MIND PLEASE OPENING YOUR DEPOSITION TO PAGE 24.

MR. WHERRY: WHAT LINE, PLEASE?

MS. CRAIG: LINE 2.

Q. (BY MS. CRAIG, CONTINUING) PLEASE TELL ME WHEN YOU'RE READY. ARE YOU ON PAGE 24? ARE YOU ON PAGE 24?

A. YES.

Q. I'M GOING TO READ THE QUESTION STARTING WITH LINE 2. IF YOU WILL REPLY WITH THE ANSWER.

QUESTION: "IN THE PAST TEN YEARS HAS THERE EVER BEEN A TIME WHEN DID YOU NOT HAVE A CAR?"

YOUR ANSWER?

A. "NOT REALLY, NO."

Q. EXCUSE ME?

A. "NOT REALLY, NO."

Q. "SO APPROXIMATELY FROM 1985 UNTIL NOW YOU PRETTY MUCH

[SANDRA POWELL 177]

ALWAYS HAD" -

YOUR ANSWER?

A. "HAD A CAR, YES."

Q. AND YOU WENT TO SUBSTANCE ABUSE IN 1989; IS. THAT CORRECT?

A. YES.

Q. THANK YOU.

A. BUT, MISS -

Q. THANK YOU FOR ANSWERING MY QUESTION.

NOW, MS. POWELL, YOU FULLY COMPLETED YOUR SUBSTANCE

ABUSE PROGRAM; IS THAT CORRECT?
A. YES.
Q. THAT MEANS YOU SUCCESSFULLY COMPLETED YOUR TREATMENT?
A. YES.
Q. AND YOU ADMITTED THAT YOUR SUBSTANCE ABUSE COUNSELING AND TREATMENT HELPED YOU TO GET OFF DRUGS; IS THAT CORRECT?
A. YES. HELPED ME TO LOVE MYSELF.
Q. MS. POWELL, HAVE YOU USED COCAINE SINCE YOUR ARREST?
A. NO, SIR. NO, MA'AM.
Q. SO AFTER ALMOST TWENTY YEARS OF USING COCAINE, YOU GOT INTO SUBSTANCE ABUSE TREATMENT, YOU SUCCESSFULLY COMPLETED THAT SUBSTANCE ABUSE TREATMENT AND YOU HAVE NEVER USED COCAINE SINCE, IS THAT YOUR TESTIMONY TODAY?
A. TWENTY YEARS OF USING COCAINE? NO, MA'AM:
Q. YOU DID NOT START USING COCAINE IN 1970'S?
A. TWENTY YEARS OF USING IT? NO, MA'AM.

[SANDRA POWELL 178]

Q. 1970'S AND 1980'S?
A. NOT TWENTY YEARS.
Q. AFTER USING COCAINE FOR A SIGNIFICANT PERIOD OF TIME YOU GOT INTO SUBSTANCE ABUSE AND SUCCESSFULLY COMPLETED SUBSTANCE ABUSE. HAVE YOU EVER USED COCAINE SINCE YOUR ARREST, MS. POWELL?
A. NO, MA'AM.

MS. CRAIG: THANK YOU. MAY I HAVE A MINUTE, PLEASE.

(PAUSE.)

MS. CRAIG: THANK YOU VERY MUCH. NO FURTHER QUESTIONS.

MR. WHERRY: MAY I REDIRECT, YOUR HONOR?

THE COURT: YES.

REDIRECT EXAMINATION

BY MR. WHERRY:

Q. MS. POWELL, JUST ONE OR TWO QUESTIONS. YOU WERE ASKED ABOUT USING A DIME BAG A WEEK?

A. YES, SIR.

Q. A DIME BAG, MS. POWELL, IS THAT TEN DOLLARS WORTH OF COCAINE?

A. YES, SIR.

Q. IS THAT WHERE THE WORD DIME COMES FROM?

A. YES, SIR.

Q. A DIME BAG OF COCAINE, WOULD YOU EXPLAIN FOR THE JURY,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPT FROM TESTIMONY OF ROBERT ROBERTS

[ROBERTS 3]

(TESTIMONY EXCERPT OF CAPTAIN ROBERTS 11-26-97.)
THE COURT: G00D MORNING. KEEP YOUR SEAT.
GOOD MORNING, LADIES AND GENTLEMEN.
THE JURY: GOOD MORNING, YOUR HONOR.
THE COURT: ALL RIGHT, YOU MAY PROCEED.
MR. WHERRY: CALL CAPTAIN ROBERT ROBERTS, YOUR HONOR. AND I CALL HIM AS AN ADVERSE WITNESS.

- - -

ROBERT ROBERTS, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. WHERRY:

Q. CAPTAIN ROBERTS, YOU'RE A CAPTAIN WITH THE CHARLESTON CITY POLICE DEPARTMENT; IS THAT CORRECT?

A. I'M A RETIRED CAPTAIN.

Q. CAPTAIN, YOU STILL WORK THREE DAYS A WEEK WITH THE CHARLESTON CITY POLICE DEPARTMENT?

A. I DO AS ADVISORY CAPACITY.

Q. YOU STILL HOLD THE RANK AS CAPTAIN?
A. NO, SIR, I AM RETIRED.
Q. WHEN DID YOU RETIRE?
A. FEBRUARY OF 1994.
Q. SO IN '89, '90, '91, YOU WERE A CAPTAIN WITH THE CHARLESTON CITY POLICE DEPARTMENT?
A. THAT IS CORRECT.

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[ROBERTS 6]

WOULD OBJECT TO THE ADMISSION INTO EVIDENCE.

THE COURT: SIR, ARE YOU SAYING IN THAT TIME FRAME THIS IS THE ONLY BELT THAT POLICEMEN USED IN CHARLESTON?

THE WITNESS: YES, SIR. THIS WAS THE BELT THAT WAS ROUTINELY USED. I WAS NOT PRESENT, HOWEVER, AT THE ARREST OF THE WOMEN.

THE COURT: I'LL PERMIT IT IN.

MR. WHERRY: THANK YOU, SIR.

MR. HOOD: YOUR HONOR, THESE ARE THINGS THAT ARE ACTUALLY USED. I MEAN, HE IS NOT BUYING THEM AND GETTING THEM AND SUBPOENAING THEM, AND WE WANT TO GET THEM BACK AT SOME POINT. CAN WE DO THAT?

THE COURT: YOU KNOW HOW TO DO THAT. THAT WON'T BE ANY PROBLEM.

GO AHEAD.

MR. WHERRY: THANK YOU, SIR.

Q. (BY MR. WHERRY, CONTINUING) SHOWING YOU WHAT HAS BEEN

MARKED PLAINTIFF'S EXHIBIT 239 FOR IDENTIFICATION, AND ASK YOU, SIR, WHETHER THAT IS THE TYPE OF LEG SHACKLES USED TO RESTRAIN THE PLAINTIFFS IN THIS CASE?

A. YES.

IS THAT THE ONLY TYPE OF LEG SHACKLE USED BY THE CHARLESTON POLICE DEPARTMENT DURING THE TIME IN QUESTION?

A. YES, I BELIEVE IT WAS.

MR. WHERRY: YOUR HONOR, I MOVE 239 INTO EVIDENCE.

[ROBERTS 7]

Q. (BY MR. WHERRY, CONTINUING) LET ME SHOW YOU, CAPTAIN, 240 FOR IDENTIFICATION, AND ASK YOU, SIR, WHETHER THAT IS THE TYPE OF HANDCUFF USED TO RESTRAIN THE PLAINTIFFS IN THIS CASE?

A. YES.

Q. WERE THERE ANY OTHER TYPE OF HANDCUFFS USED BY THE CHARLESTON CITY POLICE DEPARTMENT DURING THE POINT IN TIME THAT WE'RE CONSIDERING?

A. NOT TO THE BEST OF MY KNOWLEDGE.

MR. WHERRY: YOUR HONOR, I MOVE 240 INTO EVIDENCE.

MS. SHOWERS: SAME OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

MR. WHERRY: YOUR HONOR, I HAVE A KEY, IT'S NOT HIS, THAT WILL OPERATE THESE, WHICH I'M PLEASED TO LEAVE WITH THE

COURT CLERK, BECAUSE THEY CAN ACTUALLY BE OPENED AND CLOSED AND HOOKED ONTO SOMETHING. AND I'LL BE PLEASED TO LEAVE THAT WITH THE COURT IF IT WOULD LIKE, OR NOT.

THE COURT: WELL, I GUESS GIVE IT TO THE CLERK. I DON'T THINK SHE IS GOING TO LOCK HERSELF UP, BUT YOU CAN'T EVER TELL. SHE MIGHT TAKE THEM HOME WITH HER AND LOCK UP HER HUSBAND TONIGHT.

MR. WHERRY: THAT'S WHY I'M LEAVING THEM HERE SO MY WIFE WON'T USE THEM.

Q. (BY MR. WHERRY, CONTINUING) CAPTAIN, THIS BELT THAT HAS BEEN MARKED 238 HAS WHAT APPEARS TO BE A RING, A D RING THAT IS IN THE FRONT; IS THAT RIGHT?

[ROBERTS 8]

A. CORRECT.

Q. IN USING THIS BELT, CAPTAIN, I TAKE IT THAT THE BUCKLE GOES TO THE REAR?

A. YES, SIR.

Q. AND THE D RING IS IN THE FRONT?

A. THAT'S CORRECT.

Q. AND THEN USING IT, CAPTAIN, DO THE HANDCUFFS GO THROUGH THAT BELT SO THAT THE HANDCUFFS ARE ATTACHED TO THE BELT?

A. YES, THEY DO.

Q. AND, CAPTAIN, WITH THE SHACKLES, IS THERE A CHAIN THAT

CAN BE USED THAT WILL CONNECT THE SHACKLES TO THE BELT?
A. YES. NORMALLY THESE - AT LEAST WHEN I USE THEM, THE SHACKLES WENT AROUND THE ANKLES AND THE HANDCUFFS, THE TRADITIONAL HANDCUFFS WENT THROUGH THEY EYELET.
Q. SO TRADITIONALLY THE LEG SHACKLES ARE NOT CONNECTED TO THE BELT; IS THAT CORRECT?
A. THEY CAN BE. THAT'S ONE OTHER MANNER, BUT I NORMALLY USE THEM AS I DESCRIBED.
Q. CAPTAIN, THE PURPOSE FOR THE RESTRAINTS?
A. YES, SIR.
Q. FOR THE HANDCUFFS, BELT AND SHACKLES, IS TO PUT A PRISONER OR AN ARRESTED PERSON IN A POSITION WHERE THEY CAN'T GET AWAY FROM THE CUSTODIAL OFFICER, FAIR?
A. YES.
Q. OR HARM THE OFFICER?

[ROBERTS 9]

A. YES.
Q. WOULD IT BE FAIR - WELL, LET ME WITHDRAW THAT.
YOU WERE INVOLVED IN THE INTERAGENCY POLICY AS IT CAME TO BE KNOWN, WERE YOU NOT?
A. YES, I WAS.
Q. AND YOU ATTENDED A NUMBER OF MEETINGS ON BEHALF OF CHIEF REUBEN GREENBERG IN YOUR DEPARTMENT?

A. YES, I DID.
Q. AND AT SOME OF THOSE MEETINGS, YOU BROUGHT OTHER REPRESENTATIVES OF THE CHARLESTON CITY POLICE DEPARTMENT?
A. TO ONE IN PARTICULAR, YES.
Q. CAPTAIN, YOU WERE THE SUPERIOR OFFICER OF THE DETECTIVE BUREAU AT THE CHARLESTON CITY POLICE DEPARTMENT DURING THE OPERATIVE TIME, WERE YOU NOT?
A. YES, I WAS.
Q. AND IN THAT CAPACITY YOU WERE THE SUPERVISORY OFFICER OF DETECTIVE WARING; IS THAT RIGHT?
A. THAT'S CORRECT.
Q. DETECTIVE WARING WAS A DETECTIVE ASSIGNED TO THE CHARLESTON CITY POLICE DEPARTMENT RESPONSIBLE FOR THE MOST PART WITH THE IMPLEMENTATION OF THE INTERAGENCY POLICY FROM THE PERSPECTIVE OF THE CHARLESTON POLICE DEPARTMENT, FAIR?
A. CORRECT.
Q. YOU WERE NOT INVOLVED IN THE POLICY-MAKING DECISION OR THE CREATION OF THE POLICY, WERE YOU?

[ROBERTS 10]

A. NO.
Q. YOU WERE MERELY INVOLVED IN THE EXECUTION OF THE POLICY BY THE CHARLESTON CITY POLICE DEPARTMENT?
A. CORRECT.
Q. ARE YOU AWARE OF ANY OTHER POLICE DEPARTMENT WITHIN THIS

GEOGRAPHIC AREA THAT WAS INVOLVED IN THE EXECUTION OF THE INTERAGENCY POLICY? COUNTY, SHERIFF, COUNTY POLICE, POLICE DEPARTMENT, SLED?

A. WELL THE SHERIFF'S DEPARTMENT IN THE SENSE THAT THEY HOUSE PEOPLE UNABLE TO MAKE BOND. HOWEVER, AS FAR AS THE INVESTIGATION AND ARREST PROCESS, NO, I BELIEVE THE CHARLESTON POLICE DEPARTMENT WAS THE ONLY LAW ENFORCEMENT DIVISION.

YOU ARE AWARE OF WHAT WAS REQUIRED DURING THAT TIME PERIOD FOR A POLICE OFFICER TO MAKE AN ARREST, ARE YOU NOT?

A. YES, I BELIEVE THAT I WAS.

Q. AND DESCRIBE THAT FOR THE JURY, PLEASE.

A. PROBABLE CAUSE WAS THE STANDARD FOR ARREST. WHAT WOULD LEAD AN AVERAGE PERSON OF COMMON SENSE TO REASONABLY BELIEVE THAT A CRIME HAD BEEN COMMITTED OR WAS BEING COMMITTED IS THE DEFINITION.

Q. PROBABLE CAUSE WOULD NOT EXIST TO ARREST -

THE COURT: WAIT A MINUTE. WAIT A MINUTE NOW. WHAT DOES THAT HAVE TO DO WITH THIS CASE?

MR. WHERRY: PROBABLE CAUSE?

THE COURT: YES, SIR.

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[ROBERTS 12]

SOMETHING PAGES.
MR. WHERRY: YES, SIR.
THE COURT: YOU DO ALLEGE A VIOLATION OF CONSTITUTIONAL RIGHTS BASED ON UNREASONABLE SEARCH AND SEIZURE?
MR. WHERRY: YES, SIR.
THE COURT: BUT I THOUGHT THAT THE THRUST OF THAT WAS TOWARDS THE UNREASONABLE SEARCH. I WAS NOT ON NOTICE THAT IT INVOLVED THE ARREST ITSELF AND, AGAIN, I JUST - WE HAVE GOT ENOUGH ISSUES IN THIS CASE RAISED BY THE PLEADINGS NOT TO HAVE ANY MORE BURDENING MY MIND AND THE JURY'S MIND. SO WE CAN LOOK AT THIS AND IF IT DOES CONTAIN ALLEGATIONS THAT ADDRESS THOSE ISSUES, WE CAN COME BACK. IN THE MEANTIME I'LL TRY TO LOOK AT IT, TOO.
MR. WHERRY: AND, YOUR HONOR, IT'S NOT A SIGNIFICANT POINT IN MY QUESTIONING OF THE CAPTAIN, SO I'LL MOVE ON.
Q. (BY MR. WHERRY, CONTINUING) CAPTAIN, YOU HAVE BEFORE YOU JOINT EXHIBIT NUMBER 1. THAT IS, SIR, A COPY OF THE OPERATIONAL GUIDELINES WHICH WERE WRITTEN BY YOU, BY YOUR HAND IN CONSULTATION WITH THE SOLICITOR'S OFFICE AND DISTRIBUTED TO THE DETECTIVE BUREAU OF THE CHARLESTON CITY POLICE DEPARTMENT,

FAIR?
A. YES.
Q. AND THAT, SIR - WELL, FIRST OF ALL, WHEN WAS THAT WRITTEN BY YOU? ABOUT.

[ROBERTS 13]

A. VERY CLOSE IN TIME TO THE DATE ON THE MEMORANDUM.
Q. WHICH IS?
A. 12, OCTOBER, 1989.
Q. BEFORE OCTOBER OF 1989, CAPTAIN, THERE WAS NO PROCEDURE WITHIN THE CHARLESTON CITY POLICE DEPARTMENT FOR HANDLING CASES LIKE THIS, WAS THERE?
A. NO.
Q. BECAUSE IN FACT BEFORE THAT TIME, CAPTAIN, THERE HAD NEVER BEEN ANY CASES LIKE THIS, HAD THERE?
A. NO.
Q. AND BEFORE THAT POINT IN TIME, CAPTAIN, TO YOUR KNOWLEDGE, NO ONE HAD BEEN ARRESTED FOR ABUSE OR NEGLECT OF THE CHILD BECAUSE THEY USED DRUGS WHILE PREGNANT; ISN'T THAT SO?
A. I WAS AWARE OF A POLICY SOMETHING SIMILAR TO THIS IN THE GREENVILLE OR SPARTANBURG AREA. I'M NOT CERTAIN FROM MY OWN MEMORY WHETHER IT PREDATES OUR POLICY OR CAME SHORTLY THEREAFTER. I DO RECALL IT THE SAME GENERAL TIME FRAME.

Q. I UNDERSTAND THAT. IN THE CHARLESTON CITY POLICE DEPARTMENT?
A. NO.
Q. THERE HAD NEVER BEEN ANYBODY ARRESTED FOR ABUSE OR NEGLECT OF A CHILD BECAUSE THEY USED CONTROLLED SUBSTANCES WHEN THEY WERE PREGNANT; ISN'T THAT FAIR?
A. YES, THAT'S FAIR.

[ROBERTS 14]

Q. AND THEREFORE, CAPTAIN, THE DRAFTING OF THAT GUIDELINE FOR, YOUR POLICE OFFICERS WAS NECESSARY, WASN'T IT?
A. I FELT IT WOULD BE BENEFICIAL, YES, SIR, TO PROVIDE SOME STRUCTURE IN CONTACT INFORMATION AND BACKGROUND.
Q. THOSE GUIDELINES FOR THE GUIDANCE OF YOUR OFFICERS WAS DRAFTED IN CONJUNCTION WITH THE SOLICITOR'S OFFICE, FAIR?
A. YES.
Q. YOU CONSULTED WITH THEM AND GOT THEIR ADVICE?
A. YES.
Q. AND THEIR ACQUIESCENCE IN YOUR GUIDELINES?
A. ACQUIESCENCE, APPROVAL, YES.
Q. AND SO WE UNDERSTAND, CAPTAIN, THE SOLICITOR'S OFFICE IS THE CHIEF LAW ENFORCEMENT OFFICER OF THE COUNTY; IS THAT CORRECT?

A. WELL, THE SHERIFF, THE SOLICITOR I'M NOT - IN A PURE LEGAL SENSE I DON'T KNOW HOW TO ANSWER THAT. I WOULD SAY THAT HE IS THE CHIEF PROSECUTOR IN THE COUNTY.

Q. WAS THERE CONSULTATION, CAPTAIN, WITH PERSONNEL AT MUSC CONCERNING THOSE GUIDELINES?

A. YES.

Q. AND THAT PERSON, IF THERE WAS CONSULTATION WITH, WAS SHIRLEY BROWN, CORRECT?

A. CORRECT.

Q. SHIRLEY BROWN WAS THE POINT PERSON AT MUSC FOR THE INTERAGENCY POLICY AS FAR AS YOU WERE CONCERNED, FAIR?

[ROBERTS 15]

A. SHE WAS OUR PRIMARY POINT OF CONTACT, YES.

Q. AND ALTHOUGH YOU WERE HER SUPERIOR, DETECTIVE WARING WAS THE POINT PERSON IN THE CHARLESTON CITY POLICE DEPARTMENT?

A. THAT'S FAIR.

Q. NOW, IN THE SECOND PARAGRAPH OF JOINT NUMBER 1, WHICH IS YOUR OPERATIONAL GUIDELINES, CORRECT ME IF I'M WRONG, CAPTAIN, BUT IT LISTS OR DESCRIBES THE DRUGS WHICH ARE NOT LEGAL DRUGS; IS THAT FAIR?

A. CORRECT. HEROIN, CRACK COCAINE, AMPHETAMINES ANY OTHER DRUGS ILLEGAL INGESTED BY THE PATIENT THAT THE MEDICAL

AUTHORITIES DEEM TO ENDANGER THE LIFE OF THE UNBORN CHILD,
YES, SIR.
Q. AT THAT TIME IN THE CITY OF CHARLESTON, THE STREET DRUGS THAT WERE GENERALLY AVAILABLE WERE HEROIN, POWDER COCAINE, CRACK COCAINE, MARIJUANA, TCP, ANGEL DUST, FAIR?
A. YES, IN GENERAL. I DON'T KNOW TO WHAT EXTENT EACH ONE WAS PRESENT. BUT, YES, IN GENERAL THAT'S CORRECT.
Q. IN YOUR ENTIRE RELATIONSHIP WITH - OH, LET ME WITHDRAW THAT. AND ARRESTS WERE GENERALLY MADE FOR POSSESSION OR DISTRIBUTION OF ALL OF THOSE DRUGS I JUST ASKED YOU ABOUT?
A. THOSE DRUGS AND OTHER CONTROLLED SUBSTANCES, YES.
Q. IN THE ENTIRE COURSE OF THE POLICY, THE INTERAGENCY POLICY, THERE WERE NO ARRESTS MADE, WERE THERE, FOR PREGNANT WOMEN FOR USE OF ANY DRUG WHILE PREGNANT EXCEPT CRACK COCAINE?
A. I'M NOT CERTAIN FROM PERSONAL KNOWLEDGE, BUT I WOULD SAY

[ROBERTS 16]

THAT CRACK COCAINE WAS CERTAINLY THE PREDOMINANT DRUG. IF THERE WAS ONE OR TWO OTHERS I COULDN'T SAY, BUT, YES, IN GENERAL, THAT'S CORRECT.
Q. AND I UNDERSTAND YOUR RELUCTANCE TO USE ABSOLUTES. ARE

YOU AWARE OF ANY ARRESTS FOR HEROIN, METHAMPHETAMINE, PCP, ANGEL DUST OR ANY OF THE OTHER DRUGS?

A. NO.

Q. NOW, THIS OPERATIONAL GUIDELINE WHICH YOU HAVE BEFORE YOU SPECIFICALLY REFERS TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, DOESN'T IT?

A. YES.

Q. NO ARRESTS WERE MADE AND THERE WAS NO POLICY, WAS THERE, AT SAINT FRANCIS HOSPITAL?

A. I HAD NO CONTACT WITH THAT HOSPITAL, NO.

Q. ROPER?

A. NO.

Q. TRIDENT?

A. NO.

Q. THERE WAS NOTHING ABOUT THOSE HOSPITALS THAT MADE CRACK COCAINE LEGAL, WAS THERE?

A. NO. TRIDENT IS NOT IN OUR JURISDICTION. ONE OF THE REASONS THAT WE WERE DIRECTLY INVOLVED WAS OUR AGREEMENT WITH THE MEDICAL UNIVERSITY ON THE MAJOR CRIME CASES AND ALSO THE FACT THAT IT WAS WITHIN OUR JURISDICTION, BUT NO, WERE WE INVOLVED IN ARRESTS AT OTHER HOSPITALS WITHIN THE CITY LIMITS

[ROBERTS 17]

NO.

Q. AND THERE WAS NOTHING ABOUT THOSE HOSPITALS, THE ONES

WITHIN THE CITY LIMITS THAT YOU KNOW OF THAT MADE THE USE OF CRACK COCAINE OR COCAINE DURING PREGNANCY LEGAL, WAS THERE?

A. NO.

Q. IS IT FAIR TO SAY THE REASON THAT YOU DEALT ONLY WITH THE MEDICAL UNIVERSITY HOSPITAL WAS BECAUSE THAT WAS THE HOSPITAL THAT YOU HAD THE WORKING ALLIANCE WITH SHIRLEY BROWN AND THE OTHER STAFF MEMBERS?

A. THAT WOULD BE THE BEST OF MY KNOWLEDGE, YES.

Q. AND, CAPTAIN, AT VIRTUALLY EVERY STEP ALONG THE WAY IN THIS PROCESS THAT EVENTUALLY LED TO THE ARREST OF A PREGNANT WOMEN THERE WAS INTERACTION BETWEEN THE POLICE DEPARTMENT AND THE HOSPITAL, WASN'T THERE?

A. YES, THERE WAS DEFINITELY INTERACTION.

Q. IN FACT, CAPTAIN, YOU ATTENDED A MEETING, DIDN'T YOU, WITH THE HEAD OF THE CHARLESTON CITY POLICE DEPARTMENT'S LABORATORY, THIS QUESTION IS NOT COMING OUT WELL. LET ME START OUT AGAIN.

THERE WAS A MEETING, WASN'T THERE, WHICH WAS ATTENDED BY, AT LEAST AMONG OTHERS, YOU, THE HEAD OF YOUR LABORATORY, SHIRLEY BROWN, THE HEAD OF THE MEDICAL UNIVERSITY LABORATORY?

A. YES. AS FAR AS THE HEAD OF THE MEDICAL UNIVERSITY

LABORATORY, THAT WAS TO THE BEST OF MY MEMORY THAT HE MAY HAVE

[ROBERTS 18]

ATTENDED. THE OTHER THREE I'M SURE WERE PRESENT AT THAT MEETING.

Q. AND THE PURPOSE OF THAT MEETING, AT LEAST IN PART, WAS TO GET DOWN PAT THIS CHAIN OF EVIDENCE THING, RIGHT?

A. THAT WAS A CONCERN OF MINE. I INVITED OUR LAB DIRECTOR, BECAUSE I WAS COGNIZANT OF THE FACT THAT ANY ARRESTS COULD ULTIMATELY END UP IN A TRIAL. AND I WAS CONCERNED THAT WE AT LEAST CONSIDER THAT AS A FACTOR WHEN WE WENT THROUGH THIS PROCESS.

Q. SURE.

A. AND SO AT MY INVITATION MS. FLYNN THE LAB DIRECTOR ATTENDED, BECAUSE I AT LEAST WANTED TO RAISE THE ISSUE, YES.

Q. AND CHAIN OF EVIDENCE IS A CRIMINAL FORENSIC PROBLEM, RIGHT?

A. YES, SIR.

Q. CAPTAIN, SHOWING YOU WHAT HAS BEEN MARKED PLAINTIFFS' EXHIBIT 22 FOR IDENTIFICATION, THAT, SIR, IS THE MEMORANDA THAT YOU SENT AROUND SCHEDULING THIS MEETING IN WHICH THE CONCEPT OF CHAIN OF EVIDENCE WAS TO BE DISCUSSED, RIGHT?

A. NO, I DIDN'T SEND THIS MEMO.

Q. I'M SORRY, I MISSPOKE. THE PEOPLE AT THE MEDICAL UNIVERSITY SENT THE MEMORANDUM TO YOU, RIGHT?
A. THAT'S CORRECT. BUT - THEIR - I DON'T KNOW WHAT THEIR AGENDA WAS. I HAVE TO GO FROM THE MEMORANDA, IT SAYS URINE TESTS, EXPECTANT MOTHERS. I HAD A CONCERN ABOUT CHAIN OF

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[ROBERTS 21]

AGGRAVATED CIRCUMSTANCES - I BELIEVE THAT'S A REFERENCE TO 1-A. THE PATIENT HAS TESTED POSITIVE FOR DRUG ABUSE AND AFTER COUNSELING AND WARNING AND HAS FAILED TO KEEP SCHEDULING APPOINTMENTS FOR PRENATAL CARE.
Q. OKAY. AND IN ANY EVENT, CAPTAIN?
A. YES, SIR.
Q. IF A WOMEN WENT INTO THE HOSPITAL AND HAD A BABY AND AFTER THE BIRTH THERE WAS A POSITIVE UDS, A POSITIVE DRUG SCREEN, THERE WOULD BE A REPORT MADE TO YOU AND THERE WOULD BE AN ARREST; IS THAT RIGHT?
A. AT THE INCEPTION OF THE POLICY I BELIEVE THAT TO BE CORRECT, YES.
Q. WHEN DID THAT CHANGE, DO YOU REMEMBER?
A. I KNOW IT CHANGED. I DON'T RECALL EXACTLY WHEN. I BELIEVE IT WAS EARLY ON IN THE POLICY, BUT PRECISELY WHEN, I

DON'T REMEMBER.
Q. CAPTAIN, DO YOU HAVE - YOU HAVE NO DETECTIVE, DETECTIVE WARING OR OTHERWISE, STATIONED AT THE HOSPITAL TO INVESTIGATE PEOPLE WHO CAME IN, DID YOU?
A. WAS SHE STATIONED THERE?
Q. YES.
A. NO, SIR.
Q. IN FACT, THE ONLY WAY THAT YOUR DEPARTMENT WOULD KNOW OF A POSITIVE DRUG SCREEN OR OF A POSITIVE ADMISSION OF THE USE OF COCAINE WOULD BE THAT YOU WOULD GET A CONTACT FROM SHIRLEY

[ROBERTS 22]

BROWN OR SOMEONE LIKE HER FROM THE HOSPITAL; IS THAT FAIR?
A. THAT IS FAIR.
Q. AND IN FACT IT WAS THE UNDERSTANDING AMONG THE AGENCIES INVOLVED THAT SHIRLEY BROWN OR HER EQUAL WAS SUPPOSED TO NOTIFY YOU WHEN SOMEBODY CAME IN POSITIVE; IS THAT RIGHT?
A. IT'S MY UNDERSTANDING. I DON'T KNOW SPECIFICALLY WHAT PEOPLE AT THE MEDICAL UNIVERSITY WERE TOLD, BUT, YES, THAT WAS MY UNDERSTANDING OF THE POLICY. THOSE THAT MET THE CRITERIA, THE GUIDELINES, THAT INFORMATION WAS TO BE PROVIDED TO THE POLICE DEPARTMENT.
Q. AND IT WAS THE POSITION OF THE CHARLESTON CITY POLICE

DEPARTMENT THAT YOU ENCOURAGED THAT CONDUCT, THAT REPORTING BY MUSC STAFF?
A. SIR, I DON'T KNOW ABOUT ENCOURAGED. I KNOW THAT I WAS PART OF EXECUTING THE POLICY THAT HAD BEEN DECIDED UPON.
Q. WELL, CHIEF RUEBEN GREENBERG WAS THE CHIEF OF YOUR DEPARTMENT?
A. YES, HE WAS.
Q. AND IS IT NOT CORRECT THAT CHIEF GREENBERG, ON BEHALF OF THE DEPARTMENT, WAS IN - WAS IN SUPPORT OF THIS POLICY AND ENCOURAGED THIS POLICY?
A. I BELIEVE THAT HE DID, YES.
Q. WOULD IT THEN BE FAIR TO SAY THAT THE CHARLESTON CITY POLICE DEPARTMENT WAS IN SUPPORT OF AND ENCOURAGED THE REPORTING BY THE MEDICAL PERSONNEL TO YOUR DEPARTMENT?

[ROBERTS 23]

A. YES.
Q. YOU UNDERSTAND, DON'T YOU, CAPTAIN, THAT WHEN A LAW ENFORCEMENT AGENCY IMPLIES OR ENCOURAGES A NON-LAW ENFORCEMENT PERSONNEL TO PERFORM WHAT WOULD NORMALLY BE POLICE FUNCTION, CERTAIN THINGS ATTACH TO THAT RELATIONSHIP?
MS. SHOWERS: I OBJECT.
MR. WHERRY: I WITHDRAW THE QUESTION.

Q. (BY MR. WHERRY, CONTINUING) THE COMPLAINTS, BY THE WAY, THAT WERE FILED BY SHIRLEY BROWN OR SOMEONE LIKE HER AT THE HOSPITAL WERE FILED BY TELEPHONE, WEREN'T THEY?
A. INITIALLY, YES.
Q. AND IN FACT IF THE PERSON TO BE ARRESTED WAS A PATIENT AT THE HOSPITAL, THE POLICE DEPARTMENT WAS NOTIFIED WHEN THEY WERE TO BE DISCHARGED?
A. AT SOME POINT, YES, WE LEARNED WHEN THEY WOULD BE DISCHARGED.
Q. AND THAT WAS AS A MATTER OF CONVENIENCE SO YOU WOULDN'T HAVE TO GO SCHLEPPING ALL OVER THE CITY TRYING TO FIND THESE PEOPLE YOU KNEW WHERE THEY WERE RIGHT?
MS. SHOWERS: I AGAIN OBJECT, THIS WITNESS SAID THAT HE WASN'T INVOLVED IN ANY OF THE ARRESTS.
MR. WHERRY: LET ME LAY A BETTER FOUNDATION.
THE COURT: OKAY.
Q. (BY MR. WHERRY, CONTINUING) YOU, SIR, WERE THE DIRECT .. SUPERVISOR OF THE DETECTIVE DIVISION THAT WAS USED TO ARREST

[ROBERTS 24]

THE WOMEN, WEREN'T YOU?
A. YES.
Q. YOU WERE AWARE AS A SUPERVISOR OF HOW THE OPERATIONS

WENT, WEREN'T YOU?
A. YES.
Q. YOU WERE AWARE OF EACH OF THE - NOT WHICH CAR WAS USED, BUT EACH OF THE DETAILS OF THE PROCEDURE, WEREN'T YOU?
A. YES, I DON'T KNOW EXACTLY WHAT WENT ON IN EVERY INVESTIGATION AND EVERY ARREST, BUT, YES, I WAS IN CHARGE AND I HAD A GENERAL FAMILIARITY WITH THE OPERATIONS ON A REGULAR BASIS.
Q. AND THE REASON THAT YOU WERE NOTIFIED AS TO WHEN THE DISCHARGE WOULD BE WAS FOR THE CONVENIENCE OF THE POLICE DEPARTMENT SO YOU KNEW WHERE THE DEFENDANT WAS, FAIR?
A. YES, OPERATIONAL EFFICIENCY AND ACTING AS SOON AS POSSIBLE WITHIN RECEIPT OF A COMPLAINT.
Q. SO THAT WAS NOT SOMETHING THAT HAPPENED JUST BY ACCIDENT, THAT WAS A DESIGN THAT WAS IN THE PROGRAM?
A YES.
Q. WHEN YOUR DETECTIVE RECEIVED THE NOTIFICATION FROM SHIRLEY BROWN AND WENT TO THE HOSPITAL, WERE THERE THINGS THAT YOU REQUIRED AS A SUPERVISOR BE OBTAINED FROM THE HOSPITAL AS WELL AS THE BODY OF THE SUSPECT?
A. WELL, CLEARLY I WANTED THE INFORMATION THAT CONSTITUTED PROBABLE CAUSE AND OTHER INFORMATION RELATIVE TO THE

[ROBERTS 25]

INVESTIGATION. THAT COULD TAKE IN A NUMBER OF VARIABLES.
Q. SURE. ROUTINELY THE INFORMATION THAT COMPRISED PROBABLE CAUSE WAS A COPY OF THE UDS, THE URINE DRUG SCREEN, FAIR?
A. I THINK THAT WOULD BE A PRIMARY FACTOR, YES. WHETHER IT WOULD BE VERBALLY OR IN WRITING, BUT INFORMATION RECEIVED.
Q. AND THAT INFORMATION ABOUT THE POSITIVE URINE DRUG SCREEN WAS RECEIVED BY YOU FROM THE HOSPITAL? I DON'T MEAN YOU PERSONALLY, YOU PLURAL.
A. AS IN THE INVESTIGATING OFFICER OR DETECTIVE ASSIGNED?
Q. YES.
A. YES.
Q. IN ADDITION, ANY STATEMENTS MADE TO THE HOSPITAL PERSONNEL BY THE PATIENT/SUSPECT, WERE RECEIVED BY YOUR 13, PER INVESTIGATING OFFICER, ISN'T THAT SO?
MS. SHOWERS: AGAIN I OBJECT. HE WASN'T THERE. THE OFFICER WHO TOOK THE STATEMENTS WOULD BE THE ONES TO TESTIFY TO THIS.
THE COURT: GO AHEAD.
MR. WHERRY: THANK YOU.
Q. (BY MR. WHERRY, CONTINUING) YOUR ANSWER?
A. YES, THAT WAS MY DIRECTIVE, ANY INFORMATION THAT BORE ON THE COMMISSION OF THE OFFENSE, BE IT VERBAL STATEMENTS BY THE

SUSPECT OR ANY OTHER, YES.
Q. THERE CAME A POINT IN TIME, DIDN'T THERE, CAPTAIN, WHEN YOU RECEIVED A LETTER- LET ME WITHDRAW THAT.

[ROBERTS 26]

WHILE MR. HOOD AND MS. SHOWERS ARE LOOKING AT THAT,
IN THE EARLY STAGES OF THIS POLICY NO SEARCH WARRANTS WERE USED TO GET THE MEDICAL RECORDS, WERE THEY?
A. THE VERY EARLY STAGES I DON'T - I DON'T BELIEVE THAT THERE WERE. I KNOW THAT BECAME A CONCERN EARLY ON. PRECISELY WHEN I DON'T RECALL. I KNOW THERE IS SOME MEMORANDUM REGARDING THAT ISSUE, BUT YES.
Q. A SEARCH WARRANT, JUST IN GENERAL TERMS, IS APPROVAL BY A COURT TO SEARCH A PERSON OR THEIR HOUSE OR THEIR PAPERS OR THEIR PROPERTY, FAIR?
A. FAIR.
Q. AND THAT APPROVAL BY THE COURT, AS YOU UNDERSTAND IT, IS BASED UPON A FINDING OF PROBABLE CAUSE?
A. THAT'S CORRECT.
Q. ALTHOUGH IN A DIFFERENT CONTEXT, THE SAME KIND OF PROBABLE CAUSE THAT YOU WERE TALKING ABOUT, TO ARREST SOMEONE"?
A. CORRECT. PROBABLE CAUSE IS REQUIRED, BE IT A SEARCH WARRANT OR AN ARREST.

Q. SIR, LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFF'S EXHIBIT 13 FOR IDENTIFICATION, AND ASK WHETHER YOU RECOGNIZE THAT DOCUMENT?
A. YES, I DO.
Q. AND IS THAT DOCUMENT ADDRESSED TO YOU?
A. YES, IT IS.
Q. IS THAT DOCUMENT FROM THE SOLICITOR'S OFFICE?

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[ROBERTS 36]

MS. SHOWERS: YOUR HONOR, THIS WASN'T GIVEN TO US AS A TRIAL EXHIBIT UNTIL JUST THIS MINUTE. WE'RE TRYING TO LOOK THROUGH.

THE COURT: OKAY.

Q. (BY MR. WHERRY, CONTINUING) DETECTIVE - I'M SORRY, CAPTAIN, I JUST DEMOTED YOU. CAPTAIN, LET ME SHOW YOU WHAT WE HAVE MARKED 228-B FOR IDENTIFICATION. AND REFER YOU TO THE NEXT TO THE LAST PAGE A FORM ENTITLED SUPPLEMENTARY REPORT WHERE IT SAYS DATE OF WARRANT. DO YOU SEE THAT?
A. ARE YOU REFERRING TO -
Q. DATE OF WARRANT?
A. RIGHT.
Q. WARRANT NUMBER?
A. YES, THAT REFERS TO AN ARREST WARRANT.
Q. THAT WAS MY POINT. WHEN THE REPORT SAYS DATE OF WARRANT

AND WARRANT NUMBER, THAT REFERS TO AN ARREST WARRANT NOT A SEARCH WARRANT, FAIR?
A. YES.
Q. AND IF THERE WAS A SEARCH WARRANT ISSUED, AND EXCEPT AN ERROR BY THE OFFICER, ONE WOULD EXPECT TO SEE IN THERE AN "I APPLIED FOR A SEARCH WARRANT BEFORE JUDGE SO AND SO ON SUCH
Q. AND SUCH A DATE. THE WARRANT WAS ISSUED, WE EXECUTED IT AT THIS TIME, AND THIS IS WHAT WE GOT," SOMETHING ABOUT LIKE THAT?
A. I WOULD EXPECT TO SEE SOME REFERENCE TO IT, YES.

* * *

[ROBERTS 38]

MR. WHERRY: YOUR HONOR, IT CAME FROM THE DEFENDANTS' -
THE COURT: SHE SAID THAT SHE HASN'T BEEN ABLE TO LOOK AT IT. IT OBVIOUSLY IS OFFERED AS A BUSINESS RECORD OF THE CHARLESTON POLICE DEPARTMENT. IT HAS TO BE OFFERED THROUGH THE CUSTODIAN. HE IS NOT THE CUSTODIAN. I MEAN -
I MEAN, WHEN HE RECOGNIZES IT AS - HE IS READING THROUGH IT RIGHT NOW. AND LET'S SAY HE SAYS THAT IT'S CRYSTAL FERGUSON'S FILE. IF I READ THROUGH IT RIGHT NOW I WOULD SAY

THAT IT LOOKS LIKE THAT FILE, TOO, BUT THE PERSON THAT PUTS IT IN HAS TO BE THE CUSTODIAN OR SOMEBODY THAT KNOWS THAT FILE. HAVE YOU EVER SEEN IT BEFORE?

THE WITNESS: HAVE I SEEN THIS, JUDGE?

THE COURT: YES.

THE WITNESS: NO, SIR, I HAVE NOT.

MR. WHERRY: JUDGE, I WILL CALL THE CUSTODIAN. NO PROBLEM.

Q. (BY MR. WHERRY, CONTINUING) AS THE SUPERVISOR OF THE DETECTIVE BUREAU, DO YOU KNOW WHO MADE THE DECISION AS TO WHAT WOMEN WERE GOING TO BE ARRESTED?

A. DO I KNOW WHO MADE THE DECISION?

Q. YES.

A. MADE BY THE DETECTIVE ON THE SCENE AFTER THEY HAD ASSESSED THE INFORMATION.

Q. AND THE ON THE SCENE MEANS AT THE HOSPITAL AFTER THE

[ROBERTS 39]

INFORMATION WAS RECEIVED FROM SHIRLEY BROWN?

A. YES, IN MOST INSTANCES IT WOULD REFER TO DETECTIVE WARING.

Q. BEFORE A PERSON WOULD BE ARRESTED FROM THE HOSPITAL, YOU HAD A CONCERN, AND YOU ADDRESSED THAT CONCERN THAT THEY WERE

PHYSICALLY CAPABLE OF BEING HOUSED IN THE JAIL; ISN'T THAT RIGHT?

A. YES. THAT WAS A POTENTIAL OF ANYONE THAT IS CHARGED IF THEY WERE UNABLE TO MAKE BOND.

Q. AND YOU WANTED THE ASSURANCE FROM THE HOSPITAL BEFORE YOU WOULD AUTHORIZE YOUR DETECTIVES TO ARREST A WOMEN THAT THEIR PHYSICAL CONDITION WAS SUCH THAT THEY COULD BE SAFELY AND MEDICALLY HOUSED, FAIR?

A. FAIR.

Q. SIR, I TAKE IT THEN THAT YOU INSISTED THAT THE HOSPITAL GIVE DETECTIVE WARING SOME PIECE OF PAPER, SOME DOCUMENT, SOMETHING THAT SAID THIS WOMAN'S HEALTH IS OKAY TO LOCK UP?

A. IN SHORT, THAT'S MY MEMORY OF IT THAT WE HAD SOME - A WRITTEN DOCUMENTATION REGARDING THE FACT THAT THEY COULD BE HOUSED IN THE JAIL FACILITY.

WHAT WRITTEN DOCUMENTATION? WHAT DID IT LOOK LIKE? WHAT WAS IT CALLED?

A. I NEVER SAW THEM PERSONALLY.

Q. DO YOU KNOW ANYONE WHO HAS EVER SEEN IT? THAT DOCUMENT?

A. I WOULD - I CAN ONLY REFER YOU TO DETECTIVE WARING.

* * *

[ROBERTS 47]

VARIOUS MATERIALS ASSOCIATED WITH THIS CASE, I HAD SEEN AN

AMENDED COPY.
Q. WHAT DOES THAT SAY?
A. SECTION C, SIR?
Q. THE AMENDED COPY?
A. I DO NOT HAVE THAT HERE IN WHAT YOU PROVIDED ME, BUT I HAVE SEEN AN AMENDED COPY.
Q. HAVE YOU PROVIDED THAT TO MR. HOOD?
A. I DON'T KNOW THAT IT CAME FROM ME, SIR. I BELIEVE IT WAS OBTAINED FROM SOME OTHER SOURCE.
Q. THE PURPOSE OF THE POLICY, AS I UNDERSTAND IT - WELL, YOU TELL ME WHETHER I'M CORRECT, WAS TO PROTECT THE UNBORN CHILDREN; IS THAT CORRECT?
A. YES, SIR.
Q. WAS THERE ANYTHING ABOUT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA THAT MADE THAT NEED TO PROTECT THE UNBORN CHILDREN MORE EXISTENT THERE THAN AT THE OTHER HOSPITALS WITHIN YOUR JURISDICTION?
MS. SHOWERS: YOUR HONOR, I OBJECT ON THE GROUND OF RELEVANCE.
MR. WHERRY: MAY I BE HEARD?
THE COURT: I'LL PERMIT HIM TO ANSWER THAT IF HE KNOWS THE ANSWER.
A. I DON'T KNOW.
Q. SO THE DECISION TO ENFORCE THIS - THESE LAWS ONLY AT

[ROBERTS 48]

MUSC WAS NOT A DECISION MADE BY YOU?

A. I ACTED ON THE INFORMATION I RECEIVED. HAD I RECEIVED IT FROM SOMEONE ELSE I WOULD HAVE ACTED ON IT. I NEVER DID, NO, SIR.

Q. SIR, WAS THERE A - WAS THERE A LOG OR A SYSTEM KEPT AT CHARLESTON CITY POLICE DEPARTMENT WITH RESPECT TO THE INTERAGENCY POLICY OF THOSE PEOPLE ARRESTED PURSUANT TO THE POLICY?

A. I KEPT A LOG. IT WAS A MANAGEMENT TOOL FOR MYSELF THAT WAS SEPARATE AND APART FROM THE RECORD SYSTEM IN THE POLICE DEPARTMENT, AND IT ASSISTED ME IN THE OVERSIGHT OF THE DETECTIVE DIVISION. YES, THERE WAS A LOG AND THERE WAS A AS YOU - IF YOU PROFFER A CHAPTER OR SECTION WERE THESE CASES WERE NOTED.

Q. AND IT WAS NECESSARY TO CREATE THAT LOG OR THAT SECTION, WASN'T IT, BECAUSE CASES OF THIS NATURE, CASES OF THIS CLARIFICATION DIDN'T EXIST BEFORE THE POLICY, ISN'T THAT SO?

A. YES, THAT'S CORRECT.

Q. NOW, CAPTAIN, GOING BACK TO YOUR DIRECTIVE, YOUR OPERATIONAL GUIDELINES?

A. YES.

Q. JOINT EXHIBIT NUMBER 1?

A. YES.

Q. ON PAGE, I GUESS PAGE 2, UNDER EVIDENCE, SUBPARAGRAPH A, DO YOU SEE THAT?

[ROBERTS 49]

A. UNDER EVIDENCE?
Q. YES. I'M SORRY. CHARGES TO BE FILED?
A. UNDER.
Q. PAGE 2?
A. YES.
Q. SUBPARAGRAPH A UNDER CHARGES TO BE FILED?
A. YES, SIR.
Q. THAT INDICATES, DOES IT NOT, IF PREGNANCY IS 27 WEEKS OR LESS, THE CHARGE SHOULD BE POSSESSION OF BLANK, MEANING WHAT DRUG IS TO BE FILLED IN THERE, AND THE SOUTH CAROLINA STATUTORY SECTION; IS THAT RIGHT?
A. YES, SIR.
Q. IN YOUR OPERATIONAL GUIDELINES YOU CITE A NUMBER OF STATUTORY SECTIONS AND CRIMES WITH WHICH TO CHARGE THE PEOPLE. ON PAGE 2 AND THEN OVER ON PAGE 3; IS THAT RIGHT?
A. YES.
Q. CHILD ABUSE IS NOT ONE OF THE STATUTES, IS IT?
A. ON PAGE 3-C, UNLAWFUL NEGLECT OF THE CHILD.
Q. AND NEGLECT YOU EQUATE WITH THE ABUSE OF THAT CHILD?
A. WELL, I'M GOING TO - I HAVE TO GET THE STATUTE. I KNOW WE FREQUENTLY REFER, I'M NOT SPEAKING OF THE STATUTE, BUT WE FREQUENTLY REFER TO ABUSE AND NEGLECT OF CHILDREN AND I DON'T

KNOW IF THIS WORDING ABUSE WAS LEFT OUT BY ME OR WHETHER THAT CODE SECTION SPECIFICALLY RELATES TO NEGLECT.

Q. ONE OF THE THINGS THAT YOU SUGGEST IN YOUR OPERATIONAL

[ROBERTS 50]

GUIDELINES THAT THE SUSPECT BE CHARGED WITH IS WHAT WE IN THE LEGAL PROFESSION CALL SIMPLE POSSESSION, RIGHT?

A. YES, POSSESSION OF. YES.

Q. POSSESSION OF BLANK, COCAINE, HEROIN?

A. CORRECT.

Q. SIR, IN YOUR ASSOCIATION WITH THE INTERAGENCY POLICY, IN YOUR SUPERVISORY CAPACITY OVER THE DETECTIVE BUREAU, DURING THE PERIOD OF THIS POLICY, WAS THERE ANY MALE HUMAN BEING ARRESTED AND CHARGED WITH SIMPLE POSSESSION WHEN THEIR URINE OR OTHER TESTS AT MUSC CAME UP POSITIVE?

A. MALE.

Q. MALE HUMAN BEINGS?

A. NO.

Q. AND THAT ASSUMING THAT THESE PLAINTIFFS COULD HAVE BEEN CHARGED WITH POSSESSION, AS YOUR GUIDELINES SAY, THAT IS ONE OF THE THINGS THAT THEY SAY, ISN'T IT? YOU CAN CHARGE THEM WITH POSSESSION?

A. YES.

Q. ASSUMING THE WOMEN COULD BE CHARGED WITH POSSESSION, WHY WOULDN'T THE MEN BE CHARGED WITH POSSESSION?

MS. SHOWERS: I OBJECT ON THE GROUND OF RELEVANCE. AND ALSO HE HASN'T ESTABLISHED THAT THIS WITNESS HAD CONTACT WITH ANY OTHER PATIENTS OR ACCESS TO RECORDS OR REPORTS OTHER THAN UNDER THIS POLICY.

MR. WHERRY: ON THE RELEVANCE ISSUE, MAY I BE

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[ROBERTS 59]

PROMOTED TO CAPTAIN, DETECTIVE DIVISION COMMANDER, AND I CONTINUED THOSE RESPONSIBILITIES AND ADDITIONAL RESPONSIBILITIES AS FAR AS OVERSIGHT OF OTHER FELONY INVESTIGATIONS. IN AUGUST OF 1994 CHIEF GREENBERG ASKED ME TO RETURN TO THE DEPARTMENT IN AN ADVISORY CAPACITY AND ASSIST IN THE HOMICIDE INVESTIGATION. SO AFTER MY RETIREMENT I DID RETURN. AND I PRESENTLY SERVE THREE DAYS A WEEK WITH THE DEPARTMENT ON HOMICIDE INVESTIGATIONS. I ALSO ASSIST THE STATE ATTORNEY GENERAL'S OFFICE IN MEDICAID FRAUD INVESTIGATION ON A PART-TIME BASIS.

Q. CAPTAIN ROBERTS, YOU TESTIFIED EARLIER THAT YOU WERE

INVOLVED WITH THE INTERAGENCY POLICY IMPLEMENTATION; IS THAT CORRECT?
A. YES.
Q. AND SO YOU WERE FAMILIAR WITH THE PROCESS OF THE INTERAGENCY POLICY?
MR. WHERRY: OBJECTION, LEADING.
Q. (BY MS. SHOWERS, CONTINUING) ARE YOU FAMILIAR WITH THE PROCESS OF THE INTERAGENCY POLICY, CAPTAIN?
A. YES.
Q. IT'S ALREADY BEEN MARKED INTO EVIDENCE NUMBER 156, HOW THE POLICY WORKED. CAPTAIN, IF YOU COULD STEP DOWN HERE AND RUN THROUGH THIS WITH ME, PLEASE. NUMBER 1 INDICATES THAT A GENERAL CONCEPT FORM WAS SIGNED AT ADMISSION TO MUSC; IS THAT WHAT THAT SAYS?

[ROBERTS 60]

A. YES.
Q. WERE THE POLICE INVOLVED AT ANYTIME IN GETTING THAT CONSENT FORM?
A. NO.
Q. ALL RIGHT. AND THEN A VIDEO WAS REVIEWED AND LETTER WAS SIGNED BY THE PATIENT; IS THAT WHAT NUMBER 2 SAYS?
A. YES, IT IS.
Q. WERE THE POLICE INVOLVED WITH THAT VIDEO OR GETTING ANY LETTERS SIGNED TO MUSC?

A. NO.
Q. IF CRITERIA WERE MET, NUMBER 3, A URINE DRUG SCREEN WAS PERFORMED. THAT'S WHAT NUMBER 3 SAYS; IS THAT RIGHT?
A. YES, A UDS PERFORMED.
Q. DID THE POLICE HAVE ANY INPUT INTO WHAT TYPE OF CRITERIA WAS USED FOR THE URINE DRUG SCREEN?
A. NO.
Q. WAS THAT MEDICAL CRITERIA?
A. TO THE BEST OF MY KNOWLEDGE, YES.
Q. IF THE URINE DRUG SCREEN WAS POSITIVE, LET ME FIRST ASK YOU, WERE YOU REPORTED ABOUT A POSITIVE DRUG SCREEN - STRIKE THAT.
WERE YOU REPORTED THAT A DRUG SCREEN WAS DONE?
A. ON EVERY PATIENT, NO.
Q. AND IF A URINE DRUG SCREEN WAS POSITIVE, NUMBER 4, A VIDEO WAS SHOWN AGAIN. DID YOUR DEPARTMENT HAVE ANY INPUT

[ROBERTS 61]

INTO THE VIDEO BEING SHOWN HERE?
A. NO.
Q. AND THE CASE MANAGER, PART B, WAS SHE EMPLOYED BY THE CHARLESTON POLICE DEPARTMENT?
A. NO.
Q. ALL RIGHT. AND THE HARMFUL EFFECTS OF THE COCAINE WERE EXPLAINED AND A HISTORY WAS TAKEN. NUMBER 3, EXPLAIN THE

REQUIREMENT TO REPORT POSITIVE AND OFFER AMNESTY BY SOLICITOR.

FOUR, SOLICITOR LETTER REVIEWED AND SIGNED.

FIVE, APPOINTMENT MADE AT SUBSTANCE ABUSE TREATMENT CENTER FOR EVALUATION.

HAVE I READ THAT CORRECTLY?

A. YES.

Q. WAS THE POLICE DEPARTMENT INVOLVED AT ANY STEP ALONG THE WAY 1 THROUGH 5?

A. NO.

Q. NUMBER 5, IF THE PATIENT FAILED TO SUCCESSFULLY COMPLETE SUBSTANCE ABUSE TREATMENT, OR RETURN TO MUSC AND ANOTHER POSITIVE URINE DRUG SCREEN DURING PRENATAL CARE OR AT DELIVERY, THE OB CASE MANAGER WOULD REPORT TO THE POLICE AS THE REPORTING STATUTE REQUIRED. IS THAT NUMBER 5?

A. YES, IT IS.

Q. IS THAT YOUR UNDERSTANDING OF HOW THIS WORKED?

A. THAT'S MY UNDERSTANDING.

[ROBERTS 62]

Q. SO THE POLICE DID NOT GET INVOLVED UNTIL AFTER?

MR. WHERRY: OBJECTION, LEADING.

THE COURT: SUSTAINED.

Q. (BY MS. SHOWERS, CONTINUING) DID THE POLICE GET INVOLVED

IN ANY OF THESE STEPS PRIOR TO NUMBER 5?
A. NO.
Q. THANK YOU. YOU WERE INVOLVED WITH WRITING THE OPERATIONAL GUIDELINES THAT WERE PUT INTO EVIDENCE, CAPTAIN?
A. YES, MA'AM.
Q. DO YOU HAVE THOSE IN FRONT OF YOU?
A. YES, I DO.
Q. COULD YOU READ THE FIRST SENTENCE OF THE OPERATIONAL GUIDELINES?
A. YES. PREGNANT WOMEN ABUSING ILLEGAL DRUG IS A GROWING PROBLEM THAT POSES POTENTIALLY FATAL CONSEQUENCE FOR THE UNBORN CHILD. THIS THREAT TO HUMAN LIFE HAS NEGATED POLICE INTERVENTION IN THOSE INSTANCES WHERE PREGNANT FEMALES HAVE REJECTED OPPORTUNITY TO VOLUNTARILY OBTAIN ASSISTANCE IN STOPPING THEIR ABUSE OF DANGEROUS DRUGS.
Q. AND COULD YOU EXPLAIN TO THE JURY, FROM YOUR OPERATIONAL GUIDELINES AND YOUR UNDERSTANDING OF HOW THE POLICE INVOLVEMENT IN THIS POLICY WAS GOING TO WORK?
A. WELL, OUR INVOLVEMENT OCCURRED AFTER THE VARIOUS STEPS THAT WERE OUTLINED PREVIOUSLY HAD BEEN GONE THROUGH. WHEN THOSE STEPS HAD FAILED TO ACHIEVE THE DESIRED OBJECTIVE, WHICH

[ROBERTS 63]

WAS THE FEMALES STOPPING THE ABUSE OF ILLEGAL DRUGS, THEN THE POLICE WERE INVOLVED. IT BECAME A MATTER FOR CRIMINAL INVESTIGATION AND POTENTIALLY FOR PROSECUTION.

Q. LET ME GET TO YOU LEAN A LITTLE BIT FURTHER, I THINK THE JURY IS HAVING TROUBLE.

A. I APOLOGIZE.

THE COURT: IS THAT MICROPHONE ON?

DEPUTY CLERK: YES, SIR.

A. AFTER THE STEPS THAT WERE PREVIOUSLY OUTLINED HAD BEEN PERFORMED, IF IN FACT THE INDIVIDUALS HAD STILL FAILED TO STOP THEIR ABUSE OF ILLEGAL DRUGS, AT THAT POINT, I BELIEVE IT'S STEP NUMBER FIVE, THEN THE POLICE BECAME INVOLVED, IT BECAME A MATTER FOR CRIMINAL INVESTIGATION. WE RECEIVED INFORMATION FROM THE MEDICAL UNIVERSITY AND A DETECTIVE WAS DISPATCHED THERE TO MAKE AN ON SITE INVESTIGATION, COLLECT INFORMATION, MAKE DETERMINATIONS AS TO WHETHER OR NOT PROBABLE CAUSE EXISTED AND WHAT OTHER STEPS NEEDED TO BE TAKEN.

Q. BACKING UP, CAPTAIN, WHEN YOU RECEIVED A REPORT, IT WAS A

REPORT FROM A DOCTOR OR A NURSE AT THE MEDICAL UNIVERSITY; IS THAT CORRECT?
A. THAT'S CORRECT.
AND DID YOU HAVE EMPLOYEES IN THE POLICE DEPARTMENT WORKING AT THE HOSPITAL TO IMPLEMENT THIS POLICY?
NO.
SO WHEN YOU RECEIVED A REPORT, ONE OF YOUR DETECTIVES WAS

[ROBERTS 64]

DISPATCHED TO MUSC?
THE COURT: AGAIN.
MR. WHERRY: OBJECTION.
THE COURT: YOU'RE LEADING. LET'S DON'T LEAD ANY MORE.
MS. SHOWERS: ALL RIGHT.
Q. (BY MS. SHOWERS, CONTINUING) THE DETECTIVES THAT WORK IN YOUR DIVISION, ARE THEY UNIFORMED POLICE OFFICERS OR PLAIN CLOTHES?
A. THEY ARE PLAIN CLOTHES.
Q. AND YOU HAVE ALREADY TESTIFIED THAT DETECTIVE WARING WAS THE PRIMARY POINT PERSON FROM YOUR DEPARTMENT?
A. YES. DETECTIVE WARING HANDLED PROBABLY THE VAST MAJORITY OF THESE CASES.
Q. TO YOUR KNOWLEDGE DID DETECTIVE WARING WEAR PLAIN CLOTHES OR UNIFORM?
A. SHE WORE PLAIN CLOTHES.

Q. AND COULD YOU DESCRIBE FROM YOUR KNOWLEDGE WHAT SHE WOULD DO WHEN SHE WENT TO MUSC?

MR. WHERRY: OBJECTION, COMPETENCE. HE WASN'T THERE.

THE COURT: WELL YOU HAVE OBJECTED THROUGHOUT THE DIRECT EXAMINATION THAT HE WASN'T THERE AND DIDN'T KNOW, AND I HAVE BASICALLY SUSTAINED THOSE OBJECTIONS.

MS. SHOWERS: YES, SIR. I WAS JUST TRYING TO GET

[ROBERTS 65]

THROUGH THE OPERATIONAL GUIDELINES THAT HE DEVELOPED.

THE COURT: THAT WASN'T WHAT YOU ASKED HIM.

Q. (BY MS. SHOWERS, CONTINUING) ACCORDING TO YOUR OPERATIONAL GUIDELINES, CAPTAIN ROBERTS, WHAT WOULD DETECTIVE WARING DO WHEN SHE RESPONDED TO MUSC?

A. SHE WOULD RESPOND, MEET WITH THE APPROPRIATE INDIVIDUALS IN THE MEDICAL FIELD, OBTAIN AS MUCH INFORMATION AS POSSIBLE, AND AT THAT POINT MAKE A DETERMINATION AS TO WHETHER OR NOT PROBABLE CAUSE EXISTED. WHETHER OR NOT THERE WAS SUFFICIENT TIME TO OBTAIN AN ARREST WARRANT. AND THEN COORDINATE ACTIVITIES WITH THE SOLICITOR AND THE MEDICAL PERSONNEL IF IN

FACT A DECISION WAS MADE TO MOVE FORWARD WITH AN ARREST. AND SHE WAS PRIMARILY RESPONSIBLE, IN THOSE INSTANCES WHERE AN ARREST OCCURRED, SHE WAS PRIMARY RESPONSIBLE FOR THE PHYSICAL TAKING OF THAT SUBJECT INTO CUSTODY. SHE WAS THE ARRESTING OFFICER.

Q. AND TO THE BEST OF YOUR KNOWLEDGE WITH THE INTERAGENCY POLICY ARRESTS, WERE THE NORMAL ARRESTS PROCEDURES FOLLOWED?

MR. WHERRY: OBJECTION, COMPETENCE.

MS. SHOWERS: TO THE BEST OF HIS KNOWLEDGE I WOULD THINK AS HER SUPERIOR -

THE COURT: WELL, THAT'S PRECISELY THE GROUND THAT YOU OBJECTED ON EARLIER.

MS. SHOWERS: IF HE EVER BECAME AWARE OF ANY UNTOWARD EVENT DURING AN ARREST AS HER SUPERVISOR.

[ROBERTS 66]

THE COURT: IF HE ACTUALLY RECEIVED KNOWLEDGE HIMSELF, BUT THEN HOW IS HE GOING TO DO THAT EXCEPT SOMEONE TELLING HIM. JUST BECAUSE HE IS THE SUPERVISOR DOESN'T MAKE IT NON-HEARSAY.

MS. SHOWERS: WELL, IF A COMPLAINT WAS FILED WITH HIS DEPARTMENT ABOUT AN ARREST THAT WAS DONE INAPPROPRIATELY

THROUGH THE FORMAL COURSE OF BUSINESS, THAT WOULDN'T NECESSARILY BE HEARSAY.

THE COURT: RESTATE THE QUESTION.

Q. (BY MS. SHOWERS, CONTINUING) WERE YOU AWARE OF ANY NORMAL ARRESTS PROCEDURES NOT BEING FOLLOWED?

MR. WHERRY: AND THE OBJECTION IS BOTH RELEVANCE AND COMPETENCE AND HEARSAY, IF THE ANSWER IS YES. I DON'T KNOW WHAT THE ANSWER IS.

THE COURT: I'LL PERMIT HIM TO ANSWER IT BASED ON HIS OWN PERSONAL KNOWLEDGE.

A. WERE THESE ARRESTS HANDLED IN A ROUTINE MANNER?

Q. YES.

THE COURT: NO, THAT'S NOT THE QUESTION. THAT'S NOT THE QUESTION.

Q. (BY MS. SHOWERS, CONTINUING) WERE YOU AWARE OF ANY NORMAL ARRESTS PROCEDURES THAT WERE NOT FOLLOWED PURSUANT TO THE INTERAGENCY POLICY?

A. NO.

Q. DO YOUR POLICE OFFICERS GET TRAINING IN PROTECTING THE

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[ROBERTS 72]

A. IT'S FAIR, AFTER I BELIEVE THE FIFTH STEP AT SOME POINT IT WAS BROUGHT TO OUR ATTENTION, YES.

Q. AND NUMBER -

A. DON'T BELIEVE THAT WE RECEIVED IT AT THAT JUNCTURE, IS ALL I'M SAYING.
Q. I UNDERSTAND. BUT THE TIME PERIOD WHEN THE HISTORY WAS TAKEN AND, YES, I USED DRUGS WHILE I WAS PREGNANT, AND A REPORT TO YOU MAY HAVE, IN MANY CIRCUMSTANCES, BEEN QUITE A SHORT PERIOD OF TIME, FAIR?
A. I DON'T - I'M AFRAID THAT I CAN'T ANSWER THAT WITH ANY CERTAINTY ABOUT THE TIME PERIODS AS A GENERAL RULE.
Q. OKAY. THE EXPLAINING OF THE REQUIREMENT TO REPORT THE POSITIVE UDS SCREEN AND THE OFFER OF AMNESTY, THE REPORTING THAT THE PATIENTS WERE TOLD ABOUT WAS A REPORTING TO YOU, WASN'T IT? THAT'S WHERE THE REPORT WENT, RIGHT, TO YOUR DEPARTMENT?
A. THE PATIENTS WERE TOLD THAT IF THEY VIOLATED THE POLICY AND REFERRAL AND DIVERSION PROGRAMS THEY WOULD BE REPORTED, YES.
IN THE EARLY STAGES THEY WERE TOLD THAT BECAUSE THEY TESTED POSITIVE IT WAS BEING REPORTED TO THE CHARLESTON CITY POLICE DEPARTMENT FOR THEM TO BE ARRESTED, FAIR?
A. AT THE INCEPTION, YES, SIR, IN SOME INSTANCES.
Q. AND THEN AS THE POLICY WENT ON, THEY WERE TOLD IF THEY

DIDN'T DO WHAT THEY WERE TOLD, BY SHIRLEY BROWN AND THE

[ROBERTS 73]

SUBSTANCE ABUSE PEOPLE, THAT YOUR DEPARTMENT WOULD COME OUT AND ARREST THEM, RIGHT?

A. YES, SIR.

Q. I THINK I JUST HAVE TWO MORE QUESTIONS.

YOUR GUIDELINES, THAT JOINT 1 THAT MS. SHOWERS QUESTIONED YOU ABOUT, MAKES NO REFERENCE, DOES IT, TO THE CHILD ABUSE REPORTING STATUTE?

MS. SHOWERS: OBJECTION, IMPROPER REDIRECT, YOUR HONOR.

THE COURT: YOU REFERRED TO WHAT AS NOT MAKING REFERENCE TO THE STATUTE?

MR. WHERRY: J 1, HIS OFFICIAL GUIDELINES ON MS. SHOWER'S QUESTIONS THAT WE WENT OVER ON CROSS.

THE COURT: GO AHEAD AND ANSWER THE QUESTION.

A. NO, THERE IS NO SPECIFIC REFERENCE IN MY MEMORANDA CONCERNING THAT STATUTE.

Q. ONE LAST QUESTION, CAPTAIN. YOUR DETECTIVE DIVISION AT THE TIME FRAME THAT WE'RE TALKING ABOUT, DID THEY ROUTINELY HANDLE CHILD ABUSE CASES? ABUSED CHILD, SHAKEN BABY SYNDROME, THAT KIND OF THING, SEXUAL ABUSE?

A. YES. YES.

MR. WHERRY: I HAVE NO FURTHER QUESTIONS.

THE COURT: THANK YOU, SIR. YOU'RE EXCUSED.

(TESTIMONY COMPLETE.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF THOMAS ROWLAND

[ROWLAND 610]

Q. AND HOW LONG HAVE YOU BEEN ON THE BOARD OF THE MEDICAL UNIVERSITY?
A. FOURTEEN YEARS.
Q. AND HOW DID YOU OBTAIN YOUR SEAT ON THE BOARD, DOCTOR?
A. I WAS ELECTED BY A JOINT SESSION OF THE LEGISLATURE.
Q. OKAY. AND AS YOU SERVED ON THE BOARD AT THE MEDICAL UNIVERSITY, TELL US THE PHILOSOPHY THAT YOU HAVE SEEN IMPLEMENTED THERE WITH REGARD TO DIVERSITY?
A. WE HAVE A DEPARTMENT OF DIVERSITY AND WE HAVE HAD A VERY ACTIVE DEPARTMENT AS LONG AS I CAN REMEMBER BEING ON THE BOARD. AND STILL HAVE IT. AND I THINK THE UNIVERSITY DOES A YEOMAN'S JOB OF NOT - NOT HAVING ANY RACIAL DISCRIMINATION, EXCEPT MAYBE IN A POSITIVE ROLE. WE IN FACT TAKE PROMISING BLACK STUDENTS AND HELP THEM GET INTO MEDICAL SCHOOL. HELP THEM GO THROUGH UNDERGRADUATE COURSES TO QUALIFY TO GET INTO MEDICAL SCHOOL.

Q. ALL RIGHT, SIR. NOW, THIS INTERAGENCY POLICY THAT IS INVOLVED IN THIS LAWSUIT, IN YOUR PROFESSIONAL OPINION, WAS THERE ANY INTENT BY THE ADOPTION OF THIS POLICY TO DISCRIMINATE AGAINST BLACK MOTHERS?
A. ABSOLUTELY NOT.
Q. DID THIS POLICY, AS IT WENT THROUGH THE SEQUENCE OF COMMITTEES AND STUDYING TO REACH APPROVAL AND IMPLEMENTATION, DIFFER IN ANY WAY FROM THE METHOD AND MODE BY WHICH OTHER POLICIES YOU HAVE SEEN ADOPTED AND APPROVED AT THE MEDICAL

[ROWLAND 611]

UNIVERSITY?
A. NO.
Q. WERE THERE ANY DEPARTURES FROM THE NORMAL PROCEDURES AND SEQUENCE OF EVENTS THAT LED UP TO THE ADOPTION OF THE INTERAGENCY POLICY?
A. NONE OF WHICH I'M AWARE OF.
Q. ARE YOU FAMILIAR WITH THE MANDATORY REQUIREMENTS IN SOUTH CAROLINA FOR THE REPORTING OF CHILD ABUSE?
A. I AM.
Q. HAS THE MEDICAL UNIVERSITY, IN YOUR EXPERIENCE, ALWAYS COMPLIED WITH AND ATTEMPTED TO COMPLY WITH THOSE REQUIREMENTS?
A. I HAVE ALWAYS ASSUMED THAT THEY DID.

Q. WAS THIS POLICY CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS AND STANDARDS AND PHILOSOPHY?
A. YOU MEAN THE POLICY OF THIS PARTICULAR PROGRAM?
Q. DEALING WITH THE COCAINE MOTHERS, YES, SIR?
A. I THINK IT WAS FORMULATED TO IMPROVE THE HEALTH OF THE MOTHERS AND TO PROTECT THE NEWBORN FROM THE COCAINE ABUSE.
Q. AND WERE YOU IN FAVOR OF THE GOAL OF THIS POLICY?
A. I WAS.
Q. AND AS AN OBSTETRICIAN, WHAT DID YOU SEE THE ~~GO~~AL OF THIS POLICY BEING?
A. THE GOAL OF THIS POLICY WAS TO PREVENT THE DAMAGE TO THE FETUS AND TO EDUCATE AND HOPEFULLY REHABILITATE THE MOTHER.
WE HAVE HEARD A LOT OF QUESTIONS ABOUT THE ALCOHOL AND TOBACCO

[ROWLAND 612]

ABUSE AND I WOULD ADMIT THAT THE ALCOHOL AND TOBACCO ABUSE ARE MORE COMMON, BUT THEY'RE ALSO NOT AS SEVERE. ALTHOUGH ALCOHOL ABUSE CAN BE VERY DAMAGING TO A CHILD IN A SEVERE ALCOHOLIC MOTHER, SOCIAL USE OF ALCOHOL MAY - MAY NOT HAVE ANY SIGNIFICANT EFFECT. AND YOU HAVE VERY LITTLE - LITTLE WAY TO DETERMINE HOW MUCH ALCOHOL A MOTHER IS DRINKING. COCAINE ON

THE OTHER HAND CAN KILL YOU WITH ONE DOSE, ESPECIALLY CRACK COCAINE.
Q. AND THE BABY?
A. AND THE BABY.
MR. HOOD: DR. ROWLAND. THANK YOU VERY MUCH FOR COMING TODAY.
THE COURT: CROSS-EXAMINATION.

CROSS-EXAMINATION

BY MR. WHERRY:
Q. DOCTOR, ALCOHOL CAN CAUSE PERMANENT MENTAL RETARDATION, CAN'T IT?
A. SURELY.
Q. COCAINE CAN'T, CAN IT?
A. IT CAN.
Q. IT'S YOUR POSITION, DOCTOR, THAT COCAINE CAUSES MENTAL RETARDATION?
A. IT'S MY POSITION THAT ALCOHOL AFFECTS -
Q. COCAINE -
A. AFFECTS THE DEVELOPMENT OF A CHILD'S ABILITY TO LEARN AND

[ROWLAND 613]

THINK.
Q. I THINK MY QUESTION TO YOU, DOCTOR, WAS: COCAINE DOESN'T CAUSE MENTAL RETARDATION, DOES IT?
A. I THINK IT DOES.
Q. IS THERE ANY MEDICAL LITERATURE, DOCTOR, UPON WHICH YOU BASE THE OPINION THAT YOU'VE JUST GIVEN?
A. I DIDN'T COME DOWN HERE PREPARED TO BE AN EXPERT ON

COCAINE.
Q. SO I TAKE IT THE ANSWER TO THE QUESTION IS NO?
A. NO.
Q. DOCTOR, YOU WOULD AGREE THAT THIS POLICY FOCUSED ON COCAINE?
A. I AGREE.
Q. DOCTOR, WOULD YOU AGREE THAT OPIATES, BARBITURATES, AMPHETAMINES, HALLUCINOGENS ALL CAUSE SEVERE PROBLEMS WITH PREGNANT WOMEN?
A. I WOULD.
Q. AND, DOCTOR, WOULD YOU AGREE THAT THE PREVALENCE OF COCAINE USE AMONG BLACK WOMEN IS GREATER THAN THE OTHER DRUGS THAT I HAVE MENTIONED?
A. I'M NOT SURE OF THAT FACT.
Q. DOCTOR, YOU SAID THAT YOU HAD A DEPARTMENT OF DIVERSITY AT THE UNIVERSITY; IS THAT RIGHT?
A. THAT'S CORRECT.
Q. ARE YOU AFFILIATED WITH THAT DEPARTMENT, DOCTOR? IS THAT

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF JOHN SANDERS

[SANDERS 84]

'84?
A. YES, SIR.
Q. AND THEN WHERE DID YOU GO?
A. I OBTAINED A POSITION AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AS A MEDICAL PHOTOGRAPHER AND THEN I WORKED IN PATHOLOGY. AND DURING THAT TIME I ATTENDED THE MEDICAL UNIVERSITY OF SOUTH CAROLINA IN OBTAINING MY MASTER'S DEGREE AND MASTER'S OF HEALTH SERVICES ADMINISTRATION.
Q. AND DID YOU OBTAIN THOSE DEGREES, YOUR MASTERS' DEGREE?
A. YES, I DID.
Q. AND THAT WAS IN WHAT YEAR?
A. 1989.
Q. AND DID YOU BECOME EMPLOYED THEREAFTER AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. YES, SIR. I TOOK A POSITION AS ADMINISTRATIVE RESIDENT FOR CHARLENE MCCANTS OR CHARLENE STEWART AT THAT TIME.
Q. AND HOW LONG DID YOU SERVE OR WORK AT THE MEDICAL UNIVERSITY?
A. TOTAL TIME AT THE MEDICAL UNIVERSITY WAS JUST UNDER TEN

YEARS. AND MY ADMINISTRATIVE CAPACITY IT WAS JUST ABOUT FIVE YEARS.

Q. AND YOU LEFT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WHEN, MR. SANDERS?

A. AUGUST OF 1994.

Q. AND HAVE YOU BEEN IN YOUR CURRENT POSITION IN CINCINNATI

[SANDERS 85]

SINCE THAT TIME?

A. SINCE SEPTEMBER OF '94, YES, SIR.

Q. AND YOUR ROLE AT THAT FACILITY IS AS A HOSPITAL ADMINISTRATOR?

A. YES, SIR, IT IS.

Q. NOW, AS TO THIS POLICY THAT THIS LAWSUIT IS ABOUT, WERE YOU INVOLVED IN THE FORMATION OF THE POLICY?

A. I CAME INTO THE ADMINISTRATIVE RESIDENCY PROGRAM AND STARTED ATTENDING SOME OF THE MEETINGS AND THE FORMALIZATION OF THOSE POLICIES.

Q. AND WERE YOU THERE IN THE DECISION MAKING CAPACITY?

A. NOT AT FIRST. AS THE POLICY WAS IMPLEMENTED AND WE HAD FURTHER REFINEMENTS OF IT, I WAS IN A POSITION TO HAVE SOME INPUT.

Q. WAS - WAS THIS POLICY SHIRLEY BROWN'S?

A. NO.

Q. WERE THE NORMS AND STANDARDS OF THE MEDICAL UNIVERSITY IN

FORMULATING AND ADOPTING THE POLICY DEVIATED FROM IN ANY WAY I IN THE APPROVAL OF THIS POLICY?
A. NO, SIR, THEY WEREN'T.
Q. IS IT COMMON TO INVOLVE OUTSIDE AGENCIES IN FORMING POLICIES THAT MIGHT IN SOME WAY INCLUDE THAT?
A. YES, SIR. IT WOULD DEPEND UPON THE POLICY BECAUSE WITHIN THE HOSPITAL THERE ARE MANY POLICIES THAT DO PERTAIN TO OUTSIDE AGENCIES. FOR INSTANCE, SAFETY POLICIES THAT WOULD

[SANDERS 84]

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A. YES, SIR.
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Q. AND DID YOU OBTAIN THOSE DEGREES, YOUR MASTERS' DEGREE?
A. YES, I DID.
Q. AND THAT WAS IN WHAT YEAR?
A. 1989.
Q. AND DID YOU BECOME EMPLOYED THEREAFTER AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?

A. YES, SIR. I TOOK A POSITION AS ADMINISTRATIVE RESIDENT FOR CHARLENE MCCANTS OR CHARLENE STEWART AT THAT TIME.
Q. AND HOW LONG DID YOU SERVE OR WORK AT THE MEDICAL UNIVERSITY?
A. TOTAL TIME AT THE MEDICAL UNIVERSITY WAS JUST UNDER TEN YEARS. AND MY ADMINISTRATIVE CAPACITY IT WAS JUST ABOUT FIVE YEARS.
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[SANDERS 85]

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Q. WAS - WAS THIS POLICY SHIRLEY BROWN'S?
A. NO.
Q. WERE THE NORMS AND STANDARDS OF THE MEDICAL UNIVERSITY IN FORMULATING AND ADOPTING THE POLICY DEVIATED FROM IN ANY WAY IN THE APPROVAL OF THIS POLICY?
A. NO, SIR, THEY WEREN'T.
Q. IS IT COMMON TO INVOLVE OUTSIDE AGENCIES IN FORMING POLICIES THAT MIGHT IN SOME WAY INCLUDE THAT?
A. YES, SIR. IT WOULD DEPEND UPON THE POLICY BECAUSE WITHIN THE HOSPITAL THERE ARE MANY POLICIES THAT DO PERTAIN TO OUTSIDE AGENCIES. FOR INSTANCE, SAFETY POLICIES THAT WOULD

[SANDERS 86]

INCLUDE EITHER POLICE DEPARTMENT, FIRE DEPARTMENT, SOCIAL SERVICES DEPARTMENTS, WHATEVER, SO THAT WE CAN COMMUNICATE PROPERLY BETWEEN THE INTERNAL PARTS OF THE HOSPITAL AND THOSE OUTSIDE AGENCIES. SO, YES, SIR.
Q. ANY REVISIONS THAT WERE MADE TO THE POLICY, WERE THEY DONE IN A NORMAL FASHION AND REVIEWED ON AN ANNUAL BASIS BY THE JOINT COMMISSION?

A. YES, SIR. WE UNDER THE - OUR REGULATIONS BY THE JOINT COMMISSION, WE ARE REQUIRED, ALL HOSPITALS, TO REVIEW POLICIES ON AN ANNUAL, BIANNUAL OR EVERY THREE YEARS BY THE MEDICAL DEPARTMENTS OR BY THE HOSPITAL. AND THOSE POLICIES ARE REVIEWED ON A TIMELY BASIS.

Q. AND THE CONTENTS OF THIS POLICY, WAS IT CONSISTENT WITH THE MEDICAL UNIVERSITY NORMS AND STANDARDS CONCERNING PATIENTS RIGHTS AND PRIVILEGES?

MS. PALTROW: OBJECTION LEADING.

THE COURT: I THINK THE QUESTION IS LEADING, AND I SUSTAIN THE OBJECTION.

Q. (BY MR. HOOD, CONTINUING) IN THE CONTEXT OF THE POLICY, WAS IT CONSISTENT WITH THE MEDICAL UNIVERSITY'S NORMS AND STANDARDS?

A. YES, SIR, IT WAS.

Q. AND WITH REGARD TO PATIENT RIGHTS, DID THIS POLICY CHANGE OR DEVIATE FROM ANY FORMAL STANDARD CONCERNING PATIENT PRACTICE?

[SANDERS 87]

A. NO, SIR, IT DIDN'T.

Q. NOW, WHEN DID YOU TAKE ON A ROLE TO AS AN ADMINISTRATOR AT THE MEDICAL UNIVERSITY TO MAKE SURE HOSPITAL POLICIES WERE FOLLOWED?

A. I WAS IN AN OFFICIAL ROLE AS AN ADMINISTRATOR AT THE MEDICAL UNIVERSITY MARCH OF '90, I BELIEVE.

Q. AND WITH REGARD TO THE TREATMENT OF PREGNANT WOMEN AND THE DELIVERY OF WOMEN AT THE MEDICAL UNIVERSITY, WHAT ROLE DID YOU TAKE ON?

A. I TOOK ON THE RESPONSIBILITY OF WORKING WITH THE DEPARTMENT OF OBSTETRICS AND GYNECOLOGY AND ALSO THE NURSING DEPARTMENT IN THAT AREA. AND WAS THEIR REPRESENTATIVE, IN A WAY, TO HOSPITAL ADMINISTRATION.

Q. AND WAS THIS POLICY APPLIED TO PRIVATE AS WELL AS PUBLIC CLINIC PATIENTS?

A. YES, SIR, IT WAS.

Q. WAS THIS POLICY DESIGNED, DEVELOPED OR IMPLEMENTED IN A DISCRIMINATORY FASHION?

A. ABSOLUTELY NOT.

Q. WOULD YOU CHARACTERIZE THE CRITERIA UNDER THE POLICY?

A. WE UTILIZED THE CRITERIA THAT WAS PUT TOGETHER IN THE POLICY SO THAT IT WOULD NOT BE SUBJECTIVE AND WE WOULD HAVE OBJECTIVE TESTING OR ISSUES THAT WE WOULD FOLLOW TO MAKE SURE THAT WOMEN WERE TESTED OR GIVEN URINE DRUG SCREENS PROPERLY.

Q. MR. SANDERS, WERE YOU PRESENT AS A HOSPITAL EMPLOYEE AND

AS ONE OF THE ADMINISTRATORS THERE WHEN WOMEN WERE ARRESTED UNDER THIS POLICY?
A. YES, SIR, I WAS.
Q. WHAT WAS YOUR ROLE AT THAT TIME?
A. AT THAT TIME I WAS THE ADMINISTRATOR IDENTIFIED WITH THE PERINATAL AREAS. AND MY ROLE WAS TO BE PRESENT AT ANYTIME WHEN A WARRANT WAS SERVED TO A PATIENT TO MAKE SURE THAT THE PROCEDURE WAS DONE IN A CORRECT MANNER, THAT THE DIGNITY OF THE PATIENT WAS PRESERVED AS MUCH AS POSSIBLE, AND ALSO TO MAKE SURE THAT THERE WAS NO DISRUPTION ON THE FLOOR.
Q. AND AT ANYTIME WHEN A WOMEN WAS ARRESTED UNDER THIS POLICY, WAS THERE ANY DEVIATION FROM THE METHOD AND MODE BY WHICH THE POLICY WAS TO OPERATE?
A. NO, SIR, THERE WASN'T.
Q. WERE ALL OF THE PATIENTS THAT WERE ARRESTED BLACK?
A. NO, SIR.
Q. WERE YOU PRESENT WHEN A WHITE PATIENT WAS ARRESTED?
A. YES, SIR, I WAS.
Q. WAS SHE TREATED ANY DIFFERENTLY THAN A BLACK PATIENT?
A. NO, SIR.
Q. NOW THE ACTUAL ARRESTING, WAS THAT DONE BY ANY EMPLOYEE OF THE MEDICAL UNIVERSITY?
A. NO, THIS - IT WAS DONE BY THE DEPARTMENT OF POLICE.

Q. AND WERE THE PATIENT'S RIGHTS ENFORCED?
A. YES, SIR, THEY WERE.

[SANDERS 89]

MS. PALTROW: OBJECTION, LEADING.
Q. (BY MR. HOOD, CONTINUING) DID YOU GET INVOLVED IN THE PATIENTS' RIGHTS WITH REGARD TO THEIR ARRESTS?
A. I MADE SURE THAT THEIR RIGHTS WERE PRESERVED.
Q. AND WHAT WAS REQUIRED BEFORE A PATIENT WAS ARRESTED?
A. COULD YOU EXPLAIN YOUR QUESTION?
Q. DID YOU HAVE TO HAVE A MEDICAL ORDER, DISCHARGE ORDER?
A. CERTAINLY. THE PHYSICIAN WOULD WRITE THE DISCHARGE ORDER.
Q. WERE THESE ARRESTS DONE IN A - DESCRIBE HOW THEY WERE DONE.
A. IF THE POLICE DEPARTMENT, USUALLY DETECTIVE WARING, THAT I WAS AWARE OF, WOULD COME TO THE HOSPITAL AND WOULD COME TO EITHER MY OFFICE. OR I WOULD KNOW WHERE DETECTIVE WARING WAS AND WOULD MEET WITH HER AND WITH ONE OF THE CASE MANAGERS. WE WOULD PROCEED TO THE PATIENT'S ROOM. IN SOME CASES DETECTIVE WARING WOULD SERVE THE WARRANT AND IN OTHER CASES OUR SECURITY

OFFICERS WOULD DO THAT, BECAUSE THEY WERE EMPLOYED BY THE STATE AND HAD THAT CAPACITY.

AND THEN THE - AFTER THE WARRANT WAS READ, THE PATIENT WAS - GATHERED HER BELONGINGS, WAS PLACED IN A WHEELCHAIR. SHE DID HAVE - IN MOST CASES WAS HANDCUFFED. WE PUT A SHEET OR A BLANKET OVER HER SO THAT PEOPLE COULD NOT SEE THAT. SHE WAS TAKEN OUT OF THE HOSPITAL THROUGH BACK CORRIDORS OR IN WAYS THAT WE WOULD NOT MAKE A PUBLIC DISPLAY.

[SANDERS 90]

SHE WAS TAKEN OUT ON SABIN STREET TO DETECTIVE WARING'S CAR.

Q. WHAT STREET IS THAT?

A. SABIN STREET.

Q. IS THAT THE MAIN ENTRANCE TO THE HOSPITAL?

A. NO, IT'S NOT. A BACK STREET. YOU CAN ALMOST CALL IT AN ALLEYWAY BETWEEN THE RESEARCH BUILDING AND THE HOSPITAL.

Q. DO PATIENTS NORMALLY GO IN AND OUT OF THAT DOOR?

A. PATIENTS DON'T NORMALLY DO THAT. THE ONLY PATIENTS AT - DURING PART OF THAT TIME THE ENTRANCE TO THE OB/GYN CLINIC WAS LOCATED DOWN THE STREET.

Q. NOW, AT ANYTIME WHILE YOU WERE AT THE MEDICAL UNIVERSITY WAS ANY WOMAN ARRESTED AND NOT ALLOWED TO SEE A RELATIVE?

A. NOT THAT I'M AWARE OF.
Q. NOT ALLOWED TO PUT ON CLOTHING?
A. NOT THAT I'M AWARE OF.
Q. NOT GIVEN A DISCHARGE KIT OR MEDICAL SUPPLIES THAT WOMEN WHO HAVE HAD A BABY WOULD BE GIVEN?
A. NO, THOSE PATIENTS WERE ALWAYS GIVEN THE SAME MATERIALS THAT THE PATIENT WOULD GET WHEN THEY WERE DISCHARGED FROM THE HOSPITAL.
Q. WERE ANY WOMEN HELD, PHYSICALLY CONTAINED UNTIL THE POLICE ARRIVED?
A. ABSOLUTELY NOT.
Q. DID SHIRLEY BROWN PROHIBIT ANY PATIENT FROM SEEING ANY FAMILY MEMBERS, TO YOUR KNOWLEDGE?

[SANDERS 91]

A. NOT THAT I'M AWARE OF.
Q. AND DID YOU ACCOMPANY THE PATIENT AS THE PATIENT LEFT THE HOSPITAL?
A. I STAYED WITH THE PATIENT FROM THE TIME THAT THE WARRANT WAS SERVED UNTIL THE TIME SHE WAS IN THE CAR.
Q. AND WOULD YOU DESCRIBE THE DEMEANOR AND PERFORMANCE OF THE JOB OF ARRESTING BY DETECTIVE WARING?
A. DETECTIVE WARING WAS VERY PROFESSIONAL, VERY CARING TOWARDS THE PATIENTS.
Q. DID SHE GIVE ANY INDICATION OF DISCRIMINATING AGAINST ANY PATIENTS?

A. ABSOLUTELY NOT.
Q. HAVE YOU - DURING THE TIME YOU WERE AT THE MEDICAL UNIVERSITY AND WORKING AND HELPING, AMONG OTHER THINGS WITH THIS POLICY, DID YOU EVER HEAR ANYONE EXPRESS ANY RACIALLY DEROGATORY COMMENTS IN CONNECTION WITH THE POLICY?
A. NO, SIR, I HAVE NOT.
Q. SPECIFICALLY AS TO SHIRLEY BROWN, DID YOU EVER HEAR HER EXPRESS ANY RACIALLY DEROGATORY COMMENTS?
A. NO, SIR, I DID NOT.
Q. WAS THERE EVER ANY INTENTION, AS YOU OBSERVED IT, THROUGH THE IMPLEMENTATION AND DEVELOPMENT AND FOLLOWING OF THIS POLICY, TO DISCRIMINATE AGAINST BLACK WOMEN?
A. ABSOLUTELY NOT. OUR FOCUS WAS ON THE DISPOSITION OF THE BABY WHEN IT WAS BORN.

* * *

[SANDERS 97]

MS. PALTROW: IT'S A STATEMENT THIS WAS ENFORCED TO EVERYBODY EQUALLY. THIS IS AN OPPORTUNITY TO ASK HIM ABOUT THAT.
THE COURT: GO AHEAD.
MS. SHOWERS: YOUR HONOR, IT'S IN RESPONSE TO THE HEALTH AND HUMAN SERVICES INVESTIGATION, THAT'S - IT'S

DIRECTLY RELATED. AND THEY'RE JUST TRYING TO GET IN THE BACK DOOR.

THE COURT: I JUST DON'T UNDERSTAND THE IMPORTANCE OF IT. I HAVE BEEN -

I HAVE BEEN - TELL ME ABOUT IT AGAIN.

MS. SHOWERS: IT'S IN RESPONSE TO THE HEALTH AND HUMAN SERVICES INVESTIGATION. AND THEY'RE TRYING TO GET IN THROUGH THE BACK DOOR SOMETHING THEY CAN'T GET IN THROUGH THE FRONT DOOR.

MS. PALTROW: NO, SIR.

THE COURT: WHAT DOES IT HAVE TO DO WITH THE CASE?

MR. HOOD: NOTHING. THE CASE IS ALREADY BROUGHT.

MS. PALTROW: AS WE ASKED HIM IN HIS DEPOSITION -

THE COURT: LET'S REFER TO WHAT WE ASK HIM HERE IN COURT.

MS. PALTROW: SAYS, PLEASE INCORPORATE AN OPPORTUNITY FOR EACH PRENATAL PATIENT TO VIEW THE VIDEOTAPE. THIS IS THE VIDEOTAPE UNDER THE POLICY. THEY WERE NOT

[SANDERS 98]

ENFORCING THE POLICY AT THESE OTHER CLINICS.

THE COURT: HASN'T SOMEBODY ALREADY TESTIFIED TO

THAT? DIDN'T THE LADY COME IN AND SAY THEY WERE NOT?

MS. PALTROW: NO. DENA CLAIR SAID THEY WERE. THERE HAS BEEN CONFLICTING TESTIMONY, AND HE JUST TESTIFIED THAT IT WAS APPLIED FAIRLY.

THE COURT: GO AHEAD. I'LL PERMIT IT.

MS. PALTROW: YOUR HONOR, I TAKE IT IT'S IN EVIDENCE?

THE COURT: YES, IT'S IN EVIDENCE.

Q. (BY MS. PALTROW, CONTINUING) CAN YOU TELL ME WHAT IT SAYS AT THE TOP.

THE COURT: JUST READ IT. READ IT TO THE JURY. YOU PUT IT IN EVIDENCE, NOW PUBLISH IT. GO AHEAD.

Q. (BY MS. PALTROW, CONTINUING) AT THE TOP THERE IS HANDWRITTEN WORD THAT SAYS, I BELIEVE, LAWSUIT. AND IT'S A MEMORANDUM TO NURSE MIDWIVES AND STAFF AT THE RUTLEDGE AVENUE CLINIC, FROM KATHLEEN M. HIGGENS, DIRECTOR OF NURSING SERVICES, DATED MARCH 23, 1994, REGARDING ABUSE FILM. I HAVE BEEN ASKED TO ASSURE OUR COMPLIANCE WITH THE DIRECTIVES OF MEDICAL UNIVERSITY HOSPITAL IN REGARD TO ORIENTATION OF MATERNAL CLIENTS TO RISK OF DRUG USE DURING PREGNANCY. PLEASE INCORPORATE AN OPPORTUNITY FOR EACH PRENATAL PATIENT TO VIEW

THE VIDEOTAPE SUPPLIED BY JOHN SANDERS AND REQUEST THAT EACH CLIENT READ AND SIGN THE ATTACHED FORM. IF THERE IS ANY

[SANDERS 99]

ANTICIPATED DIFFICULTY COMPLYING WITH THIS DIRECTIVE, PLEASE RESPOND AS SOON AS POSSIBLE.

MR. SANDERS, ISN'T IT CORRECT THAT THIS WAS WRITTEN IN RESPONSE TO SOME REQUEST - SOME INFORMATION THAT YOU SOUGHT; ISN'T THAT TRUE?

A. I FREQUENTLY OR ON A REGULAR BASIS TOUCHED BASE WITH DIFFERENT AREAS WHERE PREGNANT WOMEN WERE SEEN TO MAKE SURE THAT THE POLICY WAS BEING ENFORCED.

Q. DID YOU FINISH YOUR SENTENCE?

A. YES.

Q. I'M SORRY, I COULDN'T HEAR IT.

A. WAS BEING ENFORCED.

Q. AND CAN YOU TELL ME WHAT THE NURSE MIDWIVES AND STAFF AT RUTLEDGE AVENUE CLINIC WHO THEY ARE OR WHAT THAT IS?

A. THE NURSE MIDWIFERY PROGRAM IS DIRECTED BY THE COLLEGE OF NURSING AT THE MEDICAL UNIVERSITY. AND THEY - THEY AT THAT TIME HAD A PRACTICE ON RUTLEDGE AVENUE.

Q. AND THAT'S PART OF THE MEDICAL UNIVERSITY, ISN'T IT?

A. YES, IT IS.

Q. AND WOULDN'T IT BE FAIR TO SAY WHAT THIS LETTER INDICATES

THAT NOT UNTIL 1994 WERE THEY SHOWING THE VIDEOTAPE ASSOCIATED WITH THE INTERAGENCY POLICY?

A. NO, MS. PALTROW, THAT DOESN'T INDICATE THAT AT ALL. JUST ASSURES COMPLIANCE WITH THE POLICY.

Q. MR. SANDERS, DO YOU HAVE ANY OTHER DOCUMENTATION OF

[SANDERS 100]

COMPLIANCE WITH THE POLICY FROM THAT CLINIC PRIOR TO MARCH OF 1994?

A. I DO NOT HAVE IN MY POSSESSION ANY NOTIFICATION OF COMPLIANCE.

Q. MR. SANDERS, YOU WERE ASKED BEFORE ABOUT THE JOINT COMMISSION. CAN YOU TELL ME A LITTLE BIT ABOUT WHAT THEY'RE PROVIDED WITH?

A. WHAT THEY'RE PROVIDED WITH?

Q. YES, WHEN THEY COME TO EVALUATE THE HOSPITAL?

A. IT'S AN ENORMOUS AMOUNT OF INFORMATION. THE JOINT COMMISSION SURVEYS THE HOSPITAL ON A VARIETY OF DIFFERENT ISSUES. WE PROVIDE THEM WITH THE POLICIES AND STANDARDS OF OUR ORGANIZATION, LIKE SAFETY ISSUES, POLICIES AND PROCEDURES FROM DIFFERENT UNITS, NURSING PROTOCOLS, PHYSICIAN DOCUMENTATION, MEDICAL RECORDS, CAN - EVERYTHING THAT IS INVOLVED IN RUNNING A HOSPITAL.

Q. YOU DIDN'T PARTICULARLY SHOW THEM THE MEDICAL RECORDS OF WOMEN WHO WERE IDENTIFIED UNDER THE POLICY AND TURNED OVER TO THE POLICE, DID YOU?
A. I DON'T KNOW WHAT RECORDS WERE PROVIDED TO THE JOINT COMMISSION. THAT'S A RANDOM PULL OF RECORDS THAT IS GIVEN TO THEM.
Q. SO IT'S POSSIBLE, ISN'T IT, THAT THE JOINT COMMISSION WOULD NOT KNOW ABOUT HOW WOMEN WERE TAKEN OUT OF THE HOSPITAL IN HANDCUFFS AND SHACKLES; ISN'T THAT CORRECT?

[SANDERS 101]

A. THE JOINT COMMISSION WOULD HAVE BEEN ABLE TO SEE THE POLICY IN THE ADMINISTRATIVE POLICY BOOK.
Q. THEY WOULD HAVE JUST SEEN THE WRITTEN POLICY BUT THEY WOULDN'T HAVE HAD ANY FURTHER INFORMATION ABOUT HOW IT WAS ACTUALLY IMPLEMENTED, WOULD THEY?
A. NO.
Q. MR. SANDERS, YOU SAID THAT YOU ATTENDED MANY OF THESE ARRESTS TO MAKE SURE THEIR RIGHTS WERE PRESERVED; ISN'T THAT CORRECT?
A. YES, MA'AM, I DID.
Q. IN THAT CAPACITY WERE YOU WORKING AS A HOSPITAL EMPLOYEE, FOR THE SOLICITOR'S OFFICE, OR FOR THE POLICE IN TERMS OF

INSURING RIGHTS?
A. AS A HOSPITAL EMPLOYEE.
Q. AND WHAT RIGHTS DID YOU THINK THEY HAD AT THAT POINT, MR. SANDERS?
A. THE RIGHTS TO BE TREATED FAIRLY AND WITHIN OUR INSTITUTION AND TO MAKE SURE THAT THAT POLICY WAS ENACTED IN THE WAY THAT IT WAS DESIGNED.
Q. AND IN YOUR ESTIMATION, TAKING WOMEN OUT IN HANDCUFFS AND ALSO FEET SHACKLES WAS IN FACT HOW THE POLICY WAS DESIGNED TO TAKE PLACE; ISN'T THAT CORRECT?
A. THE POLICY WAS TO TURN THE INFORMATION OVER WHEN WE SUSPECTED OR HAD EVIDENCE OF COCAINE ABUSE. THE POLICY OF THE POLICE DEPARTMENT, THAT WAS THEIR POLICY TO TAKE CARE OF THE

[SANDERS 102]

PATIENTS TAKING THEM OUT AND HOW THEY WERE HANDCUFFED. THAT WAS NOT UNDER OUR CONTROL.
Q. MR. SANDERS, I'M GOING TO SHOW YOU WHAT IS PLAINTIFFS' EXHIBIT 224, A COPY OF A - A VERSION OF THE HOSPITAL POLICY THAT YOU IDENTIFIED AND AUTHENTICATED IN A DEPOSITION THAT IS NOW IN EVIDENCE. I WOULD LIKE TO ASK YOU TO PUBLISH A PORTION OF THAT, AND THAT WOULD BE THE PARAGRAPH UNDER THE WORDS POLICY?
A. PUBLISH MEAN READ IT?

Q. YES.
A. I'M SORRY.
MR. HOOD: CAN I SEE WHAT HE HAS GOT?
MS. PALTROW: YES, OF COURSE.
MR. HOOD: IS IT IN EVIDENCE?
MS. PALTROW: YES, IT IS.
Q. (BY MS. PALTROW, CONTINUING) IF YOU WOULD READ THAT PARAGRAPH, PLEASE.
A. "THE MUSC MEDICAL CENTER WILL COOPERATE WITH THE CITY OF CHARLESTON POLICE DEPARTMENT AND COURT OF LAW IN REPORTING PREGNANT WOMEN WHO HAVE TESTED POSITIVE FOR ILLEGAL DRUGS. THE FOLLOWING CRITERIA WILL BE USED TO DETERMINE WHO WILL BE SCREENED FOR URINE DRUG TESTING."
Q. SO IN FACT THE CITY OF CHARLESTON POLICE DEPARTMENT COULD MAKE ARRESTS BECAUSE THE MEDICAL UNIVERSITY DECIDED TO COOPERATE WITH THEM IN TERMS OF REPORTING COCAINE POSITIVE

[SANDERS 103]

WOMEN, ISN'T THAT CORRECT?
A. WE REPORTED POSITIVE DRUG TESTS IN REGARD TO THE DISPOSITION OF THE BABY BECAUSE ALL HEALTH CARE PROVIDERS ARE REQUIRED TO PROVIDE INFORMATION TO OUTSIDE AGENCIES IF THEY'RE SUSPICIOUS OF CHILD ABUSE.
Q. YOU DIDN'T ANSWER MY QUESTION. ISN'T IT CORRECT THAT

THEY WERE ABLE TO MAKE THE ARRESTS BECAUSE YOU DECIDED TO COOPERATE FOR WHATEVER REASON?

A. SURE WE COOPERATED, YES, MA'AM.

Q. AND ISN'T IT CORRECT, MR. SANDERS, THAT BEFORE THIS POLICY WAS PUT INTO PLACE, THAT IF THERE WAS A POSITIVE DRUG TEST ON A WOMAN ON A NEWBORN OR ALCOHOL TEST, THE HOSPITAL POLICY WAS ONLY TO REPORT IT TO DSS?

A. THAT'S CORRECT.

Q. SO THIS WAS A CHANGE FROM THAT POLICY THAT EXISTED ALL OF THE WAY UP UNTIL OCTOBER OF 1989; ISN'T THAT CORRECT?

A. YES, IT WAS.

Q. AND THERE WAS NO CHANGE IN THE STATE LAW AS OF OCTOBER 1989 THAT ANYBODY TOLD YOU ABOUT; ISN'T THAT CORRECT?

A. NOT THAT I'M AWARE OF.

Q. SO THIS POLICY CHANGED - THIS POLICY THAT MUSC ADOPTED WITH THE POLICE AND THE SOLICITOR'S OFFICE, CHANGED WHAT HAD BEEN HAPPENING FROM THE NORM BEFORE THE POLICY; ISN'T THAT CORRECT?

A. IT WAS A NEW POLICY, YES, MA'AM.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF SARAH SCHUH

[SCHUH 274]

(TESTIMONY EXCERPT OF SARAH SCHUH, 12-6-96.)
MS. DUNN: CALL SARAH SCHUH.

- - -

SARAH SCHUH, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. DUNN:
WOULD YOU STATE YOUR FULL NAME FOR THE COURT, PLEASE.
A. SARAH ELIZABETH SCHUH.
Q. WHAT DO YOU DO?
A. I'M ON THE PEDIATRIC FACULTY OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA IN CHARLESTON.
Q. HOW LONG HAVE YOU HELD THAT POSITION?
A. I HAVE BEEN ON THE FACULTY SINCE 1969.
Q. IN THE COURSE OF YOUR WORK AT THE MEDICAL UNIVERSITY DID YOU HAVE OCCASION TO PUT TOGETHER AN APPLICATION TO - FOR A GRANT PROPOSAL TO THE MARCH OF DIMES?
A. YES, I DID.
MS. SHOWERS: WE WOULD OBJECT AS TO RELEVANCE. I

THINK THE COURT HAS RULED ON IT.
THE COURT: I DON'T KNOW THAT I CAN RULE ON IT RIGHT NOW. LET ME SEE WHAT HAPPENS.
Q. (BY MS. DUNN, CONTINUING) DID YOU HAVE AN OCCASION TO PUT TOGETHER A GRANT PROPOSAL AS PART OF YOUR WORK AT THE MEDICAL UNIVERSITY?

[SCHUH 275]

A. YES, I DID.
Q. AND WHEN DID YOU PUT THAT PROPOSAL TOGETHER?
A. I BELIEVE IN 1990. '89 AND '90.
Q. AND I HAVE HANDED YOU A DOCUMENT THAT HAS PREVIOUSLY BEEN MARKED FOR IDENTIFICATION, PLAINTIFF'S EXHIBIT NUMBER 5; IS THAT CORRECT?
A. YES.
Q. WITH WHOM DID YOU WORK ON THIS GRANT PROPOSAL?
A. A VARIETY OF PEOPLE WITHIN THE UNIVERSITY. I'M NOT SURE THAT I COULD NAME THEM ALL.
Q. DID YOU WORK WITH SHIRLEY BROWN IN THE PROCESS OF PUTTING TOGETHER THIS PROPOSAL?
A. YES, I DID.
Q. DID YOU WORK WITH DR. WILLIAM PITTARD IN THE PROCESS OF PUTTING TOGETHER THIS PROPOSAL?
A. YES, SIR.
Q. DID YOU WORK WITH DR. EDGAR HORGER IN PUTTING TOGETHER THE PROPOSAL?

A. YES, BUT NOT EXTENSIVELY. HE DID REVIEW ALL OF THE INFORMATION I BELIEVE.
Q. WERE YOU THE PERSON WHO ACTUALLY PUT PEN TO PAPER AND DID MOST OF ACTUAL WRITING?
A. A GOOD BIT, YES.
Q. DID OTHER PEOPLE WHO WORKED WITH YOU IN PUTTING TOGETHER THE GRANT PROPOSAL REVIEW THE INFORMATION BEFORE IT WAS

* * *

[SCHUH 277]

REFLECT THE INFORMATION THAT WAS GATHERED BY YOU AND THE OTHER INDIVIDUALS IN PUTTING TOGETHER THIS GRANT APPLICATION?
A. IT DOES REFLECT SOME OF IT. OBVIOUSLY THERE WAS A GREAT DEAL OF INFORMATION THAT WAS NOT INCLUDED IN THE GRANT APPLICATION.
Q. WHAT SORT OF INFORMATION DID YOU GATHER TO PUT INTO THIS GRANT APPLICATION?
A. WE REVIEWED ARTICLES FROM THE LITERATURE. WE REVIEWED CASE INFORMATION THAT WE HAD FROM THE MEDICAL UNIVERSITY IN TERMS OF WHAT OUR CONCERNS WERE. WE DISCUSSED WITH OTHER MEMBERS OF THE UNIVERSITY WHAT THEIR CONCERNS MIGHT HAVE BEEN. WE TALKED TO PEOPLE WHO MIGHT BE NEEDED IN ORDER TO TRY TO PROVIDE SERVICES UNDER THE POLICY, SUCH AS SUBSTANCE ABUSE

COUNSELORS, THAT TO - TO SEE WHETHER WHAT WAS AVAILABLE LOCALLY OR WITHIN - WITHIN THE UNIVERSITY, CHARLESTON AREA. THE AREA OF PATIENTS THAT WE DREW FROM. PROBABLY SOME OTHER THINGS THAT I DON'T REALLY RECALL. I'M SURE THAT I COULDN'T NAME THEM ALL.

Q. AND THIS GRANT PROPOSAL WAS PUT TOGETHER IN THE SPRING OF 1989?

A. I BELIEVE IT WAS PUT TOGETHER IN THE SPRING GOING ON INTO THE SUMMER OF 1989.

Q. AND WHAT WAS - WHAT WAS - WHAT QUESTION WAS THE GRANT PROPOSAL TRYING TO ADDRESS?

A. WELL, THAT THE CONCERN WAS THAT - WAS THAT WE HAD SEEN

[SCHUH 278]

OR BELIEVED WE HAD SEEN AN INCREASE IN THE PROBLEMS ASSOCIATED WITH THE USE OF COCAINE BY PREGNANT WOMEN AND PROBLEMS THAT RELATED TO DAMAGED PREGNANCIES AND HIGH-RISK NEWBORNS THAT WERE PLACED AT RISK DUE TO EXPOSURE TO SUBSTANCE ABUSE. AND OUR CONCERN WAS TRYING TO DEVELOP A PROGRAM WHICH WOULD ALLOW US TO LIMIT - LIMIT AS MUCH AS POSSIBLE THE RISK BY REDUCING THE USE OF COCAINE BY PREGNANT WOMEN AND PROVIDING SERVICES AND COUNSELING, WHICH WOULD GIVE A BETTER OUTCOME FOR NEWBORNS

AND FOR THE BABIES AFTER THEY WERE BORN.
Q. WAS THIS PRO - WAS THE GRANT PROPOSAL FOR A RESEARCH GRANT?
A. NO, IT WAS NOT. IT WAS FOR A SERVICE GRANT.
Q. WHAT WAS THE SERVICE THAT YOU WERE HOPING TO PROVIDE SPECIFICALLY WITHIN THIS GRANT?
A. WE WERE HOPING TO GET THE PATIENTS, THAT IS THE MOTHERS, INTO - OFF OF COCAINE, INTO COUNSELING TO IMPROVE THEIR PREGNANCY OUTCOME WITH BETTER NUTRITION INFORMATION, BETTER PARENTING INFORMATION, AND JUST BETTER OVERALL CARE AND A BETTER CAPACITY TO COMPLY WITH THE NEED OF A PREGNANT WOMEN BY REDUCING EXPOSURE TO TOXIC SUBSTANCES AND SUBSTANCES THAT CHANGED MOOD AND CAPACITY TO EVALUATE THEIR OWN RISKS.
Q. ONE OF THE THINGS THAT WAS INCLUDED IN THE BUDGET PROPOSAL WERE FUNDS TO PROVIDE FOR TRANSPORTATION FOR WOMEN WHO MIGHT NEED IT FOR
A. THAT'S CORRECT.

[SCHUH 279]

Q. WHY WAS THAT INCLUDED IN THE BUDGET?
A. IN WORKING WITH ANY HIGH-RISK POPULATION, WHETHER IT'S A HIGH-RISK POPULATION OF CHILDREN FOR ANY KIND OF HANDICAP OR

WITH ANY DIFFICULTY IN TERMS OF SOMETIMES FINANCES AND SOMETIMES OTHER ASSOCIATED PROBLEMS, PATIENTS WHO DON'T HAVE CARS, PATIENTS WHO DON'T HAVE MONEY FOR TAXIES, PATIENTS WHO DON'T HAVE SUPPORTIVE FAMILY MEMBERS, ONE OF THE REASONS OFTEN GIVEN FOR MISSING APPOINTMENTS IS THAT THEY DON'T HAVE ADEQUATE TRANSPORTATION. AND WE FELT THAT WE COULD IMPROVE THEIR - THE CHANCES THAT WE WOULD GET PATIENTS INTO THE PROGRAM BY PROVIDING TRANSPORTATION.

Q. BUT ONE OF THE UNDERLYING CONCEPTS BEHIND THE GRANT PROPOSAL WAS THAT YOU ACTUALLY HAD SOME QUESTIONS THAT WERE NOT YET ANSWERED THAT YOU WERE GOING TO TRY TO ANSWER WITH THIS PROGRAM; IS THAT FAIR?

A. I THINK ANYTIME THAT YOU PROVIDE SERVICE TO A POPULATION YOU PROVIDE IT BASED ON THE UNDERSTANDING THAT THERE IS A GOOD CHANCE THAT YOU CAN IMPROVE SOMETHING BY - BY PROVIDING THE SERVICE.

AND, SO, FROM THAT STANDPOINT, I SUPPOSE YOU COULD SAY WE WERE HOPING TO IMPROVE THE OUTCOME. NOW HOW YOU WOULD, I GUESS YOU WOULD HAVE TO ASK SOME QUESTIONS IN ORDER TO KNOW WHETHER YOU IMPROVE THE OUTCOME.

I DON'T KNOW IF THAT ANSWERS YOUR QUESTION, BUT

HOPE IT ANSWERS YOUR QUESTION.

[SCHUH 280]

Q. OKAY. WEREN'T YOU TRYING TO SEE IF YOU COULD MAKE A DIFFERENCE, IF YOU COULD ACTUALLY MAKE IT -

A. WE WERE HOPING THAT PROVIDING SERVICES WOULD IMPROVE THE OUTCOME FOR PATIENTS. THAT IS, THE MOTHERS AS PATIENTS AND CERTAINLY FOR THE BABIES WHO WERE TO BE BORN, YES.

Q. AND IN ADDITION TO THE TRANSPORTATION PROVISION, YOU WOULD HAVE HAD A NUTRITIONIST ACTUALLY BE AVAILABLE TO WORK WITH WOMEN WOULD HAD SUBSTANCE ABUSE PROBLEMS DURING THEIR PREGNANCY?

A. YES.

Q. AND YOU HAD THE SUBSTANCE ABUSE, THE PROPOSAL WOULD HAVE HAD SUBSTANCE ABUSE COUNSELING AVAILABLE AT THE SAME PLACE AT THE SAME TIME THAT THE PRENATAL CARE WAS PROVIDED?

A. YES.

Q. WHY WOULD THAT HAVE BEEN IMPORTANT?

A. WELL, AGAIN, I THINK ANYONE WHO HAS EVER HAD FOUR APPOINTMENTS KNOWS IT'S EASIER TO KEEP ONE APPOINTMENT THAN IT IS TO KEEP FOUR, ESPECIALLY IF THEY'RE IN DIFFERENT PLACES AND DIFFERENT TIMES.

Q. THAT WAS SOMETHING THAT WAS DESIGNED TO IMPROVE MATERNAL AND FETAL HEALTH?
A. YES, IT WAS.
MS. SHOWERS: YOUR HONOR, I'M SORRY TO INTERRUPT. THIS WAS A PROPOSAL THAT WAS NEVER FUNDED. I'M NOT SURE WHAT THE RELEVANCE IS. WE SEEM TO BE GOING THROUGH THE PROPOSAL

* * *

[SCHUH 288]

I DEALT WITH CHILDREN WHO WERE AT VERY HIGH-RISK FOR MANY YEARS BEFORE THE - THE DEFINITION OCCURRED. BUT MY ACTUAL - MY INCREASED RESPONSIBILITY IN THAT AREA WITHIN THE UNIVERSITY BEGAN ABOUT 1979 AND 1980.
Q. AND, DR. SCHUH, WERE YOU INVOLVED IN ANY OF THE EARLY MEETINGS ABOUT THE INTERAGENCY POLICY IN 1989?
A. YES, I WAS.
Q. COULD YOU TELL THE JURY ABOUT YOUR INVOLVEMENT, PLEASE?
A. I THINK THAT I WAS ORIGINALLY CONTACTED ABOUT THE CONCERN FOR BABIES BEING BORN BECAUSE ONE OF THE - ONE OF THE THINGS THAT EVERYONE RECOGNIZED AT THAT TIME WAS PUTTING CHILDREN AT RISK WAS THAT THE CHILD WOULD BE IN THE CARE OF SOMEONE WHO WAS UNDER THE INFLUENCE OF ANY SUBSTANCE WHICH CHANGED MOOD, WHICH WOULD BE ALCOHOL, STREET DRUGS AND SOMETIMES ALSO

MEDICALLY PRESCRIBED DRUGS, PARTICULARLY FOR PATIENTS WHO HAD OTHER MENTAL HEALTH PROBLEMS WHICH MIGHT PUT THE CHILD AT RISK.

AND SINCE I WORKED WITH ABUSED AND NEGLECTED CHILDREN THEY FELT THAT I MIGHT HAVE SOME AWARENESS OF WHAT WENT ON. I THINK AT THE TIME THEY CONTACTED ME THAT THEY HAD NOT RECOGNIZED THAT I HAD DONE ANY WORK WITH ADDICTED PATIENTS IN THE PAST, AND THAT WAS KIND OF A SURPRISE TO THEM. BUT I THINK IT WAS PRIMARILY BECAUSE THEY FELT THAT I WOULD BE FAMILIAR WITH THE NEEDS OF CHILDREN WHERE THEY MIGHT BE AT RISK FOR NEGLECT OR ABUSE.

* * *

[SCHUH 289]

Q. WHAT WAS THE GOAL OF THE INTERAGENCY POLICY AS YOU UNDERSTOOD IT?

A. MY UNDERSTANDING OF THE GOAL OF THE INTERAGENCY POLICY WAS THAT WE WOULD TRY TO INTERVENE DURING THE PREGNANCY AND PRIOR TO THE BIRTH OF THE CHILD IN ORDER TO STOP, IF POSSIBLE, OR LIMIT THE EXPOSURE OF - PRENATALLY TO COCAINE SPECIFICALLY. I THINK WE HAD CONCERNS ABOUT OTHER DRUGS ALSO. IN ORDER THAT WE COULD ASSIST THE MOTHERS, OR

ABOUT-TO-BE MOTHERS, TOO, I WANT TO SAY, GET THEIR LIFE IN ORDER. BUT THAT'S KIND OF WHAT IT IS, TO GET THEMSELVES TOGETHER SO THAT THEY WOULD BE - PUT THE CHILD AT LESS RISK DURING THE PREGNANCY AND BE CAPABLE PARENTS WHEN THE CHILD WAS BORN.

Q. DO YOU RECALL WHY COCAINE WAS TARGETED SPECIFICALLY?

A. COCAINE WAS TARGETED SPECIFICALLY BECAUSE WITH MANY OTHER DRUGS OF ABUSE, AND I'M GOING TO EXCLUDE ALCOHOL AT THIS POINT BECAUSE IT WAS LEGAL AT THAT TIME, BUT I - I GUESS IT'S STILL LEGAL, BUT WITH MANY OTHER DRUGS OF ABUSE -

MS. DUNN: OBJECTION, YOUR HONOR. I'M NOT SURE THIS WITNESS HAS BEEN ESTABLISHED AS BEING COMPETENT IN THIS PARTICULAR AREA.

THE COURT: WHICH AREA?

MS. DUNN: SHE IS TALKING ABOUT THE EFFECTS OF COCAINE, I BELIEVE, PRENATALLY.

THE COURT: THE QUESTION WAS, WHY WAS THE FOCUS OF

[SCHUH 290]

THE POLICY ON COCAINE.

MS. DUNN: I REALIZE SHE WAS GOING INTO AN EXPLANATION.

THE COURT: I THINK SHE IS PERMITTED TO SAY THAT. I

OVERRULE THE OBJECTION.
A. THAT WE WERE SEEING AN INCREASE IN PROBLEMS IN OUR PREGNANCIES WITHIN THE UNIVERSITY THAT RELATED TO THINGS THAT HAD BEEN DESCRIBED AS ATTRIBUTED TO COCAINE IN THE PAST. AND MY UNDERSTANDING FROM MY PRIOR WORK WAS, AND I THINK MOST OF THE CURRENT LITERATURE AT THAT TIME DID NOT INDICATE MARKEDLY INCREASED RISK TO THE FETUS FROM OTHER DRUGS OF ABUSE.
Q. AT THE MEETINGS, WAS THERE ANY DISCUSSION OF THE CHILD ABUSE REPORTING STATUTE?
A. YES, THERE WAS.
Q. AND WHAT WAS YOUR UNDERSTANDING OF THAT?
A. MY UNDERSTANDING WAS THAT THE AREA OF WHAT THEY CALL FETAL ABUSE, THAT IS ABUSE TO AN UNBORN CHILD WAS NOT WELL ESTABLISHED AT THAT TIME.
Q. DID YOU UNDERSTAND FROM THE REPRESENTATIVES OF THE SOLICITOR'S OFFICE AND THE POLICE DEPARTMENT THAT YOU, AS A PEDIATRICIAN, WERE TO REPORT THAT AS SUSPECTED CHILD ABUSE AND NEGLECT?
A. YES. WE WERE GIVEN TO UNDERSTAND THAT THE SOLICITOR'S OFFICE - THE POSITION OF THE SOLICITOR'S OFFICE WAS THAT IT WOULD BE REPORTABLE.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF DAVID SCHWACKE

[SCHWACKE 137]

(TESTIMONY EXCERPT OF DAVID SCHWACKE 12-0-96).
MS. PALTROW: YOUR HONOR, I WOULD CALL DAVID SCHWACKE TO THE STAND, PLEASE.

- - -

DAVID SCHWACKE, PLF. WITNESS, SWORN.
DIRECT EXAMINATION
BY MS. PALTROW:
Q. GOOD MORNING.
A. AFTERNOON.
Q. AFTERNOON. WOULD YOU STATE YOUR NAME, PLEASE, FOR THE JURY.
A. DAVID PRICE SCHWACKE.
Q. AND TELL US WHAT YOUR POSITION IS.
A. I'M SOLICITOR FOR THE NINTH JUDICIAL CIRCUIT, WHICH IS CHARLESTON AND BERKELEY COUNTIES.
Q. AND WHEN DID YOU START IN THAT POSITION?
A AS SOLICITOR I WOULD HAVE BEGUN ON MARCH THE 18TH OF 1992. 1 WAS FILLING A THEN UNEXPIRED TERM FOR SOLICITOR

CONDON AND THEN WAS ELECTED FOR A FULL YEAR TERM IN NOVEMBER OF 1982. REELECTED JUST THIS PAST MONTH.
Q. AND PRIOR TO TAKING THE POSITION OF SOLICITOR, DID YOU WORK IN THE SOLICITOR'S OFFICE?
A. I WORKED IN TWO DIFFERENT OFFICES. MY INITIAL EMPLOYMENT WAS IN THE NINTH CIRCUIT AS ASSISTANT SOLICITOR IN

[SCHWACKE 138]

CHARLESTON. AND AUGUST OF 1983 THROUGH AUGUST OF 1984 1 LEFT CHARLESTON TO GO WORK IN THE SECOND JUDICIAL CIRCUIT, WHICH WAS AIKEN, BAMBERG AND BARNWELL COUNTIES. AND WAS ASSISTANT SOLICITOR FOR BOB HEART AUGUST OF '84 TO '87. AND RETURNED TO THE SOLICITOR'S OFFICE HERE IN CHARLESTON IN 1987.
Q. AND WOULD IT BE CORRECT TO SAY THAT YOU WERE NOT INVOLVED IN THE INITIAL FORMULATION OF THE INTERAGENCY POLICY?
A. THAT WOULD BE CORRECT.
Q. WOULD IT ALSO BE CORRECT TO SAY THAT WHEN YOU BECAME A SOLICITOR, THAT YOU CONTINUED TO IMPLEMENT THE INTERAGENCY POLICY?
A. THE POLICY CONTINUED WHEN I BECAME SOLICITOR.
Q. DID YOU MAKE ANY CHANGES TO THAT POLICY WHEN YOU CAME INTO YOUR NEW POSITION?

A. THERE WERE NO WRITTEN CHANGES MADE TO THE POLICY. THERE WERE SOME DECISIONS AS TO HOW TO PROCEED ON CERTAIN TYPES OF CASES, SO THAT THERE WAS A BIT OF A MODIFICATION.

Q. ISN'T IT CORRECT THAT YOU MODIFIED WHAT HAS BECOME KNOWN AS THE SOLICITOR'S LETTER?

A. ALL LETTERS WERE CHANGED TO REFLECT MY NAME. I DON'T BELIEVE THAT THERE WAS ANY CHANGE IN THE ACTUAL WORDING OF THE LETTER ITSELF, SIMPLY IN THE, I GUESS THE SIGNATURE LINE AND ANY OTHER REFERENCES AS TO THE STATIONERY ITSELF.

Q. SO IN YOUR POSITION AS SOLICITOR, YOU CONTINUED TO AUTHORIZE STAFF AT MUSC TO HAND OUT, ON YOUR BEHALF, A

[SCHWACKE 139]

SOLICITOR'S LETTER CONCERNING THE INTERAGENCY POLICY; IS THAT CORRECT?

A. ABSOLUTELY. ABSOLUTELY.

Q. AND YOU REFERRED TO CHANGES IN CERTAIN TYPES OF CHANGES IN THE POLICY?

A. THE ONLY MAJOR CHANGE DEALT WITH A DECISION DEALING WITH THE DISTRIBUTION OF CONTROLLED SUBSTANCES TO A PERSON UNDER THE AGE OF EIGHTEEN. WE INITIATED A BIT OF A RETREAT BACK TO SIMPLY THE POSSESSION CHARGES RATHER THAN THE DISTRIBUTION

CHARGES.
Q. AND WHY DID YOU MAKE THAT CHANGE?
A. THAT HAD MORE TO DEAL WITH THE UNCERTAIN STATUS OF HOW OUR COURTS WERE GOING TO RULE INITIALLY ON THIS ISSUE ABOUT WHETHER OR NOT A FETUS COULD CONSTITUTE A PERSON FOR THE PURPOSES OF DISTRIBUTION LAWS.
Q. AND IT WAS YOUR POSITION UNDER THE CRIME OF POSSESSION THAT ONE COULD MAKE A CHART SOME- CHARGE SOMEONE WITH A CRIME OF POSSESSION BASED ON A POSITIVE DRUG TEST?
A. YES.
Q. AND ISN'T IT TRUE THAT YOU HAD NO POLICY IN PLACE CONCERNING ANY OTHER PATIENTS AT MUSC WHO TESTED POSITIVE FOR DRUGS TO BE PROSECUTED FOR POSSESSION OTHER THAN THOSE WHO FELL WITHIN THE INTERAGENCY POLICY?
A. A POLICY, NO. BUT IF ANYBODY HAD A - PERSON HAD BEEN CHARGED WITH THAT OFFENSE, FROM ANYWHERE, AND IT WAS SIMPLY

[SCHWACKE 140]

BASED UPON THEIR BEING TESTED POSITIVE, WE WOULD HAVE PROSECUTED THEM.
Q. BUT YOU HAD NO FORMAL ARRANGEMENT WITH ANYBODY, FOR EXAMPLE AT MUSC, TO REPORT FATHERS WHO TESTED POSITIVE FOR AN ILLEGAL SUBSTANCE, DID YOU?

A. THERE WAS - THE ONLY REPORTING REQUIREMENT HERE DEALS WITH THE CHILD ABUSE AND NEGLECT REPORTING REQUIREMENT, THAT WOULD BE THE ONLY ONE IN PLACE.

Q. BUT IS IT CORRECT THAT YOU HAD NO POLICY WITH THE MEDICAL UNIVERSITY, SO THAT IF SOMEBODY IDENTIFIED A FATHER WHO TESTED POSITIVE FOR ILLEGAL SUBSTANCES, THEY WERE TO REPORT THAT TO YOU?

A. THERE WAS NO POLICY.

Q. AND SIMILARLY YOU HAD NO POLICY CONCERNING MEN IN GENERAL WHO TESTED POSITIVE AT THE HOSPITAL FOR THOSE MEN TO BE REPORTED TO THE SOLICITOR'S OFFICE, WHETHER OR NOT THEY HAD CHILDREN AT HOME; ISN'T THAT CORRECT?

A. THE ONLY POLICY IN PLACE IS THIS INTERAGENCY POLICY. NOW, AGAIN, I GET MY CASES BECAUSE OF CRIMINAL CONDUCT BEING REPORTED TO ME. IF SOMEONE HAD CHOSEN TO REPORT THAT TO ME, WE WOULD HAVE PROSECUTED. IF SOMEONE HAD TAKEN OUT AN ARREST WARRANT SIGNED BY A MAGISTRATE, WE WOULD HAVE PROSECUTED.

Q. BUT ISN'T IT CORRECT THAT'S THE ONLY WRITTEN AND FORMAL ARRANGEMENT THAT YOU HAD?

A. I HAVE SO TESTED, YES.

[SCHWACKE 141]

Q. AND ISN'T IT TRUE THAT YOU DID NOT HAVE ANY KIND OF

INTERAGENCY POLICY, MEANING A WRITTEN OR FORMAL POLICY CONCERNING POSITIVE DRUG TESTS ON PREGNANT WOMEN AT ANY OTHER HOSPITAL WITHIN THE JURISDICTION OF THE SOLICITOR'S OFFICE?

A. THERE WAS NO POLICY. THERE WERE ATTEMPTS TO MEET WITH OTHER HOSPITALS AND ESTABLISH A SIMILAR TYPE OF POLICY AND PROGRAM.

Q. BUT THOSE WERE NOT SUCCESSFUL, WERE THEY?

A. WELL, THE ONLY ONE THAT HAPPENED DURING MY TERM AS SOLICITOR WAS AT ROPER. AND WE MET WITH THEM AT THAT - IRENE DIXON AUDITORIUM AT THE END CLOSEST TO THE COUNTY MEMORIAL HOSPITAL WITH A GROUP OF PHYSICIANS THERE AND EXPLAINED TO THEM AGAIN THE REPORTING REQUIREMENT AND THE LAW AND TRIED TO SET UP A POLICY. THAT BEGAN AN INTERNAL DEBATE AMONG THEM AT ROPER. NO POLICY EVER CAME FROM THAT, AS A RESULT OF THOSE MEETINGS. BUT WE CERTAINLY DID INFORM THEM OF THE REQUIREMENTS.

Q. AND YOU HAVE NEVER BROUGHT A PROSECUTION AGAINST ANY OF THOSE PHYSICIANS AT ROPER, FOR EXAMPLE, FOR FAILING TO REPORT UNDER THE CHILD ABUSE REPORTING LAWS, HAVE YOU?

A. THAT'S A SELF-POLICING STATUTE COMPLETELY, BECAUSE YOU

HAVE TO KNOW THAT THE DOCTOR KNEW SOMETHING AND DIDN'T REPORT IT. SO, NO TYPE OF PROSECUTION LIKE THAT HAS TAKEN PLACE,
YOU'RE RIGHT. BUT IF WE KNEW OF IT, CERTAINLY WE WOULD HAVE ACTED.

* * *

[SCHWACKE 157]

A. YES, SIR.
Q. HAVE HOW MANY CHILDREN?
A. TWO CHILDREN.
Q. NOW, WHEN YOU TOOK OVER THIS POLICY AT THE SOLICITOR'S OFFICE, THIS POLICY WAS ALREADY IN PLACE; IS THAT CORRECT?
A. THAT'S CORRECT.
Q. AND EXPLAIN TO THE JURY WHAT THE GOAL OF THIS AMNESTY PROGRAM WAS?
A. THE WHOLE POLICY WAS DESIGNED AND CONTINUED ON AS A CARROT-AND-STICK APPROACH TO TRY TO MAKE CERTAIN THAT INDIVIDUALS, IN THIS CASE PREGNANT FEMALES TESTING POSITIVE FOR COCAINE, HAD THE OPPORTUNITY TO GO INTO A TREATMENT PROGRAM.
THE WHOLE PROCESS WAS DESIGNED ABOUT MAKING SURE THEY UNDERSTOOD THE RAMIFICATIONS OF IT FIRST IN TERMS OF THE HEALTH CONCERNS THAT IT PLACED NOT ONLY TO THEM AND TO THEIR CHILDREN, BUT ALSO THE FACT THAT IT WAS JUST PLAIN FLAT OUT

ILLEGAL AND CRIMINAL CONDUCT. AND THERE WERE ALSO RAMIFICATIONS FOR THAT AS WELL. EACH OF THESE INDIVIDUALS WHO WERE ARRESTED WERE PLACED INTO A DIVERSION PROGRAM, PRETRIAL INTERVENTION WITH THE HOPE OF GETTING THEM TREATMENT. AND ANYBODY WHO COMPLETED THAT PROGRAM THAT GOT THAT TREATMENT WAS NOT PROSECUTED, THE CHARGES WERE DISMISSED AND THEIR RECORD WAS EXPUNGED.

Q. YOU MENTIONED PRETRIAL INTERVENTION PROGRAM. EXPLAIN TO

* * *

[SCHWACKE 159]

Q. AND IF THEY DID WHAT THE POLICY REQUIRED, DID YOUR OFFICE PROSECUTE THEM IF THEY WENT TO SUBSTANCE ABUSE LIKE THEY WERE SUPPOSED TO?

A. IF THEY DID THE PROGRAM REQUIREMENTS, ATTENDING COUNSELING, ATTENDING THE PRISON TOUR, WHATEVER WAS REQUIRED OF THEM, THOSE CHARGES WERE DISMISSED AND THEY WERE ABLE TO EXPUNGE THEIR RECORD.

WE HAD 253 THAT WERE TESTED POSITIVE, 30 WERE ARRESTED AND TWO WERE PROSECUTED. DID THOSE TWO ACTUALLY EVER GET SENTENCED TO JAIL?

MS. PALTROW: OBJECTION, LEADING.

THE COURT: I THINK THE QUESTION, THE LAST THREE OR FOUR WORDS MAY NOT HAVE BEEN LEADING, BUT THE QUESTION IN SUBSTANCE WAS. SO I SUSTAIN THE OBJECTION AND ASK YOU TO REPHRASE IT.

MR. HOOD: YES, SIR. I DIDN'T THINK IT WAS IN DISPUTE.

THE COURT: THAT DOESN'T MAKE ANY DIFFERENCE. A LEADING QUESTION IS A LEADING QUESTION, AND IT'S OBJECTIONABLE.

MR. HOOD: YES, SIR.

Q. (BY MR. HOOD, CONTINUING) THE TWO WOMEN THAT CAME UNDER THE POLICY, WERE THEY EVER ACTUALLY PUT IN PRISON AND SENTENCED?

A. THEY WERE NOT SENTENCED TO ACTIVE JAIL TIME, THEY WERE

[SCHWACKE 160]

PLACED ON PROBATION. CONTINUED DRUG TREATMENT WAS A SPECIAL CONDITION OF THEIR PROBATION.

Q AND THE THIRTY WOMEN THAT WERE ARRESTED, DID ANY OF THEM EVER GET PLACED IN JAIL OTHER THAN THE INITIAL ARREST, WHERE THEY SENTENCED AND CONVICTED AND PUT IN JAIL FOR VIOLATING THE LAW?

A. NO, THEY WERE NOT. NOT - NOT RELATED TO THESE OFFENSES.

Q. MR. SCHWACKE, I WANT TO MAKE SURE THAT THE JURY UNDERSTANDS WHAT THE LAW WE'RE TALKING ABOUT.

MR. HOOD: I HAVE DONE A BLOWUP, YOUR HONOR, THAT I WOULD LIKE TO AT THIS TIME ASK HIM ABOUT. IT'S - I'M SORRY GIVE YOU AN IDEA. PERSONS TO REPORT, IMMUNITY FROM LIABILITY, ABROGATION OF PRIVILEGED COMMUNICATION AND PENALTIES. THIS IS THE REPORTING STATUTES.

MS. PALTROW: I OBJECT. I THINK THAT'S A PROPER INSTRUCTION AT THE END OF THIS TRIAL. THIS IS NOT AN APPROPRIATE - HE WOULD BE SPEAKING ABOUT WHAT THE LAW IS, WHICH IS THE PURVIEW OF THIS COURT, NOT THIS WITNESS.

THE COURT: WHAT DO YOU ANTICIPATE ASKING HIM ABOUT IT?

MR. HOOD: THIS IS THE LAW OF SOUTH CAROLINA AND UNDER THE REQUIREMENTS.

THE COURT: HE IS A LAWYER AND HE KNOWS THE LAW?

MR. HOOD. YES, SIR.

THE COURT: YOU HAVE ASKED SOME WITNESSES WHO MAY

* * *

[SCHWACKE 163]

Q. (BY MR. HOOD, CONTINUING) YOU MENTIONED TO COUNSEL THAT

YOU CAN ONLY DO SOMETHING AS OUR CHIEF PROSECUTOR IF A CRIME IS REPORTED TO YOU. IF YOU GO TO THE OTHER HOSPITALS IN THE CHARLESTON COMMUNITY AND DISCUSS THIS POLICY AND AMNESTY PROGRAM AND THE NEED TO REPORT TO CHILD ABUSE -

MS. PALTROW: OBJECTION, LEADING.

THE COURT: I THINK IT'S LEADING. I SUSTAIN THE OBJECTION.

Q (BY MR. HOOD, CONTINUING) DID YOU GO TO THE OTHER H08PITALS IN THIS COMMUNITY IN CONNECTION WITH THIS INTERAGENCY POLICY?

A. SPECIFICALLY ROPER HOSPITAL DURING THE TIME I WAS SOLICITOR.

Q. OKAY. AND WHAT WAS THE PURPOSE OF YOUR GOING TO ROPER?

A. THE PURPOSE WAS TO ADDRESS WITH THE DOCTORS THERE THE NEED TO REPORT CASES OF SUSPECTED CHILD ABUSE AND NEGLECT, TO MAKE THEM AWARE OF THE POLICY AS IT EXISTED AT THE MEDICAL UNIVERSITY. THE PHILOSOPHIES BEHIND THE POLICY. AND TO ENGAGE THEM HOPEFULLY TO BEGIN REPORTING CASES THAT SHOULD HAPPEN THERE OF A SIMILAR TYPE OF CONDUCT.

Q. AND AS SOLICITOR, DID YOU BECOME AWARE OF REPORTING TO YOUR OFFICE OR TO THE CHARLESTON COUNTY SUBSTANCE ABUSE

COMMISSION THE USE OF COCAINE BY PREGNANT WOMEN FROM PRIVATE PHYSICIANS AND/OR OTHER HOSPITALS?
A. WE HAD THE ONE INSTANCE SPECIFICALLY THAT WAS REPORTED TO

[SCHWACKE 164]

US BY EAST COPPER, WHATEVER THEY WERE CALLED THERE, AMI OR WHATEVER THE NAME OF THE HOSPITAL WAS. AND I BELIEVE THAT THERE WAS - IT'S MY RECOLLECTION THERE WERE PRIVATE PHYSICIANS THAT ALSO MADE REPORTS THAT WERE NOT IN A HOSPITAL SETTING.
Q. OKAY. WAS THIS POLICY INTENTIONALLY IMPLEMENTED AND USED IN A WAY TO DISCRIMINATE?
A. AGAINST WHO?
Q ANYONE.
A. I MEAN, THE BOTTOM LINE OF THE POLICY IS, IT EXISTED TO HELP TWO PEOPLE, MOTHER, CHILD. I MEAN, WHOSE BEING DISCRIMINATED AGAINST? IF YOU DO NOTHING TO HELP THE CHILD YOU'RE DISCRIMINATING AGAINST THE CHILD. AND IF YOU DISCRIMINATE AGAINST THE MOTHER, BY DOING A PROGRAM DESIGNED TO HELP THEM HELP THEMSELVES, AND IN THE PROCESS HELP THE CHILD, THE POLICY WAS NOT DESIGNED TO DISCRIMINATE.
Q. WHAT ABOUT RACE?
A. NOT DESIGNED TO DISCRIMINATE AGAINST RACE. AGAIN, EITHER

YOU'RE IGNORING THE FACT THAT YOU'RE HELPING BOTH THE BLACK MOTHER AND BLACK CHILD OR WHITE MOTHER AND WHITE CHILD, IT MADE NO DIFFERENCE TO US WHO THAT PERSON WAS.

Q. THESE WOMEN REPORTED FROM THE OTHER HOSPITALS, DO YOU KNOW IF THE MOTHERS WERE WHITE?

A. SPECIFICALLY I DON'T KNOW.

Q. NOW, WITH REGARD TO YOUR OFFICE - OFFICE OF SOLICITOR,

* * *

(12)

No. 99-936

Supreme Court, U.S.
FILED
JUN 1 - 2000
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX
VOLUME III OF III, (Pages 1131 to 1420)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF LAVERNE SINGLETON

[LAVERNE SINGLETON 51]

Q. OF SOUTH CAROLINA?
A. YES, SIR.
Q. AND WITH FIVE CHILDREN, THIS MIGHT BE DIFFICULT, BUT DO YOU REMEMBER HIS DATE OF BIRTH?
A. HE WAS BORN NOVEMBER THE 9TH, 1989.
Q. PRIOR TO NOVEMBER 9, PRIOR TO THE BIRTH OF ARNEL, HAD YOU HAD ANY PRENATAL CARE?
A. YES, SIR.
Q. WHERE WAS THAT PRENATAL CARE?
A. MEDICAL UNIVERSITY.
Q. AND DURING - WELL, LET ME WITHDRAW THAT, PLEASE.
DESCRIBE JUST GENERALLY, MS. SINGLETON, THAT PRENATAL CARE. HOW MANY TIMES DID YOU GO TO THE MEDICAL UNIVERSITY FOR PRENATAL CARE?
A. WHEN I FIRST BEGIN I STARTED ONCE A MONTH. AND THEN AFTER THAT EVERY WEEK ONCE A WEEK.
Q. OKAY.
MR. WHERRY: YOUR HONOR, COULD I APPROACH THE WITNESS TO POUR SOME WATER FOR HER?
THE COURT: SURE.
THE WITNESS: THANK YOU.

Q. (BY MR. WHERRY, CONTINUING) DURING ANY OF THOSE VISITS - WELL, LET ME WITHDRAW THAT.

DESCRIBE JUST GENERALLY WHAT THEY WOULD DO FOR YOU OR TO YOU DURING THOSE PRENATAL VISITS, JUST GENERALLY?

[LAVERNE SINGLETON 52]

A. WELL THEY TAKE YOUR WEIGHT. THEY TAKE YOUR BLOOD PRESSURE. AND THEN SOMETIME THEY WOULD DRAW BLOOD AND GET A URINE SPECIMEN.

Q. EACH TIME YOU GO?

A. NORMALLY.

Q. OKAY. YOU SAID THAT YOUR BABY WAS BORN NOVEMBER 9TH?

A. YES, SIR.

Q. ANY OF THE TIMES THAT YOU WENT TO THE MEDICAL UNIVERSITY PRIOR TO NOVEMBER 9TH, DID ANYONE SPEAK TO YOU ABOUT THE USE OF COCAINE OR OTHER DRUGS?

A. NO, SIR.

Q. DID YOU RECEIVE ANY SUBSTANCE ABUSE COUNSELING?

A. NO, SIR.

Q. DID ANYONE EVER MENTION TO YOU THAT YOU TESTED POSITIVE FOR COCAINE?

A. WOULD THAT BE DURING THE -

Q. PRIOR TO NOVEMBER 9TH?

A. NO, SIR.

Q. BEFORE YOUR BABY WAS BORN?

A. NO, SIR.

Q. DID ANYONE SHOW YOU A VIDEO ABOUT THE HARMFUL EFFECTS OF COCAINE AND ALCOHOL ON PREGNANT WOMEN?
A. NO, SIR. I CAN'T REMEMBER.
Q. OKAY. DID ANYONE GIVE YOU A LIST OF PLACES THAT WERE AVAILABLE FOR YOU TO GO FOR SUBSTANCE ABUSE COUNSELING?

[LAVERNE SINGLETON 53]

A. NO, SIR.
Q. ON NOVEMBER 9TH, DID YOU DELIVER YOUR BABY AT THE HOSPITAL?
A. NO, SIR.
Q. WHERE DID YOU DELIVER THE BABY?
A. PRIOR TO GETTING TO THE HOSPITAL, IN THE AMBULANCE. IT WAS ALREADY HERE.
Q. SO I TAKE IT THAT YOU EXPERIENCED LABOR, YOU OR SOMEBODY ON YOUR BEHALF CALLED THE AMBULANCE?
A. YES, SIR.
Q. AND I'M SORRY, YOU HAVE TOLD US, BUT WHERE DID YOU LIVE THEN? NO, YOU HAVEN'T TOLD US. WHERE DID YOU LIVE THEN?
A. HOLLYWOOD, SOUTH CAROLINA.
Q. WHERE IS THAT?
A. HOLLYWOOD.
Q. HOW FAR IS THAT FROM CHARLESTON?
A. ABOUT 12 MILES FROM HERE.
Q. IN THE 12-MILE RIDE BY AMBULANCE, WAS THE BABY BORN?
A. YES, SIR.

Q. AND DID THE AMBULANCE CONTINUE ON NEVERTHELESS?
A. YES, SIR.
Q. TO THE MEDICAL UNIVERSITY?
A. YES, SIR.
Q. YOU AND THE BABY WERE TAKEN IN THE HOSPITAL?
A. YES, SIR.

* * *

[LAVERNE SINGLETON 60]

THE COURT: OKAY. PROCEED.
Q. (BY MR. WHERRY, CONTINUING) MS. SINGLETON, WHEN WE BROKE FOR LUNCH - WHEN WE BROKE FOR LUNCH, I THINK YOU HAD JUST DESCRIBED HAVING GIVEN BIRTH TO YOUR BABY IN THE AMBULANCE AND THEN COMING INTO THE HOSPITAL FOR MEDICAL TREATMENT; IS THAT RIGHT?
A. YES, SIR.
Q. THE NEXT MORNING YOU SAID YOU LEFT THE HOSPITAL, CORRECT?
A. YES, SIR.
Q. THE NEXT MORNING, LET ME DIRECT YOUR ATTENTION TO THAT MORNING. DID YOU HAVE OCCASION TO MEET NURSE SHIRLEY BROWN?
A. YES, SIR.
Q. AND WOULD YOU DESCRIBE FOR THE JURY, PLEASE, THAT MEETING, WHAT SHE SAID TO YOU AND WHAT YOU SAID TO HER.
A. SHE CAME INTO THE ROOM AND THERE WAS ANOTHER PATIENT IN THE ROOM AND SHE CLOSED -
Q. GO AHEAD.

A. SHE CAME INTO THE ROOM. AND THERE WAS ANOTHER PATIENT IN THE ROOM. AND SHE CLOSED THE CURTAIN SO THAT PERSON WON'T HEAR. AND SHE SAID YOU WERE TESTED POSITIVE FOR COCAINE. AND I SAID WHAT. AND SHE SAY YES. AND SHE SAID SHE JUST LOOKED AT ME IN A GAZE AND SHE SAID I'LL BE RIGHT BACK. AND SO SHE LEFT THE ROOM. AND SHE CAME BACK AND SHE SAID YOU ARE BEING ARRESTED FOR HAVING COCAINE IN YOUR URINE WHILE DELIVERING. AND I SAID - I STARTED TO CRY. AND -

[LAVERNE SINGLETON 61]

Q. LET ME STOP YOU THERE. HAD YOU USED COCAINE DURING YOUR PREGNANCY?

A. YES, SIR.

Q. YOU SAID THAT YOU STARTED TO CRY. WITHDRAW THAT.

IN YOUR PRENATAL CARE AT MUSC, HAD ANYONE ADVISED YOU THAT THE USE OF COCAINE WAS HARMFUL TO YOUR BABY?

A. NO, SIR.

Q. ALL RIGHT. YOU SAID THAT YOU STARTED TO CRY WHEN YOU WERE TOLD THAT YOU WERE GOING TO BE ARRESTED. WHAT HAPPENED NEXT?

A. I TOLD HER TO - WOULD SHE PLEASE WAIT UNTIL I GET MY -- CLOTHES. AND SHE SAID I DON'T KNOW ABOUT THAT. AND THEN

Q. HOW WERE YOU DRESSED WHEN SHE TOLD YOU?
A. IN THE HOSPITAL GOWN.
Q. WHICH YOU DESCRIBED EARLIER THIS MORNING?
A. YES, SIR.
Q. GO AHEAD, PLEASE.
A. AND A DETECTIVE LADY CAME IN, A WOMAN. SHE WAS PREGNANT. AND COPS CAME IN ALONG WITH HER.
Q. HOW MANY?
A. ONE. AND A DETECTIVE, A WOMAN.
Q. THE DETECTIVE, MALE OR FEMALE?
A. A MALE. I'M SORRY. FEMALE.
Q. DO YOU KNOW HER NAME?
A. NO, SIR.

[LAVERNE SINGLETON 62]

Q. OKAY. WHAT HAPPENED WHEN THE DETECTIVE AND THE UNIFORMED OFFICER CAME INTO THE ROOM?
A. THEY BROUGHT A WHEELCHAIR AND SAT ME IN THE WHEELCHAIR. AND TOOK ME TO A ROOM OFF THE HOSPITAL AND READ MY RIGHTS. AND --
Q. WERE YOU HANDCUFFED AT THAT TIME OR NOT?
A. YES, SIR.
Q. WERE YOU HANDCUFFED IN FRONT OF YOU OR BEHIND YOUR BACK?
A. IN THE FRONT.
Q. OKAY. DID YOU HAVE SHACKLES ON OR NOT? LEG IRONS?
A. I HAD CUFFS ON MY LEGS.
Q. OKAY. AND YOU HAD - I'M SORRY, YOU WERE IN A

WHEELCHAIR, TAKEN OFF TO ANOTHER ROOM?
A. YES, SIR.
Q. WHO READ YOU YOUR RIGHTS?
A. THE DETECTIVE.
Q. OKAY. AND THEN WHAT HAPPENED?
A. THEY - SHE GOT A SHEET AND PUT OVER MY HAND AND MY FEET. SHE AND - MS. SHIRLEY BROWN AND THE DETECTIVE LADY AND THE COPS TOOK ME DOWN THE HALL TO THE BACK OF THE HOSPITAL.
Q. DID NURSE SHIRLEY BROWN GO WITH YOU WITH THE DETECTIVE AND THE OTHER OFFICER?
A. YES, SIR.
Q. THEY TOOK YOU DOWN THE HALL. HOW DID YOU FEEL BEING WHEELED DOWN THE HALL, HAVING JUST GIVEN BIRTH, WITH

[LAVERNE SINGLETON 63]

HANDCUFFS, SHACKLES AND THE SHEET OVER YOU?
A. EMBARRASSED.
Q. WHEN YOU GOT DOWN THE HALL, DID YOU GET TO AN IN-AND-OUT SIDE DOOR?
A. YES.
Q. WERE YOU TAKEN OUTSIDE?
A. YES, SIR.
Q. WHAT HAPPENED WHEN YOU GOT OUTSIDE?
A. DETECTIVE CAR WAS ALREADY PARKED IN THE BACK. AND THEY GOT ME OUT OF THE CAR AND PUT ME - PUT MY HEAD DOWN, FRONT SEAT OR THE BACK SEAT.

Q. DID YOU HAVE HELP GETTING OUT OF THE WHEELCHAIR OR NOT?
A. YES, SIR.
Q. DID THE HANDCUFFS AND SHACKLES REMAIN ON?
A. YES, SIR.
Q. DID THE SHEET REMAIN OVER YOU OR WAS THAT TAKEN OFF?
A. THAT TAKEN.
Q. NOW WHEN YOU WERE PUT IN THE CAR, DID YOU HAVE HELP GETTING INTO THE CAR?
A. YES, SIR.
Q. WHAT KIND OF HELP? WHAT WAS DONE TO YOUR BODY TO GET YOU INTO THE CAR?
A. ONE, A DETECTIVE GUY, UNIFORMED OFFICER, GRAB THIS ARM AND THE LADY, THE DETECTIVE GRABBED THIS ARM AND THEN HELPED ME TO THE CAR.

[LAVERNE SINGLETON 64]

Q. DID YOU HAVE TO BEND DOWN TO GET INTO THE CAR?
A. YES, SIR.
Q. WAS THE BACK OF YOUR HOSPITAL GOWN OPEN?
A. YES, SIR.
Q. WERE YOU GIVEN ANY ADDITIONAL COVERING?
A. NO, SIR.
Q. ON YOUR DRIVE FROM THE HOSPITAL TO THE JAIL?
A. NO, SIR.
Q. DID YOU, MS. SINGLETON, GO DIRECTLY TO THE JAIL?
A. NO, SIR.

Q. WHERE DID YOU GO ON YOUR WAY TO THE JAIL?
A. THEY TOOK ME TO THE - THE HOLDING CELL ON IN THE CITY.
Q. DID YOU GO DIRECTLY THERE?
A. YES, SIR.
Q. WHEN YOU GOT TO THE HOLDING CELL, IS THAT LEEDS AVENUE?
A. NO, SIR.
Q. OKAY. WHEN YOU GOT TO THE HOLDING CELL WERE YOU TAKEN INSIDE?
A. YES, SIR.
Q. DID YOU HAVE HELP GETTING OUT OF THE CAR?
A. YES, SIR.
Q. SAME PEOPLE?
A. YES, SIR.
Q. WHEN YOU WENT INTO THE HOLDING CELL WERE YOU COVERED WITH ANYTHING OTHER THAN THE HOSPITAL GOWN?

[LAVERNE SINGLETON 65]

A. NO, SIR.
Q. AND WHEN YOU WENT INTO THAT JAIL SECTION, THAT BUILDING, WERE YOU COVERED WITH ANYTHING OTHER THAN THE HOSPITAL GOWN?
A. NO, SIR.
Q. WAS IT STILL OPEN IN THE BACK?
A. YES, SIR.
Q. WERE YOU PROCESSED IN BY A POLICE OFFICER?
A. YES, SIR.
Q. WHAT DOES THAT PROCESS CONSIST OF? WHAT COULD THEY DO?

A. THEY TOOK MUGSHOTS, THEY FINGERPRINT ME AND THEN TOOK ME BACK.
Q. DID THEY ASK YOU QUESTIONS, YOUR NAME AND WHERE YOU LIVED?
A. OH, YES.
Q. WHO DID THAT, MALE OR FEMALE OFFICERS?
A. MALES.
Q. STILL IN THE HOSPITAL GOWN?
A. YES, SIR.
Q. WHAT WAS YOUR PHYSICAL CONDITION AT THAT TIME, MS. SINGLETON? WHAT WAS YOUR PHYSICAL CONDITION?
A. I WAS STILL BLEEDING AND I ONLY HAD WHAT THEY --
Q. I'M GOING TO GET TO THAT. WHEN YOU LEFT THE HOSPITAL, WERE YOU GIVEN ANY MEDICAL SUPPLIES THAT WOULD INCLUDE, FOR INSTANCE, SANITARY NAPKINS?
A. NO, SIR.

[LAVERNE SINGLETON 66]

Q. WERE YOU GIVEN ANY CLOTHING?
A. NO, SIR.
Q. WERE YOU GIVEN YOUR OWN CLOTHING BACK?
A. NO, SIR.
Q. AFTER YOU WERE PROCESSED THROUGH THIS HOLDING AREA, WERE YOU PUT IN A CELL?
A. YES, SIR.
Q. HOW MANY PEOPLE WERE IN THE CELL WITH YOU?
A. NO ONE.

Q. DESCRIBE THE CELL.
A. IT WAS COLD. IT WAS - I DON'T HAVE NO SHOES ON. THE SHOES I HAD WAS PAPER SHOES.
Q. PAPER SHOES?
A. YES, SIR.
Q. WHERE DID YOU GET THE PAPER SHOES?
A. FROM THE HOSPITAL.
Q. CONTINUE.
A. THE COMMODE HAD OTHER PEOPLE WASTE ON IT. BLOOD. AND I WANTTO URINATE SO I HAD TO STOOD UP. I HAD TO GET UP AND YOU KNOW I DIDN'T HAVE ANY BOTTOM HIT THE STOOL.
Q. WHY?
A. BECAUSE IT HAD BLOOD ON IT FROM SOMEONE ELSE.
Q. CONTINUE.
A. AND THEY HAD - IT WAS A COT, BUT - THE COT HAD A MAT. COLD. IT WAS COLD. AND SO I SAT THERE UNTIL ABOUT SEVEN

[LAVERNE SINGLETON 67]

HOURS AND THEN THEY TOOK ME FROM THERE.
Q. LET ME STOP YOU THERE. DID YOU HAVE ANY BLANKETS?
A. NO, SIR.
Q. DID YOU HAVE A PILLOW?
A. NO, SIR.
Q. DID YOU HAVE CLOTHING OTHER THAN THE HOSPITAL GOWN?
A. NO, SIR.
Q. TELEVISION?
A. NO, SIR.

Q. BOOKS?
A. NO, SIR.
Q. VISITORS?
A. NO, SIR.
MR. HOOD: THE COUNTY IS NOT A DEFENDANT IN-THIS. ALL OF THIS IS OCCURRING IN THE COUNTY JAIL. LIKE THE LAST PLAINTIFF, I THINK WE OUGHT TO MOVE ON TO SOMETHING RELEVANT. THIS IS THE COUNTY JAIL, NOT THE CITY.
MR. WHERRY: IF THE COURT WOULD LIKE - MAY I BE HEARD.
THE COURT: I'M NOT SURE THAT THE METHOD OF QUESTIONING IS NOT OBJECTIONABLE BECAUSE IT'S LEADING.
MR. HOOD: IT IS LEADING.
THE COURT: AND TO SOME EXTENT IT'S ARGUMENTATIVE, BUT AS FAR AS THE CONDITIONS THAT SHE ENCOUNTERED IN THE JAIL, I'M GOING TO LET HIM GO INTO THAT.

[LAVERNE SINGLETON 68]

MR. WHERRY: THANK YOU, SIR.
Q. (BY MR. WHERRY, CONTINUING) HOW LONG WERE YOU IN THAT JAIL CELL?
A. ABOUT SEVEN TO EIGHT HOURS.
Q. DID THERE COME A POINT IN TIME AT WHICH YOU WERE TAKEN OUT OF THAT JAIL CELL?
A. YES.
Q. WHERE WERE YOU TAKEN?
A. LEEDS AVENUE.
Q. HOW DID YOU GET THERE?

A. THE POLICE CAR.
Q. WHO TOOK YOU?
A. SOME MALE POLICEMANS.
Q. HOW WERE YOU DRESSED WHEN THE MALE POLICEMAN TOOK YOU?
A. IN THE HOSPITAL GOWN.
Q. DESCRIBE THE CONDITION OF THE BACK OF THAT HOSPITAL GOWN WHEN THE MALE POLICEMAN TOOK YOU?
A. IT WAS UP TIGHT LIKE UP HERE AND TIED RIGHT HERE, BUT IT STILL HAD OPENINGS.
Q. WHAT WAS YOUR PHYSICAL CONDITION AT THE TIME WHEN THEY TOOK YOU AFTER THE SEVEN HOURS?
A. I WAS STILL - MY BOTTOM WAS STILL OPEN FROM HAVING THE BABY. I HAD NO UNDERWEAR ON BESIDES THE SANITARY NAPKIN THAT SHE GAVE ME. WHEN I GOT THERE THE GOWN HAD BLOOD ALL OVER IT
Q. WHAT GOWN HAD BLOOD ALL OVER IT?

[LAVERNE SINGLETON 69]

A. THE HOSPITAL GOWN.
Q. WHEN YOU GOT WHERE IT HAD BLOOD ALL OVER IT?
A. LEEDS AVENUE.
Q. DESCRIBE WHAT HAPPENED WHEN YOU GOT TO LEEDS AVENUE?
A. WHEN I GOT THERE, MY HAND WAS STILL CUFFED AND I WAS TRYING TO TELL THE COPS TO GIVE ME SOMETHING TO COVER UP WITH, BEHIND ME IS DIRTY. AND THEY SAID STAND AGAINST THE WALL TILL WE CAN GET SOMETHING TO COVER YOUR BACK.

Q. WOULD YOU REPEAT THAT PLEASE, I COULDN'T HEAR YOU BACK HERE.
A. WHEN I GOT THERE, MY HAND WAS STILL - MY ARM WAS STILL- CUFFED AND MY LEG. AND I TOLD THEM THAT GIVE ME SOMETHING TO COVER MY BACK WITH BECAUSE MY GOWN WAS DIRTY.
Q. WERE YOU GIVEN SOMETHING TO COVER YOUR BACK WITH BECAUSE YOUR GOWN WAS DIRTY?
A. NOT RIGHT AWAY. HE TOLD ME TO STAND AGAINST THE WALL. MY BACK TO THE WALL.
Q. WERE YOU PROCESSED INTO THAT JAIL?
A. YES, SIR.
Q. WHAT WAS THE GENDER OR SEX OF THE PEOPLE WHO PROCESSED. YOU INTO THAT JAIL?
A. MALES.
Q. AFTER YOU WERE PROCESSED IN, WHERE DID YOU GO?
A. THEY TOOK ME TO THE BIG CELL.
Q. HOW MANY PEOPLE WERE IN THE BIG CELL WITH YOU, IF ANYONE

[LAVERNE SINGLETON 70]

ELSE, I'M SORRY?
A. WHOLE BUNCH OF OTHER LADIES.
Q. HOW LONG WERE YOU IN THAT CELL?
A. FOR TWO DAYS.
Q. DESCRIBE THAT CELL AND THE FURNISHING OR LACK OF FURNISHINGS THAT WERE IN THERE?
A. IT WAS COLD. IT WAS COLD. THE LADIES, THEY WAS MAKING A

JOKE AT ME. FUN AT ME. THEY MADE SLY REMARKS AT ME. I WAS EMBARRASSED AND I HAD NO CHOICE BUT TO TAKE IT.

Q. WERE YOU GIVEN CLOTHING WHILE YOU WERE IN THERE?

A. PRIOR TO THE SECOND DAY ONE OF THE MAITRE D' CAME - WELL THAT NIGHT WHEN THE MAITRE D' CAME SHE GAVE ME A SANITARY NAPKIN AND SHE SAID YOUR SISTER JUST BROUGHT YOUR CLOTHES AND HERE IT IS.

Q. I THINK YOU HAVE ANSWERED THIS, BUT HOW LONG WERE YOU IN THAT BIG CELL?

A. FOR ABOUT TWO DAYS.

Q. THEN WHERE DID YOU GO AFTER - IF YOU WENT ANYPLACE?

A. AFTER - SAY IT AGAIN, I DIDN'T HEAR.

Q. AFTER THOSE TWO DAYS, WHERE DID YOU GO?

A. MY SISTERS CAME AND THEY GOT ME OUT.

Q. AT ANYTIME WHEN YOU WERE AT MUSC OR THE JAIL, DID ANYONE ADVISE YOU OF ANYPLACE WHERE YOU CAN GET SUBSTANCE ABUSE TREATMENT OR COUNSELING?

A. NO, SIR.

[LAVERNE SINGLETON 71]

Q. WHEN YOU WENT TO MUSC, WERE YOU TOLD THAT THE RESULTS OF THE MEDICAL TESTS THEY WERE CONDUCTING WOULD BE TURNED OVER TO THE SOLICITOR'S OFFICE OR TO THE POLICE?

A. NO, SIR.

Q. DID YOU GIVE YOUR CONSENT TO TURN OVER YOUR MEDICAL INFORMATION TO THE SOLICITOR'S OFFICE OR THE POLICE?
A. NO, SIR.
Q. DID YOU GIVE YOUR CONSENT TO TURN YOUR MEDICAL INFORMATION OVER TO ANYONE?
A. NO, SIR.
Q. DID ANYONE INQUIRE OF YOU AS TO DRUG OR OTHER SUBSTANCE ABUSE BY THE FATHER OF THE CHILD?
A. NO, SIR.
Q. I MEAN NO DISRESPECT TO YOU, BUT NO OTHER WAY TO ANSWER THE QUESTION: DO YOU KNOW WHO THE FATHER OF THE CHILD WAS?
A. YES, SIR.
Q. WHEN YOU CALLED THE AMBULANCE TO GO TO MUSC, WHY DID YOU DO THAT?
A. BECAUSE AT THAT TIME THE OTHER HOSPITALS WOULD NOT TAKE MEDICAID CARD, THEY WILL ONLY TAKE RED CROSS AND OTHER CARD, EXCEPT FOR WHILE ON MEDICAID.
Q. WHEN YOU WERE RELEASED AND YOU WENT HOME, DID YOUR BABY GO HOME WITH YOU?
A. NO, SIR.
Q. WHAT HAPPENED TO YOUR BABY?

[LAVERNE SINGLETON 73]

A. YES, SIR.
Q. AT THIS POINT IN TIME IN YOUR LIFE, NOW, TODAY, AS WE'RE IN THIS COURTROOM, DESCRIBE TO THE JURY, PLEASE, WHAT EFFECT

THIS EXPERIENCE WITH THE MEDICAL UNIVERSITY AND THE POLICE HAS HAD ON YOUR LIFE?

A. I DON'T TRUST THE SYSTEM ANY MORE.

Q. PARDON ME?

A. I DON'T TRUST THE SYSTEM ANYMORE.

Q. WHY?

A. YOU DON'T HAVE ANY PRIVACY. THEY TAKE ALL OF THAT WAY FROM YOU. PEOPLE MAKE YOUR CHOICES FOR YOU. YOU CAN'T ANSWER FOR YOURSELF. AND FROM NOW ON I'LL BE RIGHT PARTICULAR OF WHOM I GO TO FOR MEDICAL CARE.

Q. WERE YOU TOLD WHAT YOU WERE ARRESTED FOR, WHAT CRIME?

A. SHE SAID I WAS TESTED POSITIVE FOR COCAINE IN MY URINE.

Q. WERE YOU PROSECUTED FOR THAT? DID YOU GO TO TRIAL?

A. NO, SIR.

Q. WHAT HAPPENED?

A. THEY TOLD ME - I MEAN, THEY TOLD ME TO GO - BEFORE THEY TOLD ME TO GO TO SUBSTANCE ABUSE I VOLUNTEERED, I WENT MYSELF. AND THAT WAS THE END OF IT.

Q. THE CHARGE WAS FINALLY DISMISSED OR OTHERWISE DISPOSED OF?

A. YES.

MR. WHERRY: MAY I HAVE A MOMENT, PLEASE, YOUR

* * *

A. YES, SIR.
Q. TWO OF THOSE CHILDREN WERE BORN WHILE YOU WERE TAKING COCAINE?
A. YES.
Q. YOU STARTED USING COCAINE WHEN YOU WERE 18 OR 19 YEARS OLD?
A. I CAN'T REMEMBER.
Q. WHEN YOU WERE A TEENAGER?
A. I CAN'T MEMBER THAT FAR BACK. I'M THIRTY-NINE YEARS OLD NOW.
Q. YOU HAVE BEEN TAKING COCAINE ABOUT TWENTY YEARS, HAVEN'T YOU?
A. NO.
Q. WEREN'T YOU A DIME A BAG COCAINE USER?
A. NO.
Q. WHEN I ASKED YOU ABOUT THAT BEFORE, YOU SAID SOMETHING ABOUT USING A ONE DIME BAG A WEEK OF COCAINE. WHAT IS THAT?
A. I NEVER SPOKE TO YOU BEFORE. THIS IS MY FIRST TIME SPEAKING TO YOU.
Q. SOMEONE FROM MY OFFICE THAT TOOK YOUR DEPOSITION?
A. NO.
Q. YOU DIDN'T USE THE WORD I'M A ONE DIME BAG A WEEK COCAINE USER?
A. NO.
Q. OKAY. BUT YOU HAVE BEEN USING COCAINE FOR A LONG TIME?

* * *

Q. (BY MR. HOOD, CONTINUING) TURN TO PAGE 29, PLEASE. ON LINE 8, I BELIEVE CHRISTY COMPANION WAS ASKING YOU QUESTIONS. AND SHE ASKED WHEN DID YOU FIRST START USING COCAINE. AND YOUR ANSWER WAS, "I WAS ABOUT 18 OR 19."

WAS THAT YOUR TESTIMONY UNDER OATH WITH YOUR LAWYER PRESENT BEFORE A COURT REPORTER ON AUGUST THE 23, 1995?

A. I GUESS SO.

Q. DIDN'T I READ IT CORRECTLY?

A. YES, SIR.

Q. AND TURN TO THE NEXT PAGE, PAGE 30. LINE 23. YOU WERE ASKED THE QUESTION, "HOW OFTEN WOULD YOU USE - SO UPON AVERAGE WOULD YOU USE ONE DIME BAG PER WEEK?"

AND YOUR ANSWER WAS?

A. "YES."

Q. THANK YOU.

NOW, YOU TOLD US ABOUT THE ARREST, WHEN YOU TESTED POSITIVE. WHEN YOU HAD YOUR COCAINE BABY ON NOVEMBER THE 9TH, 1989, YOU WERE ARRESTED ON NOVEMBER THE 10, 1989, YOU HAD BEEN ARRESTED BEFORE AND SINCE, HAVEN'T YOU?

MR. WHERRY: I OBJECT.

THE COURT: I'M GOING TO OVERRULE YOUR OBJECTION.

MR. WHERRY: THE "BEFORE" PART WAS MY PROBLEM.

THE COURT: SAY WHAT?

MR. WHERRY: HE ASKED IF SHE HAD BEEN ARRESTED BEFORE.

[LAVERNE SINGLETON 102]

THE COURT: HE SIMPLY ASKED THE QUESTION.

MR. WHERRY: THERE IS NO GOOD FAITH BASIS FOR THAT.

THE COURT: WHAT ABOUT THAT, MR. HOOD?

THE COURT: I DON'T KNOW THE ANSWER TO IT UNTIL SHE ANSWERS IT.

MR. WHERRY: THAT'S NOT TRUE. WE JUST SPENT 20 MINUTES GOING OVER THAT.

THE COURT: WELL, BASED ON THE SHOWING THAT YOU MADE TO THIS COURT OUTSIDE OF THE PRESENCE OF THE JURY, THERE WAS NO CONTENTION THAT SHE HAD BEEN ARRESTED BEFORE THIS NOVEMBER 10, 1989, ARREST. NOW, IF YOU HAVE EVIDENCE TO THE CONTRARY I'LL BE GLAD TO HEAR IT, BUT THAT'S WHAT YOU REPRESENTED TO THE COURT AT THAT TIME.

MR. HOOD: MAY I JUST ASK, I DON'T KNOW THE ANSWER. THE FIRST -

MR. WHERRY: I OBJECT.

THE COURT: WELL, YOU REPRESENTED TO THE COURT WHAT YOU WANTED TO ASK THIS WITNESS.

MR. HOOD: OKAY.

THE COURT: AND THERE WAS NOTHING ABOUT ANY PRIOR

ARRESTS. NOW YOU HAVE ALREADY ASKED THIS WITNESS UNDER OATH ABOUT THE ARRESTS, THAT'S HOW YOU GOT THE INFORMATION THAT YOU GOT.

MR. HOOD: OKAY. I'LL GO TO -

THE COURT: NOW, LADIES AND GENTLEMEN OF THE JURY

* * *

[LAVERNE SINGLETON 110]

IT WOULD BE NICE TO KNOW.

THE COURT: ALL RIGHT, MR. HOOD.

Q. (BY MR. HOOD, CONTINUING) HAVE I NOW REFRESHED YOUR MEMORY, YOU HAVE BEEN ARRESTED FOUR TIMES AND ON THREE OCCASIONS YOU SPENT THE NIGHT IN JAIL?

A. YES, SIR.

Q. THANK YOU.

YOU HAVE HAD FIVE CHILDREN?

A. YES.

Q. AND YOU WERE TELLING US ABOUT THE DELIVERY OF ONE IN NOVEMBER OF '89. THE CHILD'S NAME IS ARNEL. AND WHEN YOU WENT IN FOR THE DELIVERY OF THAT CHILD, THEY ASKED YOU TO SIGN A CONSENT FORM AT THE HOSPITAL. IS THIS YOUR SIGNATURE ON THIS CONSENT FORM?

A. YES.

MR. HOOD: I WOULD LIKE TO PUT IT INTO EVIDENCE WITHOUT OBJECTION.

THE COURT: ANY OBJECTION?

MR. WHERRY: NO.
DEPUTY CLERK: THAT WOULD BE DEFENDANT'S EXHIBIT 155.
Q. (BY MR. HOOD, CONTINUING) DID YOU READ THIS FORM?
A. NO, SIR.
Q. AND SO WHEN IT SAYS THAT I FURTHER CONSENT TO TESTING OF DRUGS IF DEEMED ADVISABLE BY MY PHYSICIAN, YOU DIDN'T KNOW

* * *

[LAVERNE SINGLETON 111]

THAT THEY WERE GOING TO TEST YOU FOR DRUGS?
A. NO, SIR.
Q. WELL THEY DID TEST YOU FOR DRUGS AND YOU TESTED POSITIVE BECAUSE YOU HAD COCAINE IN YOU, DIDN'T YOU?
A. YES, SIR.
Q. THAT WASN'T A GOOD THING TO BE DOING TO THAT LITTLE BABY WAS IT?
A. WELL, AT THE TIME I DIDN'T -
Q. AT THE TIME YOU -
A. AT THE TIME I DID NOT KNOW.
Q. WELL, YOU WENT OFF AND THEY PUT YOU IN SUBSTANCE ABUSE AND YOU DID THAT FOR AWHILE. YOU MADE IT FOR ABOUT THREE MONTHS AND THEN YOU FELL OFF AGAIN AND WENT BACK TO COCAINE, DIDN'T YOU?
A. YES, SIR.
Q. GOT PREGNANT AGAIN AND WENT BACK TO THE MEDICAL

UNIVERSITY AND HAD ANOTHER BABY. AND AGAIN THE BABY HAD COCAINE IN IT AND YOU HAD COCAINE IN YOU, RIGHT?

A. I GUESS SO.

Q. NOW THIS TIME YOU KNEW, BECAUSE YOU HAD BEEN TO SUBSTANCE ABUSE, YOU KNEW THAT COCAINE WASN'T ANY GOOD FOR YOU AND YOU KNEW IT WAS REAL BAD FOR THAT BABY, DIDN'T YOU?

A. NO, SIR.

Q. YOU STILL DIDN'T KNOW IT?

A. (WITNESS SHAKES HEAD.)

[LAVERNE SINGLETON 112]

Q. SO FOR THE THIRD TIME THEY PUT YOU IN SUBSTANCE ABUSE? THE SECOND COCAINE BABY THEY DIDN'T ARREST YOU, YOU AGREED TO GO TO SUBSTANCE ABUSE AND YOU STARTED THAT PROGRAM, DIDN'T YOU?

A. I DIDN'T GO TO SUBSTANCE ABUSE.

Q. YOU DIDN'T GO TO SUBSTANCE ABUSE?

A. NO.

Q. DID YOU GO TO THE CHARLESTON COUNTY SUBSTANCE ABUSE?

A. NO.

Q. DID YOU GO TO PRETRIAL INTERVENTION?

A. NO.

Q. DID YOU GO SOMEWHERE FOR COUNSELING AND HELP?

A. YES, SIR.

Q. WHERE DID YOU GO?

A. TO THE MEDICAL UNIVERSITY PSYCH WARD.
Q. AND FOR THAT SECOND BABY, NOVEMBER OF 1990, IS THIS YOUR SIGNATURE ON THE CONSENT FORM?
A. YES, SIR.
MR. HOOD: I WOULD LIKE TO OFFER IT IN EVIDENCE.
106.
MR. WHERRY: NO OBJECTION.
Q. (BY MR. HOOD, CONTINUING) AND YOU ALSO SIGNED A CONSENT TO HAVE RECORDS RELEASED. THIS ONE IS DATED DECEMBER 10, 1990. IS THIS YOUR SIGNATURE?
A. YES, SIR.

[LAVERNE SINGLETON 113]

MR. HOOD: I WOULD LIKE TO PUT THAT ONE INTO EVIDENCE.
MR. WHERRY: MAY I SEE IT PLEASE.
MR. HOOD: YES.
MR. HOOD: THIS IS PART OF 110.
DEPUTY CLERK: DEFENDANT'S EXHIBIT 110-A.
MR. WHERRY: NO OBJECTION.
Q. (BY MR. HOOD, CONTINUING) NOW, ON THE FIRST BABY, NOVEMBER OF '89, YOU HAD HAD COCAINE AS RECENTLY AS FOUR DAYS BEFORE YOU WENT IN AND HAD THAT BABY?
A. I DON'T REMEMBER. I MEAN, I DON'T KNOW HOW LONG IT WAS.
Q. IF THAT'S WHAT THEY WROTE DOWN IN YOUR MEDICAL RECORD YOU,

WOULDN'T QUESTION IT, WOULD YOU?
A. I DON'T UNDERSTAND YOUR QUESTION.
Q. WHEN YOU GOT TO THE HOSPITAL, IF THEY WROTE DOWN YOU HAD COCAINE FOUR DAYS BEFORE YOU HAD THAT BABY IN NOVEMBER OF '89, WOULD YOU SAY THAT THAT IS NOT TRUE?
A. I STILL CAN'T REMEMBER.
Q. YOU JUST DON'T REMEMBER. WOULD YOU HAVE REMEMBERED BETTER THEN WHEN YOU WENT IN TO GET TREATED THAN YOU REMEMBER NOW?
A. I CAN REMEMBER THINGS NOW.
Q. OKAY. DO YOU QUESTION THE CORRECTNESS OF ANY OF YOUR MEDICAL RECORDS ABOUT WHAT YOU TOLD THE HEALTH CARE PROVIDERS AND WHAT THEY WROTE DOWN ABOUT YOU?

[LAVERNE SINGLTON 114]

A. PUT THAT AGAIN?
Q. DO YOU QUESTION THE CORRECTNESS OF ANY OF THE MEDICAL RECORDS ABOUT YOU AND WHAT YOU TOLD THE HEALTH CARE PROVIDERS WHEN YOU WENT IN TO HAVE YOUR BABY?
A. NO, SIR.
Q. OKAY. WHEN YOU GOT INTO THE COCAINE WITH THIS NEXT CHILD, ARNOLD, DELIVERED IN NOVEMBER OF 1990, YOU SAID SOMETHING IN YOUR DEPOSITION ABOUT GETTING IN THE WRONG

ENVIRONMENT. WHAT WERE YOU TALKING ABOUT?
A. I WENT TO A BIRTHDAY PARTY.
Q. ALL RIGHT. AND THEY GAVE YOU COCAINE?
A. I WAS IN THE ROOM.
Q. I'M SORRY?
A. I WAS IN THE ROOM.
Q. WELL YOU HAD TO TAKE IT? YOU HAD TO GET IT IN YOUR BODY IN YOUR BLOOD SYSTEM TO GET IN THAT BABY, BECAUSE THE BABY TESTED WITH IT, TOO. DID YOU SNIFF IT, SNORT IT OR SMOKE IT?
A. SMOKED IT.
Q. THREE TIMES SUBSTANCE ABUSE, NOVEMBER OF '89, JUNE OF - DECEMBER OF '90?
MR. WHERRY: ASKED AND ANSWERED, YOUR HONOR.
Q. (BY MR. HOOD, CONTINUING) AND EACH TIME THAT SUBSTANCE ABUSE WAS AT THE MEDICAL UNIVERSITY, AND EACH TIME YOU AGREE THAT IT HELPED YOU?
A. NO, IT DIDN'T.

[LAVERNE SINGLETON 115]

Q. IT DIDN'T HELP YOU?
A. (WITNESS NODS HEAD.)
Q. ARE YOU STILL HAVING PROBLEMS?
A. YES.
Q. I'M SORRY. HAVE YOU GONE BACK TO SUBSTANCE ABUSE?
A. I'M RECOVERING.
Q. YOU WENT TO GROUP SESSIONS WITH COUNTY SUBSTANCE ABUSE, DID THAT HELP YOU?

A. NO.
Q. WELL, YOU KNEW WHAT YOU WERE DOING WAS ILLEGAL, DIDN'T YOU?
A. YES.
Q. AND YOU HAD BEEN THROUGH THIS TWICE AND YOU KNEW THAT IF YOU DIDN'T QUIT THEY COULD PUT YOU IN JAIL?
A. NO.
Q. YOU DIDN'T KNOW THAT? YOU STILL DON'T KNOW THAT?
A. YES.
Q. BUT IT'S YOUR POSITION THAT THE ONLY PERSON IN THE MAMA-PREGNANT-CHILD-FETUS FORMULA THAT HAS A VOICE IS THE MAMA; IS THAT RIGHT?
MR. WHERRY: OBJECTION. SHE DIDN'T SAY THAT. THAT'S INFLAMMATORY AND ARGUMENTATIVE.
THE COURT: I THINK IT'S ARGUMENTATIVE, AND I SUSTAIN THE OBJECTION.
MR. WHERRY: THANK YOU, SIR.

* * *

[LAVERNE SINGLETON 118]

MR. WHERRY: MAY I HAVE A MINUTE, YOUR HONOR.
NO OBJECTION.
Q. (BY MR. HOOD, CONTINUING) I ASKED YOU THIS A MINUTE AGO AND YOU SAID NO, AND THAT'S WHY I'M ASKING YOU AGAIN NOW. ON LINE 23 YOU WERE ASKED: SO TELL ME ABOUT YOUR SUBSTANCE ABUSE

TREATMENT AT MUSC IOP. THAT'S THE PSYCHIATRIC UNIT. WAS IT HELPFUL. WHAT DID YOU SAY UNDER OATH WITH YOUR LAWYER PRESENT IN YOUR DEPOSITION ON AUGUST THE 23RD, 1995?

A. YES.

Q. YOU SAID YES, DIDN'T YOU? YOUR ANSWER WAS YES, CORRECT?

A. YES.

Q. THANK YOU.

AND WHEN YOU WERE ASKED IN YOUR DEPOSITION ON PAGE 110, AT LINE 15 -

MR. WHERRY: MAY I HAVE A MOMENT, PLEASE, YOUR HONOR.

MR. WHERRY: NO OBJECTION.

(BY MR. HOOD, CONTINUING) YOU THEN WERE ASKED WHAT I ASKED YOU A MINUTE AGO ABOUT CHARLESTON COUNTY SUBSTANCE ABUSE WHERE YOU HAD COUNSELING. EARLIER TODAY I ASKED YOU IF IT WAS HELPFUL AND YOU SAID NO. ON LINE 15 YOU WERE ASKED, "DID YOU FIND THEIR SESSIONS HELPFUL?"

AND YOUR ANSWER?

A. "YES."

Q. HAVE YOU BEEN BACK TO SUBSTANCE ABUSE SINCE I TOOK YOUR

[LAVERNE SINGLETON 119]

- SINCE - SINCE CHRISTY TOOK YOUR DEPOSITION?

A. NO.

MR. HOOD: THAT'S ALL WE HAVE.

THE COURT: REDIRECT?

MR. WHERRY: NO SIR. THANK YOU, MS. SINGLETON, YOU MAY STEP DOWN.

(TESTIMONY OF LAVERNE SINGLETON COMPLETED.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF GERTHA WARING

[WARING 131]

A. THAT IS CORRECT.
Q. AND YOU PRIMARILY DEAL WITH?
A. CASES INVOLVING CHILDREN.
Q. WERE YOU INVOLVED WITH WHAT WE HAVE COME TO KNOW AS THE INTERAGENCY POLICY?
A. I AM - I WAS INVOLVED LATER ON. I WAS NOT INVOLVED WHEN THE POLICY WAS FORMULATED.
Q. HOW DID YOU BECOME INVOLVED IN THE POLICY?
A. I BECAME WHILE I WAS MADE AWARE WHEN LIEUTENANT ROBERTS AT THAT TIME, WHO LATER ON WAS A CAPTAIN. HE EXPLAIN TO ME THAT THIS POLICY HAD BEEN FORMULATED AND THAT I WOULD BE THE PRIMARY PERSON, CONTACT PERSON AT THE CHARLESTON POLICE DEPARTMENT WHENEVER THERE WAS CONTACT FROM THE MEDICAL UNIVERSITY REGARDING CHILDREN THAT WERE ABUSE OF SUBSTANCE PRENATAL.
Q. WERE YOU STATIONED AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. NO, MA'AM.

Q. DID YOU MONITOR WHO WAS TESTED AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. NO, MA'AM.
Q. DID YOU TELL ANY DOCTOR OR NURSE THERE TO TEST A PATIENT FOR DRUGS?
A. NO, MA'AM.
Q. COULD YOU EXPLAIN TO THE JURY IN GENERAL WHAT YOUR ROLE

[WARING 132]

WAS WHEN YOU RECEIVED A CALL FROM THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. WHEN I RECEIVED A CALL FROM THE MEDICAL UNIVERSITY OF SOUTH CAROLINA IN REFERENCE TO ONE OF THE LADIES THAT TESTED POSITIVE FOR COCAINE, I WOULD SCHEDULE A TIME I WOULD GO DOWN TO THE MEDICAL UNIVERSITY, WHERE I WOULD MEET WITH ONE OF THE OFFICIALS. I WOULD TAKE THE INFORMATION FOR A REPORT. AND BASED UPON THE INFORMATION THAT HAD BEEN PROVIDED TO ME - AND THAT INFORMATION I WOULD GET WOULD BE THINGS LIKE THE MOTHER'S NAME, DATE OF BIRTH. MAYBE A SOCIAL SECURITY NUMBER. TELEPHONE NUMBER AND THING OF THAT NATURE. BASED UPON THE INFORMATION THAT I WOULD RECEIVE, IN MY OPINION IT APPEARED TO BE SUFFICIENT TO MAKE A WARRANT-LESS ARREST. SOMETIMES - LOT

OF TIMES WHEN I WOULD BE CONTACTED SOME OF THE LADIES WERE READY FOR DISCHARGE, SO I WOULD GO AHEAD AND MAKE A WARRANT-LESS ARREST AT THAT POINT.

AFTER THE ARREST WAS MADE, THEN I WOULD - WELL, OF COURSE I WOULD CONTACT THE HOSPITAL OFFICIALS. I WOULD NOTIFY SECURITY AS WELL. I WOULD PROCEED TO THE - WOULD BE ESCORTED TO THE ROOM WHERE ONE OF THE NURSE OR SOMEONE WOULD NORMALLY GO IN AND HELP THE LADY TO BECOME DRESSED OR WHATEVER THEY DID. OKAY.

Q. JUST TALK SLOWLY, THAT'S ALL RIGHT.

A. I'M TERRIBLY SORRY.

ANYWAY, THEY WOULD ASSIST THE LADIES IN GETTING

[WARING 133]

DRESSED AND THING LIKE THAT. AFTER THAT TIME THE LADIES WOULD BE SERVED WITH A WARRANT. THEY WOULD ALWAYS BE A WHEELCHAIR ON THE OUTSIDE AND A SHEET AND THAT WAS TO COVER. WHEN THESE LADIES WERE PLACED UNDER ARREST OR THE WARRANTS WERE SERVED ON THEM. IMMEDIATELY AFTER THAT WAS DONE, THEY WERE -

Q. SLOW DOWN.

A. I'M SORRY.

Q. IMMEDIATELY AFTER THEY WERE -

A. AFTER THE WARRANT HAD BEEN SERVED ON THEM, OR IF THERE

WAS A WARRANT OR THEY WERE PLACED UNDER ARREST, THEY WOULD BE ADVISED OF THEIR CONSTITUTIONAL RIGHTS. AND I WOULD READ IT FROM A CARD ADVISING THEM OF THEIR CONSTITUTIONAL RIGHTS.

AFTER THAT TIME, THE LADIES, WHATEVER THEY BROUGHT WITH THEM, THERE WAS NORMALLY PILLOWS, THERE WERE SANITARY NAPKINS AND A LOT OF OTHER PERSONAL ITEMS THAT THE HOSPITAL WOULD GIVE THEM THAT WOULD BE, YOU KNOW, TAKEN THE - WITH THEIR PROPERTY.

ONCE THE RESTRAINTS WERE PLACED ON THESE LADIES, THEY WERE SEATED IN THE WHEELCHAIR. AND THAT WAS IN AN EFFORT TO CONCEAL THE RESTRAINTS. NOW, THE BELT THAT WAS USED, THERE WERE A NUMBER OF WAYS THAT IT COULD HAVE BEEN DONE, THE HANDCUFFS THAT IS. IT COULD HAVE BEEN PLACED BEHIND THEM LIKE THIS, OR THERE COULD HAVE BEEN A BELT, SO THAT IT WOULD BE MORE COMFORTABLE AND IT WOULD BE HELD IN FRONT. AND OF COURSE WHEN - IF THE CUFFS WERE IN BEHIND IT WOULD DRAW TOO MUCH

[WARING 134]

ATTENTION, AND THAT'S ONE OF THE LAST THINGS THAT WE WANTED.

SO THE BELT WAS USED SO THAT THE CUFFS WOULD BE IN FRONT AND

SO THAT THERE WOULD BE NO ATTENTION DRAWN TO THIS.

WHEN I WENT TO ARREST THESE LADIES I WAS ALWAYS IN PLAIN CLOTHES. I WAS IN AN UNMARKED POLICE CAR. AND I WAS PARKED ON THE SIDE STREET, IT WAS NOT THE MAIN ENTRANCE TO THE HOSPITAL. AND I BELIEVE IT WAS, I'M THINKING SABIN STREET. AFTER THEY WERE WHEELED OUT IN THE WHEELCHAIR, I WOULD PULL MY CAR RIGHT UP TO THE CURB. I WOULD HELP THEM INTO THE VEHICLE. AND NINE TIMES OUT OF TEN I WAS ALONE, SO THEY SAT UP FRONT WITH ME. AND WE WOULD PROCEED ON TO THE POLICE STATION. AND ON OUR WAY THERE WE WOULD HAVE A TALK. I KNEW THIS WAS NOT A PLEASANT SITUATION AND I MADE EVERY ATTEMPT TO MAKE IT COMFORTABLE FOR THESE LADIES. BY THE TIME WE ARRIVED AT THE POLICE STATION WE WERE NORMALLY LAUGHING AND TALKING ABOUT SIMILAR INTERESTS.

AND ONCE WE ARRIVED AT THE POLICE STATION, THEY WOULD GO IN THROUGH THE REAR ENTRANCE. MOST TIMES WE WOULD GET ON THE ELEVATOR. WE WOULD GO TO THE SECOND FLOOR. WHICH IS WHERE THE DETECTIVE'S OFFICE IS LOCATED. ONCE WE GOT THERE, THEY WOULD BE OFFERED TO MAKE COUNTLESS PHONE CALLS IF THEY WANTED. THEY WOULD ALWAYS BE OFFERED SOMETHING TO EAT

AND DRINK. THEN WE WOULD PROCEED TO A SMALLER OFFICE WHERE AGAIN THEY WOULD BE MIRANDIZED. AND IF THEY WANTED TO PROVIDE A STATEMENT THEN I WOULD - ASKED IF IT WOULD BE OKAY TO HAVE

[WARING 135]

IT TAPED. THEY WOULD ACKNOWLEDGE ONE WAY OR THE OTHER. AT THAT TIME I WOULD PLACE THE TAPE RECORDER ON THE TABLE. I WOULD MIRANDIZE AGAIN ON TAPE AND I WOULD TAKE THE INFORMATION THEY HAD TO OFFER.

Q. WHEN YOU TOOK THESE WOMEN OUT OF THE MEDICAL UNIVERSITY, WERE THEY CLOTHED?

A. YES, MA'AM.

Q. WERE THEY EVER EXPOSED?

A. NO, MA'AM. I CAN REMEMBER A COUPLE OF LADIES THAT MAY NOT HAVE WORN THEIR STREET CLOTHES, BUT WHAT HAPPENED IN THOSE CASES, THEY WOULD PUT ON A HOSPITAL GOWN THAT THEY WOULD PUT - ONE WAS PUT ON THE RIGHT WAY AND THEN ONE WAS PUT ON BACKWARD TO CONCEAL THEIR PERSON.

Q. DID YOU EVER REFUSE TO ALLOW ANY OF THE WOMEN TO PUT ON THEIR CLOTHES?

A. NO.

Q. IF THEY WERE AVAILABLE?

A. NO, MA'AM. I WOULDN'T DO THAT.

Q. DID YOU EVER REFUSE TO ALLOW THE WOMEN TO SEE THEIR FAMILIES BEFORE YOU ARRESTED THEM?

A. NO, MA'AM. IN FACT, I DON'T EVEN REMEMBER ANY FAMILY MEMBERS BEING THERE ANY OF THE TIME WHEN I TAKE ANY OF THE LADIES INTO CUSTODY.

Q. DID THE WOMEN, ONCE THEY WERE TAKEN TO THE POLICE STATION, HAVE ACCESS TO FEMININE SANITARY PADS IF THEY NEEDED

[WARING 136]

THEM?

A. OH, YES, MA'AM. ONCE THEY ARRIVED AT THE POLICE STATION, ONCE THEY HAD BEEN OFFERED SOMETHING TO EAT, SOMETHING TO DRINK, THEY MADE THEIR PHONE CALLS AND THINGS OF THAT NATURE, THE MATRON NORMALLY CAME DOWN TO ASSIST. AND THAT WOULD INCLUDE GOING BACK DOWN TO THE BOOKING AREA, THE MATRON NORMALLY MADE THE RECORD OF THE MATERIAL THAT WAS BROUGHT IN. THE MATRON WAS ALSO RESPONSIBLE FOR PROVIDING SANITARY NAPKIN. IF THEY NEEDED TO MAKE ADDITIONAL PHONE CALLS, BRING THE TELEPHONE RIGHT UP TO WHERE THEY WERE. SO, NO, MA'AM, WE ALWAYS KEEP A SUPPLY OF PERSONAL ITEMS FOR THESE LADIES THAT WOULD COME IN.

Q. WERE YOU INVOLVED IN THE ACTUAL ARRESTS OF SOME OF THE PLAINTIFFS IN THIS ACTION?

A. YES, I WAS.

Q. I HAVE GOING TO BRING YOU THE ORIGINAL ARREST RECORD.
AND LET'S GO THROUGH ONE BY ONE THE PLAINTIFFS' ARREST
RECORDS. STARTING WITH LORI GRIFFIN.
THE COURT: NOW THERE HAS BEEN AN OBJECTION, AS I
UNDERSTAND IT, TO THESE RECORDS.
MR. WHERRY: WELL, I DON'T KNOW WHAT IS GOING TO BE
DONE. WHAT I WAS GOING TO ASK IS THAT THE SAME RULES BE
APPLIED TO MS. SHOWERS, THAT IF THEY'RE IN EVIDENCE THEY CAN
BE PUBLISHED TO THE JURY AT SOME OTHER TIME RATHER THAN HAVE
THIS WITNESS SIT AND READ FROM THEM. I - THERE ARE

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[WARING 143]

DO YOU RECALL OR WERE YOU INVOLVED IN THE ARREST OF
THE PLAINTIFF LORI GRIFFIN?
A. YES, I WAS.
Q. CAN YOU TELL THE JURY WHAT YOU REMEMBER ABOUT THAT
ARREST?
A. WHEN MS. GRIFFIN WAS ARRESTED, SHE WAS ARRESTED AT THE
MEDICAL UNIVERSITY. WHEN SHE WAS ARRESTED AFTER HAVING BEEN
SERVED WITH A WARRANT, THE PROCEDURE THAT I EXPLAIN EARLIER,
SHE WAS PLACED IN A WHEELCHAIR WITH RESTRAINTS AND HER
PROPERTY WAS COMING BY HER. WE WERE ESCORTED OUT OF THE

HOSPITAL.
Q. LET ME ASK YOU, DETECTIVE, THE RESTRAINTS THAT YOU APPLIED FOR MS. GRIFFIN?
A. YES.
Q. WHY DO YOU APPLY RESTRAINTS?
A. WELL, FOR NUMEROUS REASONS. WELL, FOR ONE IT WAS THE POLICY OF THE DEPARTMENT. RESTRAINTS ARE USED ON EVERYONE WHETHER IT BE A PUBLIC PERSON WITH A PETTY LARCENY OR ANYBODY. ANOTHER REASON, I WAS IN PLAIN CLOTHES WITH AN UNMARKED POLICE CAR. NORMALLY WHEN I AM TRANSPORTING SOMEONE THAT SOMEONE SITS RIGHT UP FRONT WITH ME. THERE ARE NO CAGES IN THIS VEHICLE. SO IT WAS FOR HER PROTECTION AND MINE AS WELL.
Q. GO AHEAD TELL THE JURY WHAT ELSE YOU REMEMBER ABOUT THAT ARREST?

[WARING 144]

A. WHEN MS. GRIFFIN WAS ARRESTED, AND MIND YOU I WAS PREGNANT DURING THAT SAME TIME ALSO, SHE WAS TAKEN OUT IN A WHEELCHAIR. WE WERE ESCORTED TO THE SABIN STREET EXIT, WHICH WAS THE AREA THAT WAS NOT THE MAIN ENTRANCE TO THE HOSPITAL. ONCE SHE GOT TO THE DOORWAY, I WOULD PULL MY POLICE CAR RIGHT UP TO THE CURB. I WOULD WHEEL HER AROUND. I WOULD OPEN THE

DOOR FOR HER. ALLOW HER TO GET INSIDE. AND AFTER THAT WAS DONE WE PROCEED ONTO THE HOSPITAL. EXCUSE ME, TO THE CHARLESTON POLICE DEPARTMENT.

Q. AND AT ANYTIME WERE THE HANDCUFFS VISIBLE ON MS. GRIFFIN?

A. NO, MA'AM. THEY WERE COVERED WITH THE SHEET. THAT AND THE RESTRAINTS, THE SHACKLES.

Q. AT ANY TIME WAS MS. GRIFFIN EXPOSED - EXPOSED OR NOT FULLY CLOTHED?

A. NO, MA'AM. NO, MA'AM.

Q. AND CAN YOU DESCRIBE WHAT HAPPENED ONCE YOU GOT TO THE POLICE STATION, IF YOU RECALL?

A. ONCE WE ARRIVE AT THE POLICE STATION, WE WENT TO A SMALLER OFFICE AREA, WHICH WAS NEAR THE DETECTIVE'S OFFICE, WHERE SHE WAS ALLOWED TO MAKE AS MANY PHONE CALLS AS SHE WANTED. SHE HAD BEEN OFFERED SOMETHING TO EAT OR DRINK EARLY ON, BUT THROUGHOUT THIS IS WHAT I ALWAYS DO.

I ASKED IF SHE WANTED TO MADE A STATEMENT TO ME REGARDING THE OFFENSE WHICH SHE HAD BEEN CHARGED. AT WHICH TIME WE PROCEEDED TO A SMALLER OFFICE AREA. AND EVEN SO I

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[WARING 152]

Q. (BY MS. SHOWERS, CONTINUING) DETECTIVE, COULD YOU READ

YOUR INCIDENT REPORT DATE AND TELL THE JURY WHAT THE DATE IS?
A. OKAY. I CANNOT MAKE THE DATE OUT ON THIS.
Q. GO AHEAD AND READ IT.
A. I CAN'T READ THE DATE. COMPLAINANT STATES THAT ON NOVEMBER 9TH, 1989, SUBJECT LAVERNE SINGLETON - LAVERNE SINGLETON?
Q. THAT'S RIGHT. I SEEM TO HAVE THE ONLY LEGIBLE COPY. MAKE SURE THAT'S WHAT IT IS.
A. SUBJECT -
Q. GO AHEAD AND TALK INTO THE MICROPHONE.
A. COMPLAINANT STATES THAT ON NOVEMBER 9TH, 1989, SUBJECT LAVERNE SINGLETON, BLACK FEMALE, DATE OF BIRTH 3/1 OF '57 OF 5596 DIXIE PLANTATION ROAD, MEGGETT, SOUTH CAROLINA, WAS ADMITTED INTO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AT 171 ASHLEY AVENUE IN REFERENCE TO BEING IN PRE-TERM LABOR. SUBJECT WAS THIRTY-ONE WEEKS PREGNANT. SHORTLY AFTER ADMITTANCE AT APPROXIMATELY 10:52 A.M. SUBJECT SINGLETON GAVE BIRTH TO A FOUR POUND EIGHT OUNCE BABY BOY. IMMEDIATELY AFTER SUBJECT SINGLETON GAVE BIRTH, A URINE TEST WAS PERFORMED ON SINGLETON'S URINE BY MUSC LAB TECHNICIANS, WHICH NOT ONLY TESTED POSITIVE FOR SUBSTANCE CANNABIS COMMONLY FOUND IN

MARIJUANA, BUT ALSO TESTED POSITIVE FOR COCAINE. SINGLETON'S CURRENTLY ASSIGNED TO ROOM, AND THAT PART IS, I CAN'T SEE IT, AT MUSC. IS SCHEDULED TO BE DISCHARGE ON NOVEMBER 10, 1989.

[WARING 153]

AN ARREST WARRANT FOR THE OFFENSE OF UNLAWFUL NEGLECT OF A CHILD OR HELPLESS PERSON BY LEGAL CUSTODIAN VIOLATION OF SECTION 20-750 WILL BE OBTAINED FOR SUBJECT SINGLETON AND EXECUTED UPON DISCHARGE FROM HOSPITAL.

Q. DID YOU ISSUE A SUPPLEMENTAL REPORT AS WELL, DETECTIVE?

A. YES.

Q. I HAVE A LEGIBLE COPY, IF THAT HELPS.

A. THANK YOU.

Q. COULD YOU PLEASE READ THAT TO THE JURY.

A. THIS IS DATED NOVEMBER 10 OF 1989. ON NOVEMBER 10TH, 1989, AN ARREST WARRANT WAS OBTAINED FOR SUBJECT LAVERNE SINGLETON FOR THE OFFENSE OF UNLAWFUL NEGLECT FOR A CHILD OR HELPLESS PERSON BY LEGAL CUSTODIAN. HMM. VIOLATION SECTION 20-750. ON THIS SAME DATE SUBJECT WAS CHARGED WITH SAID OFFENSE, MIRANDIZED AND TRANSPORTED TO CPD, WHICH IS CHARLESTON POLICE DEPARTMENT WHERE SHE WAS LODGED. SUBJECT

WAS AGAIN ADVISED OF HER CONSTITUTIONAL RIGHTS AND DID WISH TO PROVIDE REPORTING OFFICER WITH A TAPED STATEMENT ADMITTING THE USE OF MARIJUANA AND COCAINE WHILE PREGNANT. TAPE TO BE TRANSCRIBED.

Q. AND DID YOU SIGN THAT REPORT, DETECTIVE?

A. YES, MA'AM, I DID.

Q. AND EARLIER YOU TESTIFIED THAT YOU TOOK MS. SINGLETON TO A FAST FOOD RESTAURANT?

A. YES, MA'AM.

[WARING 154]

Q. AND TELL ME WHY YOU DID THAT?

A. BECAUSE SHE SAID THAT SHE WAS HUNGRY AND IT WAS ON THE WAY TO THE STATION. AND NORMALLY IF SOMEONE SAYS THAT, I ALWAYS OFFER SOMETHING TO EAT AND DRINK. AND IF IT'S NOT DONE IN THAT WAY, THEN I WOULD ORDER SOMETHING FROM THE MATRON SO THEY WOULD HAVE IT.

Q. DO YOU RECALL WHETHER MS. SINGLETON WAS COMPLETELY COVERED WITH CLOTHING?

A. YES, MA'AM.

Q. WAS SHE?

A. SHE WAS COMPLETELY - ALL OF THE LADIES. I DIDN'T TAKE THEM AWAY FROM THE HOSPITAL. AND AS I EXPLAIN EARLIER, IF IT WAS ONE OF THE GOWNS, THEN TWO WAS PUT ON, ONE WAS PUT ON THE RIGHT WAY AND THE OTHER BACKWARDS.

Q. WERE YOU INVOLVED IN THE ARREST OF THE PLAINTIFF ELLEN KNIGHT?
A. YES, MA'AM.
Q. DO YOU RECALL THAT?
A. YES, MA'AM.
Q. CAN YOU TELL THE JURY WHAT YOU RECALL ABOUT MS. KNIGHT'S ARREST?
A. WITH MS. KNIGHT, I WAS SUMMONED TO THE MEDICAL UNIVERSITY REGARDING AN INDIVIDUAL THAT HAD BEEN IN PRE-TERM LABOR. UPON ARRIVAL - AND I'LL NEED TO REVIEW FOR SPECIFICS ON THAT.
Q. JUST FOR NOW, TELL THE JURY WHAT YOU RECALL.

* * *

[WARING 157]

HAD A COPY. AND YOU SAID THAT YOU DID. AND I SAID AS SHE PUBLISHES IF THERE IS SOMETHING IN THERE THAT IS OBJECTIONABLE, PLEASE BRING IT TO MY ATTENTION. THE GENERAL ABILITY TO READ IT, YOU KNOW, IS SHE CAN PUBLISH IT. AND SINCE SHE WROTE IT SHE CAN DO IT.

MS. SHOWERS: THANK YOU.

THE COURT: LADIES AND GENTLEMEN, I SAID SEVERAL TIMES THAT THE HEALTH OF THE BABIES THAT ARE BORN TO THESE PLAINTIFFS IS NOT RELEVANT IN THIS CASE, WHETHER IT'S GOOD OR WHETHER IT'S BAD. AND ON A NUMBER OF OCCASIONS SOMETHING HAS

COME IN ABOUT THEIR HEALTH. AND I TRIED TO TELL YOU TO DISREGARD IT. THERE HAVE BEEN SOME QUESTIONS ASKED BY THE LAWYERS THAT SEEM TO SUGGEST THAT THE BABIES ARE HEALTHY OR NOT HEALTHY. AND TESTIMONY BY SOME WITNESSES THAT DO LIKEWISE. BUT, AGAIN, JUST LET ME SAY THAT IF THIS WITNESS HAS SAID ANYTHING ABOUT THE HEALTH OF THESE BABIES, AND I THINK SHE MAYBE DID READ SOMETHING ABOUT IT, DISREGARD IT. THE HEALTH OF THESE BABIES IS NOT RELEVANT IN THIS CASE AND YOU CANNOT SPECULATE WHETHER THEY WERE HEALTHY OR WHETHER THE COCAINE THAT THEIR MOTHERS MAY HAVE BEEN USING CAUSED INJURY TO THEM. THAT'S JUST NOT RELEVANT TO THIS CASE, SO DISREGARD IT.

Q. (BY MS. SHOWERS, CONTINUING) DETECTIVE, I'M GOING TO ASK YOU TO RELY ON YOUR MEMORY OF MS. KNIGHT'S ARREST?

A. YES.

[WARING 158]

Q. DO YOU RECALL THAT MS. KNIGHT WAS FULLY CLOTHED WHEN SHE WAS ARRESTED?

A. YES, I DO.

Q. AND WAS SHE PROVIDED WITH ALL OF THE SUPPLIES THAT SHE NEEDED TO HANDLE THE BLEEDING THAT SHE HAD POSTPARTUM?

MR. WHERRY: OBJECTION, LEADING.
THE COURT: I THINK THE QUESTION IS LEADING AND I SUSTAIN THE OBJECTION.
MS. SHOWERS: WELL, YOUR HONOR, SHE STATED THAT SHE WAS BLEEDING HEAVILY. THE ONLY WAY TO GET THE DETECTIVE TO RESPOND TO THAT IS TO TELL HER THAT AND ASK HER IF SHE RECALLS THAT.
THE COURT: I THINK THERE ARE OTHER WAYS TO DO IT.
Q. (BY MS. SHOWERS, CONTINUING) DETECTIVE, DID -
THE COURT: I MEAN, YOU CAN -
Q. (BY MS. SHOWERS, CONTINUING) DID THE WOMEN EVER NOT HAVE THE SUPPLIES THEY NEEDED?
A. WHEN ALL OF THESE LADIES THAT I WAS INVOLVED WITH WOULD LEAVE THE HOSPITAL, THEY WOULD HAVE AMPLE SUPPLY OF SANITARY NAPKINS, THE VERY LONG ONES. IN ADDITION TO THAT SOME OF THE LADIES WOULD EVEN TAKE THEIR PILLOWS AND LOTION AND OTHER THINGS LIKE THAT. ONCE THEY ARRIVED AT THE POLICE STATION, THE PROPERTY WAS REMOVED, BUT THE CITY OF CHARLESTON KEEP AN AMPLE SUPPLY OF THESE ITEMS. AND EVEN IF THEY DIDN'T USE THEIRS, THE CITY MATRON WOULD PROVIDE IT FOR THEM.

[WARING 159]

Q. AND IN MS. KNIGHT'S CASE DID SHE HAVE THOSE SUPPLIES?
A. YES.
Q. WERE YOU INVOLVED WITH THE ARREST OF MS. POWELL?
A. WHAT IS THE NAME?
Q. SANDRA POWELL?
A. I DID NOT MAKE THE ACTUAL PHYSICAL ARREST ON MS. POWELL.
Q. HOW ABOUT MS. CRYSTAL FERGUSON?
A. YES.
Q. TELL THE JURY FROM YOUR MEMORY WHAT YOU RECALL ABOUT MS. FERGUSON'S ARREST?
A. IF I REMEMBER CORRECTLY, I BELIEVE MS. FERGUSON CAME INTO THE POLICE STATION. I BELIEVE THAT SHE SURRENDERED HERSELF. AFTER THAT WAS DONE, SHE WAS BOOKED IN AT THE BOOKING DESK. SHE WAS OFFERED SOMETHING TO EAT AND DRINK. SHE WAS ALLOWED TO MAKE COUNTLESS PHONE CALLS. AND GOING FROM MEMORY, I DON'T RECOLLECT WHETHER SHE PROVIDED A STATEMENT OR NOT. I DO REMEMBER HAVING A CONVERSATION WITH MS. FERGUSON TO THE EFFECT WE TALKED ABOUT HER CHILDREN. I BELIEVE THAT SHE SAID THEY WENT TO PARK CIRCLE ELEMENTARY SCHOOL. SHE TALKED ABOUT HAVING SOMEONE WATCH THEM WHILE SHE WAS TAKING CARE OF THIS MATTER. I DON'T REMEMBER SPECIFICALLY HOW MANY CHILDREN SHE SAID THAT SHE HAD. BUT, AGAIN, THIS WAS LOW KEY. SHE WAS

VERY FRIENDLY. ALL OF THE LADIES WAS FRIENDLY, BUT I WAS NEVER MEAN TO THEM, EITHER.

Q. AND MS. WILLIAMS, WERE YOU INVOLVED IN MS. WILLIAMS'

[WARING 160]

ARREST?

A. MAY I CHECK THE BOOKING REPORT FOR A MINUTE.

YES, I WAS.

Q. TELL THE JURY FROM YOUR MEMORY WHAT YOU RECALL ABOUT MS. WILLIAMS' ARREST?

A. MS. WILLIAMS WAS ARRESTED AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. AFTER THAT TIME SHE WAS TRANSPORTED TO THE CHARLESTON POLICE.

Q. INTO THE MICROPHONE.

A. CHARLESTON POLICE DEPARTMENT. I'M SORRY. SHE WAS TRANSPORTED TO THE CHARLESTON POLICE DEPARTMENT. SHE WAS OFFERED THE USE OF A TELEPHONE. SHE WAS OFFERED SOMETHING TO EAT AND DRINK. SHE WAS FULLY CLOTHED. SHE WAS ALLOWED TO GIVE ME A STATEMENT AFTER MIRANDA HAD BEEN DONE, BOTH AT THE HOSPITAL, ON THE WAY FROM THE HOSPITAL AND AGAIN AT THE POLICE STATION AND ON TAPE. AFTER THIS TIME, THE REGULAR PROCESSING WENT ON IN TERMS OF THE FINGERPRINTING, THE PHOTOGRAPHING, WHICH IS A STANDARD.

Q. WHEN YOU REMOVED MS. WILLIAMS FROM THE HOSPITAL, WERE HER HANDS COVERED AND THE SHACKLES COVERED?
A. YES, MA'AM.
Q. AND DID SHE HAVE IN HER POSSESSION THE SUPPLIES THAT YOU HAVE DESCRIBED AS FAR AS SANITARY NAPKINS AND KITS THAT WERE REQUIRED?
A. YES, MA'AM, SHE DID.

[WARING 161]

Q. WERE YOU INVOLVED IN THE ARREST OF MS. PAMELA PEAR?
A. MAY I BRIEFLY LOOK AT IT?
I DID SECURE AN ARREST WARRANT FOR MS. PAMELA PEAR.
Q. TELL THE JURY WHAT YOU RECALL ABOUT MS. PEAR'S ARREST?
WERE YOU PRESENT FOR THE ACTUAL ARREST?
A. I'M TRYING TO REVIEW THAT. I WROTE THE INITIAL POLICE REPORT AFTER HAVING RECEIVED THE INFORMATION FROM THE COMPLAINANT. I DID SIGN AN ARREST WARRANT FOR HER ARREST. I WAS PRESENT. HER PROPERTY, HOWEVER, WAS REMOVED BY MS. MONTGOMERY, WHO IS ONE OF THE MATRONS AT THE POLICE STATION.
Q. TO YOUR RECOLLECTION, WAS MS. PEAR CLOTHED WHEN SHE WAS ARRESTED?
A. YES, SHE WAS.
Q. AND MS. PEAR TESTIFIED THAT THE JAIL WAS DIRTY AND

SMELLED BAD. IN YOUR OPINION WAS THE JAIL DIRTY AND SMELL BAD?

A. NO, MA'AM. NO, MA'AM.

Q. WERE YOU INVOLVED IN THE ARREST OF MS. THERESA JOSEPH?

A. YES, I WAS.

Q. TELL THE JURY WHAT YOU RECALL ABOUT MS. JOSEPH'S ARREST?

A. WELL WITH MS. JOSEPH'S ARREST WE WERE ABLE, I THINK, TO SPEAK - SHE SPOKE WITH ME MORE THAN ANY OF THE OTHER LADIES DID. SHE WAS VERY OPEN. SHE TALKED ABOUT HERSELF A LOT. SHE WAS FULLY CLOTHED. SHE WAS WEARING THE SAME CLOTHING THAT SHE HAD WORN TO THE HOSPITAL, BLUE JEANS AND A TOP OF SOME KIND.

[WARING 162]

I DON'T REMEMBER THE TOP.

WITH MS. JOSEPH, AGAIN SHE WAS SUPPLIED THE GENERAL SUPPLY THAT WAS TO BE GIVEN AT THE HOSPITAL, WHICH INCLUDED THE SANITARY NAPKIN, PILLOW AND LOTIONS, THINGS OF THAT NATURE. MS. JOSEPH WAS PUT IN THE WHEELCHAIR. SHE WAS COVERED BY A SHEET THAT WAS SUPPLY BY THE HOSPITAL. SHE DID WEAR RESTRAINTS.

NOW WITH MS. JOSEPH I BELIEVE THAT SHE SAID THAT SHE HAD A CESARIAN SECTION. SHE NEVER COMPLAINED OF PAIN. AND AS

I STATED, ALTHOUGH SHE WORE A - THE BACK FOR THE RESTRAINTS, THEY WERE VERY LOOSE. IN FACT IF I MAY DEMONSTRATE HOW LOOSE THEY WERE. CAN I?

Q. SURE?

A. UH-HUH. WHEN THESE LADIES WORE THE BELT, THEY WORE THE RESTRAINTS WERE LIKE THIS. THE BELT WERE SO.

Q. COME STEP DOWN HERE IN FRONT OF THE JURY SO THEY CAN SEE WHAT YOU'RE DOING?

A. THE CUFFS WERE RIGHT HERE.

Q. COME RIGHT HERE.

A. RIGHT HERE. I'M SORRY. THE BELTS WERE AROUND AND THEY BUCKLED IN BACK. THE CUFFS WENT THROUGH THE BELT AND IT WAS LIKE THIS, SO THEY WOULDN'T HAVE TO PULL THE - PUT THE EXTRA STRAP ON THEM. THE BELTS WERE SO LOOSE THAT IT OFTEN CAME DOWN HERE, BECAUSE I REMEMBER HAVING TO PULL IT UP BECAUSE IT WAS THAT LOOSE. SO ALTHOUGH SHE HAD CESARIAN SECTION, IT WAS

[WARING 163]

NOT ALL TIGHT AROUND HER. AND THIS WAS WITH ALL OF THE LADIES.

Q. THANK YOU. WERE YOU INVOLVED IN THE ARREST OF PAULA HALE?

A. LET ME CHECK AGAIN. YES, I WAS.

Q. CAN YOU TELL THE JURY WHAT YOU RECALL ABOUT MS. HALE'S

ARREST?
A. WITH MS. HALE I DID PLACE HER UNDER ARREST CHARGING -
MR. WHERRY: YOUR HONOR, THE WITNESS IS READING.
THE QUESTION IS: WHAT DO YOU RECALL? AND HER HEAD IS DOWN WITH THESE LAST DOCUMENTS.
THE COURT: SHE UNDERSTANDS THAT.
THE WITNESS: CERTAINLY.
A. SHE WAS PLACED UNDER ARREST WHILE AT THE MEDICAL UNIVERSITY AND SHE WAS CHARGED WITH DISTRIBUTION OF A PERSON UNDER 18. SHE WAS TAKEN OUT IN A WHEELCHAIR BECAUSE ALL - THIS WAS A STANDARD. WE DID THIS WITH EVERYONE. SHE WAS ADVISED OF HER CONSTITUTIONAL RIGHTS. SHE WAS REMOVED FROM THE HOSPITAL IN A WHEELCHAIR WITH RESTRAINTS ON. HOWEVER, SHE DID HAVE A SHEET COVERING BOTH HER HAND AND HER FEET. SHE WAS TAKEN IN A WHEELCHAIR OUT TO THE CURB. MY CAR WAS PULLED UP THAT LOCATION. SHE WAS HELPED INTO THE POLICE CAR. SHE SAT UP FRONT WITH ME. ONCE THAT HAPPENED, WE PROCEEDED ON TO THE POLICE STATION WHERE ONCE UPON ARRIVAL WE WENT TO THE DETECTIVE'S OFFICE. SHE WAS OFFERED USE OF THE TELEPHONE.

SHE WAS OFFERED SOMETHING TO EAT AND DRINK. AND SHE WAS ASKED THAT SHE WOULD PROVIDE A STATEMENT TO ME REGARDING THIS.

Q. NOW, DETECTIVE, YOU SAID EARLIER THAT YOU WERE PREGNANT DURING THIS TIME PERIOD BETWEEN 1989 AND 1994; IS THAT CORRECT?

A. YES, MA'AM.

Q. AND DURING THAT TIME PERIOD DID YOU YOURSELF EXPERIENCE ANY COMPLICATIONS IN PREGNANCY?

A. YES, MA'AM. I WAS - I HAD HIGH-RISK PREGNANCY.

MR. WHERRY: OBJECTION, YOUR HONOR, THIS IS NOT THE LEAST BIT RELEVANT.

MS. SHOWERS: YOUR HONOR, I WOULD BE HAPPY TO TELL THE COURT WHY.

THE COURT: SURE. I DON'T UNDERSTAND ITS RELEVANCE.

MS. SHOWERS: THERE IS A CONTENTION THAT THE ONLY HOSPITAL TESTING PREGNANT WOMEN FOR DRUGS IS THE MEDICAL UNIVERSITY. AND THIS WOMAN WAS TESTED AT ANOTHER PRIVATE HOSPITAL FOR DRUGS, BECAUSE SHE HAD EXPERIENCED THE SAME TYPES OF COMPLICATIONS.

THE COURT: OKAY. I THINK THAT MAKES IT RELEVANT.

Q. (BY MS. SHOWERS, CONTINUING) GO AHEAD.

A. YES, MA'AM. I WAS PREGNANT AT THE TIME AND I DID HAVE A

HIGH-RISK PREGNANCY.
Q. AND WHERE DID YOU GO FOR TREATMENT?

[WARING 165]

A. I WENT TO ROPER. ROPER HOSPITAL IS WHERE I WENT.
Q. AND WHAT KIND OF COMPLICATIONS WAS IT?
A. WELL, I WAS IN PRE-TERM LABOR TWICE. I WAS HOSPITALIZED TWICE. AND WHILE I WAS THERE AT THE HOSPITAL I WAS ASKED ARE YOU USING NOT ONLY ILLEGAL SUBSTANCE, BUT ANY PILLS WHATSOEVER. I SAID NO. THE OFFICIALS THERE AT THE HOSPITAL ASKED ME IF I - WOULD I MIND TO SUBMITTING TO A URINE AND A BLOOD TEST TO DETERMINE WHAT HAD CAUSED ME TO GO INTO PRE-TERM LABOR. AND OF COURSE I SAID TAKE ALL THE BLOOD YOU NEED, BECAUSE I WANTED TO FIND OUT ALSO. AND THEY DID. THEY WERE UNABLE TO DETERMINE THE CAUSE OF MY PRE-TERM LABOR. AND THANKFULLY I WAS ABLE TO CARRY THE CHILD TO FULL TERM.
Q. AND THIS IS AT WHICH HOSPITAL?
A. ROPER HOSPITAL.
Q. THANK YOU, DETECTIVE. WHEN YOU CARRIED OUT THE ARREST AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, WHO ELSE WAS PRESENT FOR THE ARRESTS, THAT YOU RECALL?
A. WELL, ADMINISTRATIVE INDIVIDUAL FROM THE HOSPITAL WAS

ALWAYS THERE. I ALWAYS CONTACTED SECURITY THERE AT THE HOSPITAL UPON ENTERING. NURSES WERE ALWAYS PRESENT TO ASSIST THESE LADIES IN GETTING DRESSED AND THINGS LIKE THAT. I BELIEVE SOMEONE FROM THE LEGAL DIVISION WAS ALSO PRESENT.

Q. DID YOU HAVE CONTACT WITH SHIRLEY BROWN DURING ANY OF THE ARRESTS?

A. YES, I DID.

* * *

[WARING 200]

HEARING.

Q. I THINK YOU JUST SAID TO ME, AND I DON'T MEAN TO BE DIFFICULT, I THINK YOU JUST SAID TO ME THAT YOU WERE NOT PROVIDED WITH THE RESULTS OF URINE DRUG SCREENS TO WOMEN?

A. NO, SIR. YOU ASKED ME IF SHE GIVE ME A COPY OF A WRITTEN DOCUMENT. AND I TOLD YOU THAT SHE -- THE INFORMATION THAT WAS PROVIDED WAS VERBAL. IT INDICATED THE CONDITION OR WHAT TERMS OR WHAT CAUSED ME TO INITIATE MY INVESTIGATION.

Q. THAT WAS PROBABLY MY FAULT BECAUSE OF MY QUESTION. I THOUGHT MY QUESTION WAS: WERE YOU GIVEN THE RESULTS OF URINE DRUG SCREENS? SO WHETHER ORAL OR WRITTEN OR SOME OTHER FORM, THE ANSWER TO THAT QUESTION IS YES?

A. I'M SORRY.

Q. YES?
A. YES, SIR.
Q. AND QUALIFIED BY YOU THAT IT MIGHT HAVE BEEN ORAL?
A. I MAY HAVE MISUNDERSTOOD YOU.
Q. IT MAY HAVE BEEN MY FAULT.
BUT IN ANY EVENT, THE RESULTS OF THE URINE DRUG SCREENS WERE PROVIDED TO YOU BY SHIRLEY BROWN?
A. YES.
Q. ON THESE TEN CASES?
A. ON THESE TEN CASES, YES.
MR. WHERRY: MAY I HAVE JUST A MOMENT, PLEASE, YOUR HONOR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF MARTHA WILLIAMS

[M. WILLIAMS 123]

(12-9-96.)

MS. DUNN: CALL MARTHA WILLIAMS.

- - -

MARTHA JANE COOPER WILLIAMS, PLF. WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. DUNN:

Q. WOULD YOUR SIC STATE YOUR FULL NAME FOR THE COURT, PLEASE.

A. MARTHA JANE COPPER WILLIAMS.

Q. WHERE DO YOU LIVE?

A. I LIVE IN COLUMBIA.

Q. AND WHAT DO YOU DO THERE?

A. I WORK FOR THE STATE DEPARTMENT OF SOCIAL SERVICES. AND I AM IN THE STAFF DEVELOPMENT AND TRAINING DIVISION. I'M AN INSTRUCTOR THERE. AND I TEACH CLINICAL ELECTIVES AS WELL AS CLINICAL PORTIONS OF THE CHILD WELFARE CERTIFICATION PROGRAM AND THE ENTIRE PROGRAM, IF NEEDED.

Q. AND IN WHAT PROFESSION ARE YOU EDUCATED?

A. I'M A MASTER OF SOCIAL WORKER, M.S.W., CLINICAL SOCIAL WORKER.

Q. AS A SOCIAL WORKER, DID YOU WORK AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AT A TIME IN THE PAST?
A. YES, I DID.
Q. WHEN DID YOU WORK THERE?
A. UMM, FROM JANUARY OF 1988 UNTIL THE FALL OF '91.
Q. AND WHEN YOU WENT IN JANUARY OF 1988, WHAT WERE YOU HIRED

[M. WILLIAMS 124]

TO DO?
A. AT THAT TIME I WAS -- I WAS AN INTERN WITH THE GRADUATE SCHOOL OF SOCIAL WORK AND THE MEDICAL UNIVERSITY OF SOUTH CAROLINA.
Q. IN THE BEGINNING OF 1988?
A. UMM-HMM.
Q. WHAT WERE YOUR JOBS? WHAT WAS YOUR JOB?
A. IN THE SPRING OF 1988 I WAS HIRED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AS A CLINICAL SOCIAL WORKER IN WORKING WITH ADULT PATIENTS FOR A PERIOD OF TIME. WHEN I DID MY INTERNSHIP, MY INTERNSHIP WAS WITH THE OB DIVISION.
Q. AND WHEN WAS THAT INTERNSHIP AGAIN?
A. THE INTERNSHIP WAS IN JANUARY UNTIL APPROXIMATELY MAY.
Q. AND MAY IS THEN WHEN YOU WERE HIRED?
A. RIGHT. I WAS HIRED IN MAY. AND I WORKED ON THE ADULT

SIDE. INPATIENT ONCOLOGY, AMONG OTHER SERVICES. SURGERY SERVICES.

Q. ARE YOU FAMILIAR WITH WHAT HAS BEEN REFERRED TO AS THE INTERAGENCY POLICY?

A. YES, I AM FAMILIAR WITH THAT.

Q. WERE YOU FAMILIAR WITH IT IN THE MONTHS BEFORE IT WAS ACTUALLY DEVELOPED IN THE SUMMER OF 1989?

A. YES, I WAS.

Q. DID YOU ATTEND ANY MEETINGS WHERE THE DEVELOPMENT OF THAT POLICY WAS DISCUSSED?

[M. WILLIAMS 125]

A. YES, I DID.

Q. CAN YOU DESCRIBE THOSE MEETINGS IN TERMS OF WHEN, WHERE, THAT SORT OF THING?

A. THE MEETINGS -- I CAN'T TELL YOU EXACT DATES. OR THE EXACT MEETING ROOM. BUT THERE WERE SEVERAL SUCH MEETINGS. AND IN THOSE MEETINGS THERE WAS A DISCUSSION OF WHAT THE MEDICAL UNIVERSITY WAS GOING TO DO IN RESPONSE TO, AS SHIRLEY BROWN PUT IT, A PERCEIVED EPIDEMIC AMONG PREGNANT BLACK WOMEN OF COCAINE ABUSE OR ADDICTION.

Q. AND WHO WAS AT THAT MEETING?

A. THERE WAS A ROTATION OF PEOPLE, BUT THE PEOPLE THAT I REMEMBER BEST WERE DR. NEWMAN, DR. HORGER, DR. SHAW. SHIRLEY

BROWN WAS IN ALL OF THE MEETINGS THAT I WAS IN.

Q. HOW MANY MEETINGS WERE YOU IN IN THE -- IN THE SUMMER OF 1989?

A. AT THIS POINT I WOULD HAVE TO GUESS, BUT MY BEST GUESSTIMATE IS ABOUT FOUR OR FIVE.

THE COURT: OKAY.

OKAY. GO AHEAD.

Q. DID YOU -- YOU SAID THAT YOU WERE INVOLVED IN MEETINGS CONCERNING THE INTERAGENCY POLICY IN THE SUMMER OF 1989. DID YOU HAVE ANY OTHER INVOLVEMENT IN THE DESIGN OF THE INTERAGENCY POLICY?

A. WELL, CAN YOU HEAR --

Q. PULL IT UP CLOSER TO YOU.

[P. WILLIAMS 126]

A. OKAY. I WAS INVOLVED IN A COMMITTEE OVER THE SUBSTANCE ABUSE COMMISSION IN MAKING PROPOSALS TOWARD AN IN-HOUSE ASSESSMENT TREATMENT, REFERRAL-TYPE PROGRAM IN CONJUNCTION WITH THE COMMISSION FOR WOMEN, BASED ON DR. CHASNOFF'S ILLINOIS MODEL.

Q. AND CAN YOU TELL US WHAT -- YOU USED THE TERM IN-HOUSE, WHAT DOES THAT REALLY MEAN?

A. WE HAD HAD A SUCCESSFUL -- WHAT WE CALL IN-HOUSE, WHEN A WOMEN WAS DISCOVERED TO HAVE BEEN COCAINE POSITIVE IN A DRUG

TEST, WHETHER SAY SHE DELIVERED IN THE HOSPITAL OR NOT,
WHETHER HER BABY WAS SHOWN TO BE POSITIVE AND TRANSFERRED TO
THE HOSPITAL, WE HAD BASICALLY THREE CATEGORIES. IT WOULD BE
A WOMEN WHO GAVE BIRTH AT MUSC, WHO SHE OR HER BABY WERE
COCAINE POSITIVE. A BABY WHO IS TRANSFERRED WHO WAS COCAINE
POSITIVE FROM ANOTHER HOSPITAL. SO WE HAD THREE. MOTHER OR
BABY OR TRANSFER.
AND THAT WOULD BASICALLY MEET THE CRITERIA FOR
ANYONE WE WOULD BE WILLING TO SEE. ONCE WE GOT THAT REFERRAL,
WE WOULD THEN ASSESS THE SITUATION. IN OTHER WORDS, WAS THIS
WOMEN A CHRONIC ABUSER, ADDICTED, A ONETIME USER. THINGS
ALONG THOSE LINES SO THAT WE KNEW WHAT WAS GOING ON, BECAUSE
TO LUMP ALL CASES INTO ONE IS NOT NECESSARILY CLINICALLY
PRUDENT.
Q. I'M NOT FOLLOWING YOU. WHEN YOU'RE DESCRIBING THE "WE"
THAT YOU'RE TALKING ABOUT?

[P. WILLIAMS 127]

A. WELL, AT THIS POINT IT WAS THE DIVISION OF SOCIAL WORK.
Q. THE DIVISION OF SOCIAL WORK WHERE?
A. AT MUSC.
Q. OKAY.

A. AND CERTAIN MEMBERS OF A COMMITTEE OVER AT THE SUBSTANCE ABUSE COMMISSION.
Q. THE CHARLESTON COUNTY?
A. HERE IN CHARLESTON, YES.
Q. THAT'S THE "WE" THAT YOU'RE TALKING ABOUT?
A. YES. WE HAD BEEN TALKING ABOUT PROVIDING SPACES AT MUSC IN ORDER TO DO THE ASSESSMENTS, THE REFERRALS, ETCETERA, OF THOSE WOMEN WHO WERE FOUND OR WHOSE BABIES WERE FOUND TO BE COCAINE POSITIVE. AND IT WASN'T JUST COCAINE.
Q. IF IT WASN'T JUST COCAINE?
A. WE WEREN'T FOCUSING ON JUST COCAINE, NO. WE WERE LOOKING AT ANY KIND OF SUBSTANCE ABUSE ISSUE THAT MIGHT ARISE, BE IT ALCOHOL ABUSE, AND OTHER TYPES OF DRUG ABUSE.
Q. DID THE REFERRAL PROCESS THAT YOU ARE TALKING ABOUT NOW INVOLVE ANY ARRESTS IN THAT PROCESS?
A. CERTAINLY NOT. IF I MAY, ONE OF THE THINGS IN THE AREA OF SUBSTANCE ABUSE AS A RULE, CRIMINALIZATION IS THE VERY LAST RESORT AND IS ONLY RECOMMENDED BY TREATMENT EXPERTS.
MS. SHOWERS: I'LL OBJECT FOR LACK OF FOUNDATION FOR THIS WITNESS TO GIVE OPINION TESTIMONY. SHE IS NOT LISTED AS AN EXPERT.

THE COURT: IS THAT CORRECT?
MS. DUNN: SHE HAS NOT BEEN LISTED.
THE COURT: LADIES AND GENTLEMEN. LADIES AND GENTLEMEN, DISREGARD THAT LAST ANSWER. SHE HAS NOT BEEN LISTED AS AN EXPERT. SHE IS A FACT WITNESS.
THE WITNESS: I'M SORRY.
THE COURT: LET'S GO ON DOWN TO THE FACTS SHE IS GOING TO TESTIFY TO.
Q. (BY MS. DUNN, CONTINUING) DID YOU HAVE OCCASION IN THE COURSE OF YOUR WORK AT THE MEDICAL UNIVERSITY TO ATTEND MEETINGS IN WHICH THE ISSUE OF STERILIZATION WAS DISCUSSED?
A. NOT MEETINGS SPECIFIC TO THAT SUBJECT, HOWEVER IN THE COURSE OF DOING, YOU KNOW, ON MY REGULAR JOB, IF WE WERE DISCUSSING A PATIENT'S DEMOGRAPHIC ISSUES, ANY KIND OF REFERRALS TO SOCIAL WORK IN REGARD TO A PATIENT, THERE WERE COMMENTS MADE SPECIFIC TO -- BY SHIRLEY BROWN SPECIFIC TO HER OPINIONS ON WHETHER OR NOT THE MOTHER SHOULD BE STERILIZED.
Q. AND WHAT WERE THE OPINIONS THAT YOU HEARD?
A. BASICALLY THAT THIS MOTHER SHOULD BE STERILIZED OR SHE -- YOU KNOW, I TALKED TO HER ABOUT BEING STERILIZED AND SHE WON'T BE STERILIZED.

Q. AND WHAT MOTHER WAS SHE TALKING ABOUT IN THAT SITUATION?
A. WELL THERE WERE FREQUENT INSTANCES. THIS WAS A HABITUAL BEHAVIOR ON SHIRLEY'S PART.
Q. BUT WHAT KIND OF PATIENT WAS SHE TALKING ABOUT?

[M. WILLIAMS 129]

A. A BLACK OR AFRICAN AMERICAN WOMAN PATIENT.
Q. DID SHE EVER TALK ABOUT IT IN CONNECTION WITH PATIENTS THAT WERE NOT IDENTIFIED AS PATIENTS WHO WERE AFRICAN AMERICAN?
A. NOT TO MY RECOLLECTION.
Q. WHEN YOU SAY THIS WAS OFTEN, DURING WHAT PERIOD OF TIME WOULD YOU HAVE BEEN INVOLVED IN THOSE CONVERSATIONS?
A. DO YOU MEAN -- DO YOU MEAN LIKE HOW MANY YEARS OR --
Q. YES. WHAT PERIOD OF TIME ARE WE TALKING ABOUT?
A. PRIOR TO THE INTERAGENCY POLICY BEING IMPLEMENTED, PROBABLY 80 - '88 UNTIL I LEFT IN '91.
Q. AND WHEN DID YOU LEAVE?
A. IN THE FALL OF '91.
Q. WERE YOU WORKING AT THE MEDICAL UNIVERSITY WHEN THERE WERE ARRESTS MADE UNDER THE INTERAGENCY POLICY?
A. YES, I WAS.
Q. DID YOU EVER HAVE OCCASION TO HAVE ANY CONVERSATIONS WITH

SHIRLEY BROWN CONCERNING HOW THE ARRESTS WERE MADE?
A. I HAD EXPRESSED CONCERNS PRIOR TO THE POLICY BEING IMPLEMENTED. ACTUALLY THE POLICY WAS FORMULATED ON THE HEELS OF THE PRACTICE. THE ARREST OCCURRED BEFORE THE POLICY WAS FORMED. SO I DID DISCUSS THAT I WAS NOT COMFORTABLE WITH THIS APPROACH TO SHIRLEY BROWN. I BROUGHT IT UP IN THOSE PREPLANNING MEETINGS. AND I ALSO DISCUSSED THIS WITH MY SUPERVISOR AND DIRECTOR.

[M. WILLIAMS 130]

Q. DID YOU EVER HAVE OCCASION AFTER THE ARRESTS -- AFTER THAT POLICY HAD BEEN IN PLACE AND ARRESTS HAD BEEN MADE, WERE YOU PART OF ANY CONVERSATION WITH SHIRLEY BROWN WHERE SHE DISCUSSED WHO WAS BEING ARRESTED?
A. YES.
Q. AND WHAT WAS THAT CONVERSATION?
A. AT A POINT WHEN A WOMEN WAS BEING ARRESTED AND LEAVING A UNIT, SHIRLEY BROWN MENTIONED THAT, WE HAD BETTER ARREST A WHITE WOMEN SOON OR THEY'RE GOING TO THINK I'M A RACIST.
Q. AND WHEN WAS THAT COMMENT MADE? CAN YOU PINPOINT THAT IN TIME?
A. I BELIEVE THAT IT WAS IN THE LAST YEAR -- MY LAST YEAR

BETWEEN '90 AND '91. I CAN'T PINPOINT IT.
Q. WAS IT AT THE HOSPITAL THAT YOU HEARD THAT COMMENT?
A. YES. ALL OF THESE CONVERSATIONS TOOK PLACE AT THE HOSPITAL.
Q. IN CONNECTION WITH YOUR POSITION IN SOCIAL WORK, DO YOU HAVE SOME TRAINING IN SUBSTANCE ABUSE IN MAKING SUBSTANCE ABUSE REFERRALS?
A. I HAVE MORE THAN SOME TRAINING.
Q. WHAT TRAINING DO YOU HAVE?
A. NOT ONLY IN MY INTERNSHIPS IN GRADUATE SCHOOL, BUT INPATIENT PSYCHIATRIC AND SUBSTANCE ABUSE HOSPITALS. AS WELL AS TRAINING THROUGH THE SOUTH CAROLINA SCHOOL FOR DRUG AND ALCOHOL STUDIES AT CLEMSON.

* * *

[M. WILLIAMS 132]

THE WITNESS: AND THIS IS WHAT SHE WAS TO DO.
MS. SHOWERS: THIS IS BEYOND THE SCOPE OF THIS WITNESS.
THE COURT: I DON'T KNOW WHAT HER RELIGIOUS BELIEFS HAVE TO DO WITH THIS, BUT I'LL LET YOU PROCEED JUST A LITTLE BIT FURTHER.
Q. (BY MS. DUNN, CONTINUING) IN CONNECTION WITH MS. BROWN'S RELIGIOUS BELIEFS, DID YOU COME TO KNOW HER OPINIONS IN

RELATIONSHIP TO INTERRACIAL RELATIONSHIPS?
A. I DID. AGAIN IN THE COURSE OF DISCUSSING DEMOGRAPHICS WITH A CASE AND A REFERRAL, IF IT BECAME APPARENT THAT THIS WAS BIRACIAL CHILD, SHE WOULD SAY THAT THIS IS NOT RIGHT, IT'S NOT GOD'S WAY. IT'S NOT GOD'S WILL.
Q. DID YOU HEAR THAT ON ONE OCCASION?
A. SEVERAL OCCASIONS.
Q. AND IN WHAT TIME-FRAME?
A. LET'S PUT IT THIS WAY, I DIDN'T NOT HEAR IT FROM HER. UNDER THOSE CIRCUMSTANCES THERE WAS A BRIEF SIX-MONTH PERIOD WHEN I WORKED AT MUSC IN THE SPRING OF '88 WHERE I WAS WORKING IN THE ADULT SIDE IN A DIFFERENT AREA. SO THAT WHEN I MOVED OVER TO THE NEONATAL INTENSIVE CARE UNIT, JUST PRIOR TO THE IMPLEMENTATION OF THAT POLICY, IT WAS ROUTINE. I ALSO HAD HEARD IT WHEN I WAS DOING MY GRADUATE INTERNSHIP THERE AS WELL.
Q. WAS THIS COMMON KNOWLEDGE IN THE WORK ENVIRONMENT?

[M. WILLIAMS 133]

A. YES, IT WAS COMMON KNOWLEDGE.
MS. DUNN: NO FURTHER QUESTIONS, YOUR HONOR.

CROSS-EXAMINATION

BY MS. SHOWERS:

Q. GOOD AFTERNOON. MS. WILLIAMS, YOU WERE A SOCIAL WORKER IN THE DEPARTMENT OF PEDIATRICS, NOT OBSTETRICS, CORRECT?

A. MY BASE WAS THE NEONATAL INTENSIVE CARE UNIT. AND WHEN I LEFT THE MEDICAL UNIVERSITY I WAS THE SUPERVISOR OR -- JUST PRIOR TO LEAVING THE MEDICAL UNIVERSITY I WAS THE SUPERVISOR OVER THE PEDIATRIC HOSPITAL, BUT I ALSO WAS DESIGNATED BY LYNN FREDRICK, OUR DIRECTOR, TO COVER THE OUTPATIENT OB CLINIC, INPATIENT OB CLINIC, AS WELL AS THE WELL BABY NURSERY.

Q. YOU MAY HAVE SEEN SHIRLEY BROWN IN THE HALLWAY EVERYDAY, BUT DID YOU NOT INTERACT WITH HER ON A PROFESSIONAL LEVEL ON A DAILY BASIS, DID YOU?

A. TO THE CONTRARY, I INTERACTED WITH HER ON A PROFESSIONAL LEVEL ON A DAILY BASIS AS A RULE.

Q. YOU CANNOT RECALL HOW MANY PATIENTS YOU WITNESSED MS. BROWN INTERACT WITH CONCERNING THIS POLICY, CORRECT? ON A DAILY BASIS?

A. ONCE THE CRIMINALIZATION PROCESS BEGAN

Q. PLEASE ANSWER MY QUESTION. YOU CANNOT RECALL HOW MANY PATIENTS YOU WITNESSED MS. BROWN INTERACT WITH ON A DAILY BASIS, CORRECT?

A. WELL THAT'S ANOTHER QUESTION. WHICH QUESTION DO YOU WANT

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[M. WILLIAMS 135]

Q. SPECIFIC DATES AND TIMES?
A. WELL, I THINK WE HAVE A DIFFERENT DEFINITION OF CIRCUMSTANCES MAYBE.
Q. SO THE ANSWER TO MY QUESTION IS NO, CORRECT?
A. IT DEPENDS ON WHAT YOU MEAN BY CIRCUMSTANCE. I'M UNCLEAR WHAT YOU MEAN BY THAT.
Q. SPECIFIC DATES AND TIMES?
A. NO, I CANNOT REMEMBER THAT.
Q. THEN YOU AGREE WITH ME THAT YOU OBSERVED SHIRLEY BROWN SPEAK WITH THREE OR LESS WOMEN ABOUT THE INTERAGENCY POLICY, CORRECT?
A. THAT IS CORRECT.
Q. AND ALL THREE OF THEM WERE BLACK WOMEN, CORRECT?
A. THAT IS CORRECT.
Q. YOU NEVER SAW HER INTERACT WITH A WHITE WOMEN, CORRECT?
A. CAN YOU ASK THAT QUESTION AGAIN, PLEASE.
Q. YOU NEVER SAW HER INTERACT WITH A WHITE WOMEN CONCERNING THE INTERAGENCY POLICY, CORRECT?
A. I DON'T THINK THERE HAD BEEN A WHITE WOMEN INVOLVED IN THAT BEFORE I LEFT.
Q. THAT WAS NOT MY QUESTION. PLEASE ANSWER MY QUESTION.
A. I LEFT BEFORE A WHITE WOMEN WAS INVOLVED.
THE COURT: SHE ASKED YOU A SPECIFIC QUESTION

WHETHER OR NOT YOU EVER SAW HER INTERACT WITH A WHITE WOMEN, YES OR NO?

[M. WILLIAMS 136]

A. NO.
Q. YOU ALWAYS LEFT THE ROOM WHEN MS. BROWN BEGAN TO INTERACT WITH A PATIENT ABOUT THE INTERAGENCY POLICY, CORRECT?
A. YES.
Q. YOU DID NOT WANT TO BE INVOLVED IN THE POLICY, CORRECT?
A. NO, WE HAD DESIGNATED ANOTHER SOCIAL WORKER TO HANDLE THAT.
Q. AND AS TO HOW THE POLICY WORKED, YOU WERE NOT AWARE THAT A PHYSICIAN DICTATED WHICH PATIENTS WERE TESTED, WERE YOU?
A. TO HEAR SHIRLEY BROWN TELL IT, SHE DECIDED THAT.
Q. NO, MS. WILLIAMS, MY QUESTION IS: YOU WERE NOT AWARE THAT A PHYSICIAN WAS THE ONE WHO DECIDED WHICH PATIENTS WERE TESTED, WERE YOU?
A. I WAS TOLD BY SHIRLEY BROWN WHO SHE DIRECTED THE PHYSICIAN TO TEST.
Q. DID YOU EVER SEE HER DO THAT?
A. NO, I DID NOT.
Q. AND YOU WERE NOT AWARE THAT IT WAS THE SUBSTANCE ABUSE TREATMENT PROFESSIONALS WHO DECIDED WHO WAS OR WHO WAS NOT SUCCESSFUL WITH SUBSTANCE ABUSE TREATMENT, AND THUS SHOULD BE

REPORTED TO LAW ENFORCEMENT, WERE YOU?
A. COULD YOU ASK THAT AGAIN, PLEASE.
Q. YOU WERE NOT AWARE THAT THE SUBSTANCE ABUSE TREATMENT PROFESSIONALS WERE THE ONES WHO DECIDED WHICH PATIENTS WERE COMPLIANT WITH THE TREATMENT, AND THOSE WHO WERE NOT COMPLIANT

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[M. WILLIAMS 139]

A. I WANT TO JUST MAKE SURE THAT I HAVE GOT YOUR QUESTION CORRECTLY. WAS I PRESENT WHEN THE DECISION TO?
Q. TO TEST A PATIENT UNDER THE POLICY WAS MADE?
A. ON THE NEONATAL UNIT I WAS.
Q. HOW ABOUT IN THE OB UNIT?
A. NOT IN THE OB UNIT, NO, BECAUSE MY BASE WAS NEONATAL INTENSIVE CARE UNIT.
Q. AND YOU AGREE WITH ME THAT YOU DID NOT HAVE THE WHOLE PICTURE OF WHAT WAS GOING ON WITH THIS POLICY, DID YOU?
A. CERTAINLY NOT.
Q. AND YOU AGREE WITH ME THAT YOU DO NOT KNOW OF ANY INSTANCES WHERE ANY OTHER OF THE NAMED DEFENDANTS IN THIS CASE MADE ANY STATEMENTS THAT YOU WOULD TERM RACIALLY DEROGATORY, CORRECT?
A. COULD YOU PLEASE REPEAT THAT QUESTION.

Q. YOU AGREE WITH ME THAT YOU DO NOT KNOW OF ANY INSTANCES WHERE ANY OF THE OTHER NAMED DEFENDANTS IN THIS CASE MADE ANY STATEMENT THAT YOU TERM RACIALLY DEROGATORY, CORRECT?

A. ARE YOU ASKING ME IF ANY OF THE OTHER PEOPLE -- IF I HEARD ANYBODY ELSE OTHER THAN SHIRLEY BROWN MAKE RACIAL REMARKS?

Q. YES.

A. NO, I DID NOT.

MS. SHOWERS: COULD I HAVE A MOMENT, YOUR HONOR.

(PAUSE IN PROCEEDINGS.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM TESTIMONY OF PATRICIA WILLIAMS

[PATRICIA WILLIAMS 210]

REALLY KNOW.
THE COURT: SPEAK INTO THE MICROPHONE, PLEASE.
THE WITNESS: OKAY. YES.
Q. (BY MS. DUNN, CONTINUING) AND WHERE DID YOU GO INITIALLY TO GET PRENATAL CARE?
A. FIRST I WENT TO NORTH CHARLESTON HEALTH DEPARTMENT.
Q. AND WHERE IS THAT?
A. NORTH CHARLESTON.
Q. AND ABOUT - DO YOU RECALL HOW FAR ALONG IN THAT PARTICULAR PREGNANCY YOU WERE WHEN YOU WENT TO THAT? WHEN YOU FIRST GOT PRENATAL CARE?
A. PROBABLY ABOUT FIVE OR SIX MONTHS, I'M NOT REALLY SURE
Q. DID YOU CONTINUE TO GET YOUR PRENATAL CARE THERE?
A. NO. I GOT TRANSFERRED TO MUSC.
Q. AND DO YOU RECALL ABOUT WHEN YOU WERE TRANSFERRED?
A. RIGHT AROUND JANUARY. I'M NOT SURE.
Q. JANUARY OF 1992?
A. UMM-HMM.
Q. WHEN YOU SAY YOU WERE TRANSFERRED TO THE MEDICAL

UNIVERSITY OF SOUTH CAROLINA, WHAT PART OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. I THINK IT WAS HIGH RISK.
Q. HIGH RISK WHAT?
A. CLINIC.
Q. DO YOU REMEMBER WHERE AT THE HOSPITAL THAT WAS LOCATED?

[PATRICIA WILLIAMS 211]

A. OB-GYN.
Q. AND DID YOU CONTINUE THEN TO GET PRENATAL CARE AT THE HIGH RISK CLINIC AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA?
A. YES, I DID.
Q. DID YOU GO REGULARLY?
A. YES.
Q. DO YOU RECALL EVER HAVING A UDS DRUG SCREEN DONE ON YOU WHEN YOU WERE GETTING PRENATAL CARE?
A. A WHAT?
Q. A UDS DRUG SCREEN?
A. YES.
Q. WHAT IS THAT? A SCREEN TO DETERMINE WHETHER YOU WERE USING DRUGS?
A. YES, I HAD IT DONE.
Q. AND WHEN WAS YOUR FIRST MEMORY OF THAT?
A. THE FIRST TIME I WENT, WHICH WOULD HAVE BEEN IN JANUARY, I BELIEVE.
Q. DID YOU KNOW THE DRUG SCREEN WAS GOING TO BE TAKEN BEFORE IT WAS TAKEN?
A. YES.

Q. AND WHAT HAPPENED THEN?
A. WELL, WHEN I FIRST WENT - WELL I ASKED TO GO TO MUSC BECAUSE I HAVE A PROBLEM.
Q. WHAT WAS YOUR PROBLEM?
A. DRUGS, OKAY?

[PATRICIA WILLIAMS 212]

Q. WHEN YOU SAY YOU ASKED, WHO DID YOU ASK?
A. I REQUESTED FROM THE NORTH AREA CLINIC. I ASKED THEM FROM THE CLINIC IN NORTH CHARLESTON TO GO THERE BECAUSE I FELT I NEEDED HELP.
Q. WHAT DID YOU NEED HELP WITH?
A. MY COCAINE PROBLEM.
Q. AND WHEN YOU WENT TO THE MEDICAL UNIVERSITY, DID YOU REPEAT - DID YOU REPORT YOUR PROBLEM TO THE PEOPLE THERE?
A. YES, I DID.
Q. DO YOU RECALL WHO YOU TALKED TO?
A. I SPOKE TO SHIRLEY BROWN, I BELIEVE.
Q. DID YOU SPEAK TO HER THE FIRST TIME THAT YOU WENT TO THE PRENATAL CLINIC?
A. I DON'T REALLY RECALL.
Q. DO YOU RECALL WHAT ELSE HAPPENED WHEN YOU WENT TO THE PRENATAL CARE THERE?
A. OKAY. AFTER I REQUESTED THAT, YOU KNOW, THAT WAS POSITIVE AND THEN, YOU KNOW, I WAS GOING IN - LIKE EVERY TWO

WEEKS IN THE BEGINNING, YOU KNOW. AND, WELL, I WENT THERE SEEKING HELP, YOU KNOW, BUT I DIDN'T REALLY GET IT, SO.

Q. DID YOU GET REFERRED TO SOME KIND OF SUBSTANCE ABUSE TREATMENT?

A. YEAH. SHE WANTED ME TO GO TO -

Q. WHEN YOU SAY SHE, WHO?

A. SHIRLEY BROWN. CHARLESTON COUNTY SUBSTANCE ABUSE.

[PATRICIA WILLIAMS 213]

Q. DID YOU DO THAT?

A. WELL, AT THAT TIME I DIDN'T HAVE ANYBODY TO KEEP THE KIDS AND I DIDN'T HAVE TRANSPORTATION, YOU KNOW. AND WELL, YOU KNOW, I EXPLAINED ALL OF THAT TO HER AND SHE SAID THAT WAS MY PROBLEM.

Q. LET ME INTERRUPT YOU. WHEN YOU SAY YOU DIDN'T HAVE THAT, WHAT OTHER KIDS DID YOU HAVE?

A. WELL I HAD THREE OTHER - WELL TWO OTHER CHILDRENS WITH ME.

Q. WHAT WERE THEIR AGES IN THE TIME FRAME THAT WE'RE TALKING ABOUT?

A. OKAY. MY SON WAS 14. 14. AND MY DAUGHTER, SHE WAS, I GUESS, NINE.

Q. GO BACK. YOU REPORTED THAT - THE PROBLEMS. AND WHAT WAS THE RESPONSE FROM MS. BROWN?

A. SHE SAID IT WAS MY PROBLEM WITH THE KID.
Q. DID YOU EVER GO TO SUBSTANCE ABUSE TREATMENT DURING THE PRENATAL CARE?
A. NO, I DIDN'T.
Q. DID YOU CONTINUE GOING FOR PRENATAL CARE?
A. YES, I DID.
Q. AND WHAT HAPPENED AS YOU WENT BACK FOR PRENATAL CARE?
A. WELL, EVERY TIME I WENT BACK, YOU KNOW, IT JUST IT WASN'T WHAT I WAS LIKE LOOKING FOR, YOU KNOW, IT WAS LIKE A PUT DOWN AND STUFF LIKE THIS, YOU KNOW. AND EVERY TIME I WENT, YOU

[PATRICIA WILLIAMS 214]

KNOW IT WAS LIKE - LIKE -
Q. I'M UNSURE IF THE MIKE IS STILL ON.
A. YES? OKAY. YOU KNOW, LIKE EVERY TIME I WENT THERE THEY PUT ME DOWN AND TREATED ME LIKE, YOU KNOW, I DIDN'T HAVE NO RIGHTS AND - AND, YOU KNOW, IT DIDN'T HELP. IT DIDN'T HELP MY SITUATION, YOU KNOW, SO I DIDN'T GET WHAT I WAS LOOKING FOR.
Q. MS. WILLIAMS, YOU SAID THAT YOU PUT DOWN. COULD YOU BE MORE SPECIFIC WHAT YOU WERE TALKING ABOUT?
A. YOU KNOW, I WAS TREATED LIKE I DIDN'T HAVE ANY RIGHTS IN THE WORLD, YOU KNOW, LIKE AN ANIMAL.
Q. AND WHO TREATED YOU THAT WAY?

A. SHIRLEY BROWN DID.
Q. CAN YOU RECALL ANYTHING SPECIFIC THAT SHE SAID TO YOU THAT MADE YOU FEEL THAT WAY?
A. WELL, YOU KNOW, LIKE A LOT OF THE CONSENT FORMS AND STUFF SHE PRESENTED, IT WAS LIKE STATED TO ME WHETHER - I SIGN THEM OR NOT, YOU KNOW, WHATEVER IT WAS WAS GOING TO GET DONE WHETHER I SIGNED OR NOT. YOU KNOW. AND -
Q. KEEP TALKING AS LOUD AS YOU CAN.
A. YOU KNOW, JUST, JUST THINGS LIKE THAT SHE WOULD SAY TO ME.
Q. AND HOW DID YOU RESPOND THEN WHEN SHE SPOKE TO YOU?
A. HOW DID I RESPOND? WELL, I WAS LIKE ANGRY AND STUFF, YOU KNOW, AND EVERY TIME - EVERY TIME IT WAS TIME FOR ME TO LIKE

[PATRICIA WILLIAMS 215]

GO FOR MY CHECKUP LIKE I WAS DELIBERATELY USE, YOU KNOW.
Q. WHY WOULD YOU DELIBERATELY USE?
A. BECAUSE I WAS LOOKING FOR HELP AND, YOU KNOW, JUST THE WAY I WAS TREATED AND TALKED TO, YOU KNOW, JUST MADE ME REBEL, I GUESS. MADE ME ANGRY.
Q. DID YOU TEST POSITIVE FOR DRUGS ON A DRUG SCREEN ANOTHER TIME BEYOND THE TIME THAT YOU DESCRIBED YOUR FIRST TIME?
A. YOU MEAN WITH MY BUSINESS AT THE CLINIC?

Q. YES.
A. YES.
Q. DO YOU RECALL WHEN YOU TESTED POSITIVE FOR A SECOND TIME?
A. I THINK PROBABLY THE SECOND TIME I WENT BACK, I'M NOT SURE.
Q. WERE YOU USING COCAINE ALL THROUGH THAT PREGNANCY?
A. NO, NOT ALL THROUGH.
Q. WHAT - HOW DID YOU USE IT? WHAT DID YOU DO?
A. PUT IN THE CIGARETTE.
Q. HOW OFTEN WOULD YOU USE?
A. I DON'T REALLY RECALL, BUT IT WASN'T THAT OFTEN. AND LIKE I WASN'T - I WASN'T - WELL, I DON'T KNOW HOW TO EXPLAIN IT, YOU KNOW, BUT WHEN I USE AND STUFF I DIDN'T LIKE REALLY INHALE - INHALE, YOU KNOW. AND THEN I WAS ALSO PRAY. YOU KNOW.
Q. DO YOU RECALL WHEN YOU WENT TO THE PRENATAL CLINIC FOR THE LAST TIME BEFORE YOUR CHILD WAS BORN?

[PATRICIA WILLIAMS 216]

A. NO, I DON'T.
Q. DID YOU GET ANY KIND OF SUBSTANCE ABUSE TREATMENT BEFORE YOUR CHILD WAS BORN?
A. NOT BEFORE.
Q. WERE YOU OFFERED ANY SUBSTANCE ABUSE TREATMENT THROUGH THE MEDICAL UNIVERSITY OTHER THAN THE REFERRAL TO CCSAC?

A. TO WHAT?
Q. OTHER THAN THE REFERRAL TO THE CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION?
A. NO, I WASN'T.
Q. BEFORE YOUR CHILD WAS BORN?
A. NO.
Q. DID YOU COME TO HAVE THE CHILD?
A. YES, I DID.
Q. CAN YOU DESCRIBE THE CIRCUMSTANCES OF THE DELIVERY?
A. OKAY. WELL, WHEN I WENT IN TO HAVE MY -
Q. YOU NEED TO SLOW DOWN A LITTLE BIT. OKAY? SO THAT WE CAN HEAR YOU AND IT'S LOUD ENOUGH.
THE COURT: YOU LET HER ANSWER THE QUESTION.
A. OKAY. MY LITTLE BOY, HE IS FOUR, HE - HIS NAME IS TEVON WILLIAMS. AND WHEN I WENT IN - WHEN I WENT IN TO HAVE HIM, YOU KNOW, I DON'T KNOW WHETHER IT WAS JUST ME, BUT I WASN'T TREATED THE WAY WITH THE OTHER TWO CHILDREN, YOU KNOW. IT WAS LIKE BECAUSE I USED DRUGS THEY KIND OF LIKE TREATED YOU DIFFERENTLY. THEY DIDN'T SPEND A WHOLE LOT OF TIME IN THE

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[PATRICIA WILLIAMS 220]

NORTH AREA OF DORCHESTER AND WENT TO THE MUSC.
Q. DO YOU RECALL WHETHER - WHETHER YOU HAD ANY ANESTHESIA

OF ANY SORT, WHETHER YOU WERE KNOCKED OUT AT ALL TO HAVE YOUR BABY?

MS. SHOWERS: I OBJECT TO RELEVANCE.

THE COURT: I DON'T KNOW WHY THAT WOULD BE RELEVANT. I SUSTAIN THE OBJECTION.

MS. DUNN: YOUR HONOR, WE WOULD SAY IT WOULD BE RELEVANT IN TERMS OF THE STORY IN TERMS OF THE TIME SEQUENCE AND WHAT HER CONDITION WAS.

THE COURT: THEN THE QUESTION IS OBJECTIONABLE BECAUSE IT'S LEADING.

MS. DUNN: ALL RIGHT.

Q. (BY MS. DUNN, CONTINUING) MS. WILLIAMS, WHAT DO YOU RECALL ABOUT WHAT HAPPENED TO YOU AT THE HOSPITAL BETWEEN THE TIME THAT YOU ARRIVED AT THE HOSPITAL IN THE CAB AND THE TIME PERIOD IN WHICH YOUR CHILD WAS ACTUALLY BORN?

A. WELL, THEY LIKE CHECKED ME WHEN I GOT THERE AND STUFF AND SAID - THEN THEY SAID THAT, YOU KNOW, I WAS UNSTEADY. AND THEN THEY CHECKED MY URINE AGAIN AND THEN THEY, YOU KNOW, PUT ME IN THE ROOM. AND, YOU KNOW, THEY PUT THE MONITOR ON YOU. AND THEN KIND OF LIKE, YOU KNOW, LIKE, YOU KNOW, I WAS THERE FOR AWHILE. AND A GIRLFRIEND OF MINE WAS THERE WITH ME. AND SHE WOULD HAVE TO GO GET THEM TO COME AND CHECK ON ME AND

STUFF. YOU KNOW. AND - AND THEN WHEN THE PAIN STARTED

[PATRICIA WILLIAMS 221]

GETTING CLOSER, THE CONTRACTION STARTED GETTING CLOSER AND THERE WAS TOO LATE FOR THEM TO GIVE ME THE - I CAN'T REMEMBER THE NAME OF THE THING, BUT THEY GAVE ME THIS STUFF WHERE THEY - I FORGET WHAT YOU CALL IT, BUT THEY PUT IT ON YOUR BACK AND THEN LIKE USING THE NEEDLE TO PUT IT, YOU KNOW, FOR THE MEDICINE TO WORK ON YOU. BUT, THEY DID THAT AT THE LAST MINUTE, YOU KNOW. AND THE AFTER BIRTH, YOU KNOW, AND TUBE LIGATION, JUST - OKAY THEY HAD THIS - I HAD A MALE NURSE AND HE WAS REALLY KIND OF LIKE, YOU KNOW, LIKE HEAVYSET, YOU KNOW. AND JUST THE WAY HE HANDLED ME, HE WOULD LIKE - IT WASN'T TOO PLEASANT.

Q. AFTER YOUR CHILD WAS BORN, DID YOU STAY IN THE SAME ROOM WHERE THE CHILD WAS BORN OR WERE YOU MOVED SOMEWHERE ELSE?

A. AFTER THEY CLEANED ME UP AND STUFF THEY MOVED ME TO ANOTHER ROOM.

Q. AND HOW LONG DID YOU STAY IN THAT ROOM?

A. I STAYED IN THE ROOM UNTIL - UNTIL THE TIME WHEN I GOT UP TO GO HOME.

Q. WHY DID YOU THINK YOU WERE GOING TO GO HOME?
A. BECAUSE AFTER - OKAY, AFTER I HAD THE TUBE LIGATION THEY TOOK ME BACK TO MY ROOM AND THE NEXT DAY I WAS GOING TO GO HOME AND I - THEY TOLD ME I WAS GOING TO GO HOME. AND - BUT I DIDN'T GO HOME, YOU KNOW. AND -
Q. WHAT HAPPENED?
A. HUH? WHAT HAPPENED WAS, WELL, I HAVE A COUSIN THAT WORKS

[PATRICIA WILLIAMS 222]

AT MUSC, SHE IS A SERGEANT OR SOMETHING AND SHE SAID - I WAS KIND OF LIKE WORRIED ABOUT BEING ARRESTED, AND SHE TOLD ME IF THEY HADN'T TOLD ME THAT I WASN'T GOING TO BE ARRESTED YET THAT I WASN'T AND I WOULD HAVE BEEN PUT IN A SPECIAL ROOM. AND SO I JUST THOUGHT I WAS GOING TO GO HOME. AND I CALLED MY COUSIN TO COME AND PICK ME UP. AND AFTER MY COUSIN GOT THERE, THAT'S WHEN I FOUND OUT THAT I WASN'T GOING TO GO HOME.
Q. HOW DID YOU FIND THAT OUT?
A. DETECTIVE WARING, I BELIEVE HER NAME WAS, AND SHIRLEY BROWN AND ANOTHER SECURITY CAME AND TOOK ME DOWN TO ANOTHER ROOM AND -
Q. WHAT WERE YOU WEARING AT THE TIME?
A. I WAS WEARING THIS SAME STUFF I WORE IN TO HAVE MY BABY

WHICH WAS STRETCH PANTS AND A SWEATSHIRT. AND THEY TOLD ME, YOU KNOW, THEY READ ME MY RIGHTS, WHICH WAS DISTRIBUTION TO A MINOR. AND I WAS KIND OF LIKE SHOCKED. I SAID THAT I NEVER SOLD DRUGS. I USED IT BUT I NEVER SOLD. AND THEY SAID IT WAS FOR USING WHILE I WAS PREGNANT. AND SO I WAS LIKE SO SHOCKED, YOU KNOW. SO I WANTED TO SEE MY COUSIN, AND SHE WENT DOWN TO GET THE CAR, TO TELL HER I WASN'T GOING HOME. AND WELL I JUST NEEDED SOMEBODY TO LIKE REALLY HOLD ME. AND - BUT THEN I WASN'T ALLOWED TO SEE HER BECAUSE SHIRLEY BROWN FIGURED THAT WE WOULD MAKE A SCENE, SO I CAN'T REMEMBER WHAT MR. EDWARD - I KNOW SOMEBODY WAS THERE AT THE MEDICAL UNIVERSITY AT THE TIME IN THE ROOM WITH US. AND HE SAID THAT HE DIDN'T SEE ANY

[PATRICIA WILLIAMS 223]

HARM IN ME SEEING MY COUSIN AND LETTING HER KNOW I WASN'T GOING HOME. BUT BY THE TIME HE GO LOOKING FOR HER AND CAME BACK, SHIRLEY BROWN DONE WHEELED ME AROUND AND OUT OF THE ROOM AND DOWN THE HALLWAY TOWARD THE POLICE CAR. AND –

Q. DURING THE PERIOD OF TIME WHEN YOU WERE IN THE ROOM, WITH - WHEN YOU WERE READ YOUR RIGHTS AND THE CIRCUMSTANCES THAT

YOU JUST DESCRIBED, HOW DID YOU FEEL? WHAT WERE YOU FEELING DURING THAT TIME?

A. I WAS IN SHOCK.

Q. AND WHAT DOES THAT MEAN?

A. I MEAN, YOU KNOW, I COULDN'T BELIEVE THAT IT WAS HAPPENING AND STUFF, YOU KNOW. IT WASN'T AWARE THAT IT WAS GOING TO HAPPEN. EVERYBODY KNEW EXCEPT ME BECAUSE ONE OF MY COUSINS THAT WORK THERE, YOU KNOW, SHE CAME INTO MY ROOM WHEN I WAS GETTING DRESSED AND WAS ALL EXCITED ABOUT GOING HOME AND SHE JUST CALLED MY NAME AND SHE TURN AND WALK AWAY, BUT I HEARD THE TEARS IN HER VOICE AND YOU KNOW. AND THEN TOO THEY WERE LIKE STALLING ME AND STUFF BECAUSE I WAS SUPPOSED TO HAVE BEEN GONE SINCE AROUND 12 AND THEY KEPT STALLING ME THAT THEY WERE WAITING ON SOMETHING, BUT NOBODY EVER TOLD ME THAT I WAS GOING TO GO TO JAIL.

Q. WHAT DO YOU MEAN THEY KEPT STALLING YOU?

A. WELL THEY KEPT LIKE THEY HAD TO WAIT ON SOMETHING - SOMETHING ABOUT MY RELEASE OR SOMETHING BEFORE I LEAVE THE HOSPITAL, YOU KNOW. AND I GUESS ALL OF THIS TIME SHE WAS JUST

[PATRICIA WILLIAMS 224]

GETTING THE STUFF SET UP WHERE THEY COULD LEGALLY ARREST ME.

Q. WHO WAS THE "THEY" THAT YOU REFERRED TO?
A. WELL SHIRLEY BROWN AND THE DETECTIVE, WHOEVER MADE THE DECISION FOR ME TO GO TO JAIL.
Q. YOU HAVE DESCRIBED BEING IN THE ROOM AND BEING ARRESTED. WHAT HAPPENED AFTER THAT?
A. REPEAT THAT.
Q. WHAT HAPPENED NEXT? WHAT HAPPENED AFTER YOU LEARNED THAT YOU WERE UNDER ARREST?
A. WELL, YOU KNOW, LIKE I SAID I WAS IN SHOCK AND STUFF. AND I WANTED TO SEE MY COUSIN TO LET HER KNOW, YOU KNOW. AND YOU KNOW, JUST SOMEBODY TO HUG OR SOMETHING, YOU KNOW. BUT SHIRLEY BROWN WOULDN'T PERMIT IT. AND, YOU KNOW.
Q. WHAT HAPPENED NEXT?
A. SO AFTER THAT, YOU KNOW, THEY - WELL, YOU KNOW, AFTER THEY READ ME MY RIGHTS AND STUFF THEY PUT THE CUFFS ON ME AND SHACKLES.
Q. DESCRIBE THE CUFFS AND THE SHACKLES, PLEASE.
A. AROUND THE WAIST. AND -
Q. WHAT WENT AROUND YOUR WAIST?
A. THE CHAIN THE SHACKLES AND - AND THEN THEY - AND THEN THEY CUFFED MY HANDS AND THEN THEY PUT SOMETHING ON MY LEG TOO AFTER I GOT IN THE CHAIR, THE WHEELCHAIR. AND THEN THEY THREW A SHEET OVER ME.
Q. WHO THREW A SHEET OVER YOU?

[PATRICIA WILLIAMS 225]

A. I THINK IT WAS DETECTIVE WARING. OR SHIRLEY BROWN. ONE OF THEM.
Q. AND ONCE YOU'RE IN THE CHAIR, THEN WHAT HAPPENED?
A. WELL, LIKE I SAID, ONE OF THE PEOPLE THAT WORK FOR THE HOSPITAL WENT TO FIND MY COUSIN SO I COULD LET HER KNOW THAT I WASN'T GOING TO GO HOME WITH HER. AND I, YOU KNOW, SHIRLEY BROWN DIDN'T WANT HIM TO DO THAT BECAUSE SHE FIGURED WE WERE GOING TO MAKE A SCENE. AND WHEN HE WENT LOOKING FOR HER, SHIRLEY BROWN WHEELED THE CHAIR OUT THE ROOM AND PUSHED ME ON DOWN THE HALL. AND DETECTIVE WARING TOOK ME FROM THERE AND TOOK ME OUT TO THE POLICE CAR TO THE CRUISER.
Q. DO YOU RECALL WHAT FLOOR YOU WERE ON?
A. NO, I DON'T.
Q. DO YOU RECALL HOW FAR IT WAS FROM YOUR ROOM TO HOWEVER YOU GOT OFF THE FLOOR?
A. NO. NO, I DON'T RECALL ALL OF THAT.
Q. HOW DID YOU FEEL ON THE WAY FROM THE ROOM TO THE CAR?
A. I MEAN, I COULDN'T - WELL, I HAD FELT LIKE A NOBODY. I COULDN'T REALLY BELIEVE THAT THAT WAS ACTUALLY HAPPENING, YOU KNOW.
Q. AND WHEN YOU GOT TO THE CAR, HOW DID YOU GET IN THE CAR?

A. DETECTIVE WARING, YOU KNOW, SHE HELPED ME OUT THE WHEELCHAIR.
Q. HOW DID SHE HELP YOU?
A. SHE TOOK THE, YOU KNOW, THE STUFF THAT HOLD YOUR LEG AND

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[PATRICIA WILLIAMS 227]

Q. HOW DID IT HAPPEN?
A. WELL, THEY JUST TOOK ME AND LIKE THEY USUALLY DO, JUST FINGERPRINTED ME.
Q. AND WHAT HAPPENED AFTER THE FINGERPRINTING?
A. IT WAS SO LONG AGO I'M TRYING TO REMEMBER. AFTER THE FINGERPRINTING, WELL I DON'T KNOW WHAT ALL THEY DID FIRST. ALL I KNOW WAS THAT I WAS FINGERPRINTED, PICTURE TOOKEN AND THEN THEY GO THROUGH YOUR PURSE AND ALL OF THAT.
Q. WHAT DID YOU SAY?
A. ALL I REMEMBER THEM GOING THROUGH YOUR PURSE AND FINGER PRINTING YOU AND TAKING YOUR PICTURE.
Q. DO YOU RECALL WHAT HAPPENED NEXT WHEN THEY FINISHED WITH ALL OF THAT?
A. THEY TOOK ME TO THE CELL.
Q. DESCRIBE THE CELL?
A. THE CELL WAS - IT WAS A BIG CELL, YOU KNOW. I WAS THE ONLY PERSON IN THERE. IT WAS LIKE COLD AND CLAMMY AND – AND I HAD TO GET A MATTRESS OR SOMETHING OFF OF THE FLOOR, BUT IT

DIDN'T HAVE NO COVERING, YOU KNOW. AND THEN IT HAD THIS BIG LIKE CAST IRON SEAT, TOILET FOR YOU TO USE, YOU KNOW. AND I JUST LOOK AROUND AND - YOU KNOW, AND ESPECIALLY JUST COMING OUT OF THE HOSPITAL AND HAVING A TUBE LITIGATION AND STUFF, YOU KNOW. THERE WAS NO CLEANLINESS, YOU KNOW, ESPECIALLY HAVING OPEN WOUNDS AND ALL OF THIS, YOU KNOW, SAYING I JUST COULDN'T BELIEVE IT.

[PATRICIA WILLIAMS 228]

Q. DID YOU HAVE ANY SORT OF MEDICAL SUPPLIES WITH YOU?
A. NO.
Q. WERE YOU WEARING A SANITARY NAPKIN?
A. YES, I WAS WEARING ONE.
Q. HOW LONG WERE YOU IN THAT CELL?
A. OVERNIGHT.
Q. DID ANYONE JOIN YOU DURING THAT TIME AT ALL?
A. NO.
Q. WHEN YOU SAY OVERNIGHT, ABOUT WHAT TIME WAS IT WHEN YOU GOT THERE?
A. UMM, IT WAS PROBABLY LIKE AROUND THREE OR FOUR O'CLOCK YOU KNOW, BUT THEN IT WAS TOO LATE FOR ME TO GO IN FRONT OF THE JUDGE. SO I HAD TO WAIT UNTIL THE NEXT MORNING.
Q. DID YOU STAY IN THE SAME PLACE THAT WHOLE TIME?
A. YES.

Q. WHEN YOU SAY YOU WAITED UNTIL THE NEXT MORNING, ABOUT WHAT TIME THE NEXT MORNING?
A. I GUESS IT WAS ABOUT LIKE MAYBE AROUND TEN O'CLOCK OR SOMETHING LIKE THAT.
Q. AND WHAT HAPPENED WHEN YOU WENT IN FRONT OF THE JUDGE?
A. WELL, YOU KNOW, I - MY CHARGES WAS READ AND STUFF, YOU KNOW. AND WELL, YOU KNOW, I WAS - THEY HAD TO SHACKLE ME TO TAKE ME DOWN THERE. AND, YOU KNOW, I WAS TOLD AND THE CHARGES WAS READ AND HE LET ME OUT ON MY OWN - ON A PR. AND, YOU KNOW, I COULDN'T LEAVE THE HOUSE EXCEPT TO GO TO WORK. AND TO

[PATRICIA WILLIAMS 229]

TAKE THE KIDS TO SCHOOL.
Q. SO, SO YOU WENT HOME AFTER THE BOND HEARING?
A. YES, I DID.
Q. HOW DID YOU GET HOME?
A. MY COUSIN TOOK ME.
Q. OKAY. HOW DID YOUR COUSIN KNOW TO COME AND GET YOU?
A. WELL, SINCE THEY ALL KNEW I WAS GOING TO GO IN FRONT OF THE JUDGE, A LOT OF MY FAMILY MEMBER CAME AND, YOU KNOW, AND I - A BUNCH OF THEM WENT BACK HOME WITH ME AFTER EVERYTHING WAS OVER.
Q. AND HOW DID YOU FEEL AT THAT TIME?

A. LIKE A NOBODY. BUT WITH MY FAMILY, LIKE MY FAMILY BEING THERE, YOU KNOW, IT HELPED, BUT THEN IT WAS ALSO EMBARRASSING. YOU KNOW, BUT, THROUGH THE WHOLE ORDEAL, YOU KNOW, I JUST MADE ME FEEL LIKE A NOBODY.
Q. IN CONNECTION WITH YOUR ARREST, DID YOU RECEIVE ANY SUBSTANCE ABUSE TREATMENT?
A. IN CONNECTION WITH MY ARREST?
Q. YES.
A. WELL, FIRST OF ALL I COULDN'T TAKE MY BABY HOME WITH ME. AND SO THE ONLY WAY I COULD GET HIM BACK WAS TO GO TO. OUTPATIENT.
Q. AND DID YOU DO THAT?
A. YEAH, I WENT TO OUTPATIENT.
Q. HOW LONG DID YOU GO?

[PATRICIA WILLIAMS 230]

A. I FORGET HOW MANY WEEKS IT WAS SUPPOSED TO LAST. BUT, YOU KNOW, BEFORE - BEFORE I COMPLETED THAT, YOU KNOW, I WASN'T BEING FAIR TO MYSELF OR MY BABY, SO I REQUESTED TO GO TO CHAPS INPATIENT PROGRAM.
Q. WHEN YOU SAY YOU WEREN'T BEING FAIR TO YOURSELF, WHAT DID YOU MEAN?
A. I WAS LIKE CHEATING.
Q. WHAT DOES THAT MEAN?
A. I WAS LIKE USING STILL.
Q. EVEN THOUGH YOU WERE GOING TO TREATMENT?

A. UMM-HMM.
Q. WHAT KIND OF TREATMENT WERE YOU GOING TO?
A. IT WAS OUTPATIENT, YOU KNOW. YOU GO EVERY MORNING AND THEN YOU GET OUT AND COME BACK HOME THAT EVENING.
Q. WAS IT IN CONNECTION WITH THAT TREATMENT THAT YOU SAY YOU WERE CHEATING?
A. YES.
Q. AND WHAT DID YOU DO THEN?
A. WELL, WHEN I WENT IN ONE MORNING - ONE MORNING I WENT IN AND SPOKE TO ONE OF THE LADIES AND TELL THEM THAT I WANTED TO GO TO CHAPS BAKER THE INPATIENT PROGRAM THAT THEY HAVE FOR 28 DAYS.
Q. WHO MADE ARRANGEMENTS FOR THAT?
A. ONE OF THE LADIES THAT WORK AT OUTPATIENT. AND SO SHE CALL THEM AND THEY TOLD ME THAT I COULD COME THAT NIGHT OR

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THAT MORNING, THE NEXT MORNING. SO I TOLD THEM THAT I WOULD COME THE NEXT MORNING.
Q. AND WERE YOU ABLE TO MAKE ARRANGEMENTS FOR YOUR CHILDREN?
A. YES.
Q. AND DID YOU GO?
A. YES.
Q. DOES YOUR - DO THE EVENTS THAT YOU HAVE DESCRIBED HAVE ANY CONTINUING EFFECT ON YOU?

A. WELL, YEAH, IT DID, BECAUSE LIKE I MEAN IT JUST - IT JUST FOLLOWED ME BECAUSE I WAS WORKING AT THE SHIPYARD, NAVAL SHIPYARD, AND THEY USUALLY DO A CLEARANCE. AND I ALMOST LOST MY JOB BEHIND THE SAME INCIDENTS THAT WAS SUPPOSED TO HAVE BEEN ERASED FROM MY RECORD. AND I HAD TO HIRE ME A LAWYER AND EVERYTHING TO GET ALL OF THAT CLEARED. AND -

Q. DO YOU RECALL HOW MUCH YOU PAID FOR THE LAWYER?

A. I THINK I PAID ABOUT EIGHT HUNDRED DOLLARS, I'M NOT REALLY SURE. ABOUT SIX TO EIGHT HUNDRED.

Q. ANY OTHER EFFECTS THAT THE EVENTS THAT YOU DESCRIBED CONTINUE TO HAVE ON YOU?

A. WELL, UMM, THEY SAID THAT - REPEAT THE QUESTION AGAIN.

Q. ANY OTHER EFFECTS THAT THE EVENTS THAT YOU HAVE JUST DESCRIBED CONTINUE TO HAVE ON YOU TODAY?

A. WELL, - WELL SOME LIKE POSITIVE EVENTS, YOU KNOW, LIKE - I'LL NOT SAY THAT.

Q. I'M SORRY, I JUST DIDN'T HEAR WHAT YOU SAID?

[PATRICIA WILLIAMS 232]

A. I'LL NOT SAY THAT, BECAUSE I DON'T KNOW WHETHER I CAN OR NOT. SO I WAS GOING TO EXPLAIN THE SITUATION BETWEEN ME AND MY CHILD.

Q. NO. YOU DESCRIBED IN YOUR TESTIMONY THAT - THAT YOU HAD A TUBAL LIGATION?
A. YES.
Q. WHAT WAS THAT FOR?
A. OKAY. AFTER I WAS - WHEN I WAS USING AND STUFF THEY WANTED ME TO HAVE A TUBE LITIGATION AND I LIKE, YOU KNOW, THEY GAVE ME THE CONSENT FORM AND IT WAS PUT TO ME LIKE, YOU KNOW, WHETHER I SIGNED OR NOT, YOU KNOW, IT WAS GOING TO BE DONE.
Q. WHAT – WHEN YOU SAY IT WAS PUT TO YOU, WHO ARE YOU TALKING TO?
A. SHIRLEY BROWN.
Q. TELL ME AGAIN.
A. OKAY. THEY - SINCE I USED DRUGS AND STUFF THEY FEEL THAT I SHOULD HAVE MY TUBES TIED SO I WON'T HAVE ANYMORE CHILDREN. AND - AND, YOU KNOW, I - I WAS SORT OF LIKE UNDECIDED. BUT SINCE IT WAS LIKE I DIDN'T HAVE ANY RIGHTS, YOU KNOW, I WENT ON AND SIGNED, YOU KNOW, BECAUSE I WAS TOLD WHETHER I AGREED OR SIGNED OR NOT IT WAS GOING TO BE DONE ANYWAY.
Q. BY WHOM?
A. SHIRLEY BROWN.
(PAUSE.)

* * *

MS. DUNN: I BELIEVE THAT I HAVEN'T SEEN WHAT Y'ALL ARE PUTTING IN, WHAT YOU CONSIDER THAT. WE HAVE BEEN GOING BACK AND FORTH WITH IT.

THE COURT: GO RIGHT AHEAD.

MS. SHOWERS: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MS. SHOWERS:

Q. YOU FIRST STARTED USING COCAINE IN 1990, CORRECT?

A. I BELIEVE SO.

Q. COULD YOU TALK JUST A LITTLE LOUDER.

THE COURT: LEAN UP. WE HAVE GOT THE MICROPHONE FIXED. I'M SORRY THE CHAIR WON'T PULL UP, BUT YOU'RE GOING TO HAVE TO SIT ON THE FRONT OF IT AND GET UP TO THAT MIKE. THE JURY ADVISED THE COURT REPORTER AT THE RECESS THAT THEY WERE HAVING DIFFICULTY HEARING YOU. AND SO LET'S SPEAK INTO THE MIKE.

THE WITNESS: OKAY.

Q. (BY MS. SHOWERS, CONTINUING) AND YOU USED COCAINE THROUGHOUT YOUR PREGNANCY WITH TEVON, CORRECT?

A. YES.

Q. IN FACT, YOU INCREASED YOUR USE OF COCAINE DURING YOUR PREGNANCY, CORRECT?

A. WELL, I CAN'T REALLY SAY. I KNOW I USED.

Q. HERE IS YOUR DEPOSITION.

A. OKAY.

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Q. WOULD YOU TURN TO PAGE 78, PLEASE.
A. 78. OKAY.
Q. ACTUALLY AT THE BOTTOM OF PAGE 77 THE QUESTION WAS, "AND CORRECT ME IF I'M WRONG YOU SAID THAT YOU USED MORE COCAINE THAN YOU HAD BEEN USING AFTER YOU GOT PREGNANT?"
AND YOUR ANSWER AT LINE 2 WAS, "SEEMS THAT WAY, YEAH." IS THAT CORRECT?
A. REPEAT THAT.
Q. YES, MA'AM. AT THE BOTTOM OF PAGE 77 STARTING AT LINE 24?
A. UH-HUH.
Q. THE QUESTION WAS, "AND CORRECT ME IF I'M WRONG, YOU SAID THAT YOU USED COCAINE - YOU USED MORE COCAINE THAN YOU HAD BEEN USING AFTER YOU GOT PREGNANT?"
AND YOUR ANSWER AT THAT TIME ON MAY 24, 1994, WAS "SEEMS THAT WAY"?
A. "SEEMS THAT WAY."
Q. YEAH.
A. YEAH.
Q. DO YOU SEE THAT?
A. YEAH, I SEE.
Q. AND THAT WAS YOUR ANSWER?
A. UMM-HMM.
Q. IS THAT A YES?
A. YES.

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Q. THANK YOU.
DID YOU NOT VOLUNTARILY GO FOR SUBSTANCE ABUSE TREATMENT ON YOUR OWN DURING YOUR PREGNANCY, DID YOU?
A. NO.
Q. AND WHEN YOU CAME TO MUSC, YOU KNEW ABOUT THE POLICY OF TESTING PREGNANT WOMEN FOR DRUGS AND REPORTING THEM TO THE POLICE, DIDN'T YOU?
A. NO. HU-UH. NO, I DIDN'T. WHEN I WENT TO MUSC I WENT THERE BECAUSE I KNEW I HAD A PROBLEM THAT I COULDN'T HANDLE BY MYSELF AND I WENT THERE SEEKING HELP.
Q. BUT YOU KNEW ABOUT THE POLICY AT MUSC THAT TESTED WOMEN FOR COCAINE, DIDN'T YOU?
A. WELL, NOT - WELL - WELL ALL I KNEW IS THAT I HEARD THAT IF YOU WANTED HELP TO GO TO MUSC.
Q. WOULD YOU TURN TO PAGE 81 OF YOUR DEPOSITION, PLEASE.
A. YES.
Q. AT LINE 11 I ASKED YOU, "YOU WERE NOT AWARE OF A POLICY AT THE MEDICAL UNIVERSITY TO TEST WOMEN FOR THE PRESENCE OF DRUGS?"
AND YOUR ANSWER AT LINE 14 WAS, "I HEARD ABOUT IT, YEAH."
DO YOU RECALL THAT?
A. WELL, I GUESS I - I GUESS I MUST HAVE SAID IT BUT I CAN'T REALLY REMEMBER.
Q. THAT WAS YOUR ANSWER?

[PATRICIA WILLIAMS 239]

A. YEAH, IT WAS THE ANSWER.
Q. AND WHEN YOU ARRIVED AT MUSC FOR THE FIRST TIME ON JANUARY 15, 1992, YOU WERE ASKED TO SIGN A CONSENT FORM, CORRECT?
A. YES.
Q. IS THAT YOUR SIGNATURE?
A. YES, IT IS.
MS. SHOWERS: DEFENDANTS' EXHIBIT 1.
DEPUTY CLERK: DEFENDANTS' EXHIBIT 1.
Q. (BY MS. SHOWERS, CONTINUING) AND YOU VOLUNTARILY ADMITTED TO THE MEDICAL UNIVERSITY STAFF AT THAT TIME THAT YOU WERE USING COCAINE, DIDN'T YOU?
A. YES.
Q. AND MS. BROWN CAME AND SPOKE TO YOU, DIDN'T SHE?
A. YES.
Q. AND SHE ASKED YOU TO SIGN A LETTER FROM THE SOLICITOR CHARLIE CONDON; IS THAT RIGHT?
A. SHE TOLD ME TO SIGN IT.
Q. IS THAT YOUR SIGNATURE?
A. YES, IT IS.
MS. SHOWERS: DEFENDANTS' 128.
THE COURT: YOU'RE OFFERING THAT?
MS. SHOWERS: YES, SIR.
THE COURT: NO OBJECTION.
MS. DUNN: NO OBJECTION, YOUR HONOR.

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Q. (BY MS. SHOWERS, CONTINUING) AND YOU WERE ALSO SHOWN A VIDEO ON THE HARMFUL EFFECTS OF COCAINE ON YOUR DEVELOPING BABY WEREN'T YOU?
A. WELL I DON'T RECALL.
Q. IS THAT YOUR SIGNATURE?
A. YES, IT IS.
MS. SHOWERS: YOUR HONOR, I OFFER DEFENDANTS' EXHIBIT 117 INTO EVIDENCE.
MS. DUNN: WITHOUT OBJECTION.
Q. (BY MS. SHOWERS, CONTINUING) THIS IS A FORM THAT SAYS THAT YOU HAVE SEEN A VIDEO ON SUBSTANCE ABUSE AND HAVE BEEN ADVISED OF THE RISK TO MYSELF AND MY BABY. I UNDERSTAND THAT THE MEDICAL UNIVERSITY MEDICAL CENTER STAFF IS WILLING TO ASSIST ME IN OBTAINING ASSISTANCE FOR DRUG ABUSE, CORRECT?
A. RIGHT.
Q. WOULD YOU LIKE TO SEE IT AGAIN? HAVE I READ THAT CORRECTLY?
A. YEAH, I GUESS YOU DID READ IT CORRECTLY.
Q. I'M SORRY?
A. YES.
Q. AND THAT IS YOUR SIGNATURE?
A. THAT IS MY SIGNATURE.
Q. AND MS. BROWN CAME AND SPOKE TO YOU AND SHE EXPLAINED TO

YOU THAT USING DRUGS WHILE YOU WERE PREGNANT WOULD HARM YOUR BABY, DIDN'T SHE?

[PATRICIA WILLIAMS 241]

A. WELL, SHE EXPLAINED, YOU KNOW, ABOUT THE DRUG USES, YOU KNOW. AND LIKE I SAID, YOU KNOW, SHE WASN'T VERY PLEASANT ABOUT EXPLAINING IT.

Q. MY QUESTION WAS WHETHER OR NOT SHE EXPLAINED TO YOU THAT USING DRUGS WHILE YOU WERE PREGNANT WOULD HARM YOUR BABY?

A. UMM-HMM, YES, SHE DID.

Q. SHE DID.

SHE ALSO MADE AN APPOINTMENT FOR YOU, OR SOMEONE AT THE MEDICAL UNIVERSITY MADE AN APPOINTMENT FOR YOU AT CHARLESTON COUNTY SUBSTANCE ABUSE FOR JANUARY 22, 1992, CORRECT?

A. YES.

Q. BUT YOU DIDN'T GO?

A. NO.

Q. YOU DIDN'T GO BECAUSE IT WAS RAINING?

A. IT WAS RAINING, I DIDN'T HAVE TRANSPORTATION AND DIDN'T HAVE NOBODY TO KEEP THE CHILDREN.

Q. AND YOU CAME BACK TO MUSC ON JANUARY 30, 1992, CORRECT?

A. I GUESS SO. I CAN'T REMEMBER THE DATES.

Q. AND YOU TESTED POSITIVE AGAIN FOR COCAINE AT THAT TIME?

A. YES.

Q. YES?
A. I GUESS SO.
Q. AND, AGAIN, SOMEONE AT MUSC MADE ANOTHER APPOINTMENT FOR YOU AT CHARLESTON COUNTY SUBSTANCE ABUSE COMMISSION FOR

[PATRICIA WILLIAMS 242]

FEBRUARY 3, 1992, DIDN'T THEY?
A. I DON'T RECALL.
Q. IF THE MEDICAL RECORD REVEALS THAT THEY DID, WOULD YOU DISPUTE THAT?
A. PARDON ME?
Q. IT'S IN EVIDENCE. IF THE MEDICAL RECORDS REVEALS THAT YOU DID, WOULD YOU DISPUTE THAT?
A. NO, I WOULDN'T DISPUTE IT.
Q. I'M SORRY?
A. NO, I WOULDN'T.
Q. BUT YOU DIDN'T KEEP THAT APPOINTMENT EITHER, DID YOU?
A. I DON'T RECALL.
Q. YOU CAME BACK TO THE MEDICAL UNIVERSITY AGAIN ON FEBRUARY 14, 1992, CORRECT?
A. I GUESS. I CAN'T REMEMBER THE DATES.
Q. WELL YOU TESTED POSITIVE AGAIN ON FEBRUARY 14TH, DIDN'T YOU?
A. I GUESS SO.
Q. YOU CAME BACK AGAIN ON THE 24TH AND TESTED POSITIVE FOR COCAINE AGAIN, DIDN'T YOU?
A. I GUESS.
Q. MS. BROWN CAME AND TALKED TO YOU AGAIN ABOUT THE MEDICAL

RISKS TO YOU AND YOUR BABY CAUSED BY YOUR CONTINUED DRUG USE, CORRECT?
A. I DON'T RECALL. MAYBE SHE DID.

[PATRICIA WILLIAMS 243]

Q. IN FACT, YOU TESTED POSITIVE FOR COCAINE AT ALL SIX OF YOUR PRENATAL VISITS TO MUSC, DIDN'T YOU?
A. I PROBABLY DID.
Q. AND YOU NEVER ONCE WENT TO SUBSTANCE ABUSE ON YOUR OWN?
A. UNTIL AFTER.
Q. AND YOU NEVER ONCE WENT TO ANY SUBSTANCE ABUSE APPOINTMENT MADE FOR YOU BY THE MEDICAL UNIVERSITY?
A. WELL, NO, I DIDN'T MAKE IT TO IT.
Q. AND YOU DIDN'T GO BECAUSE YOU TOLD ME THEY WERE INCONVENIENT. DO YOU RECALL TELLING ME THAT?
A. THAT IT WAS WHAT?
Q. INCONVENIENT?
A. YES, AT THE TIME I PROBABLY DID SAY THAT.
Q. AND THEN YOU WERE ADMITTED TO MUSC FOR THE DELIVERY OF TEVON ON MARCH 10, 1992. DO YOU RECALL THAT?
A. YES.
Q. AND YOU USED DRUGS THE NIGHT BEFORE YOU DELIVERED TEVON? DO YOU REMEMBER THAT?
A. YES.
Q. AND WHEN I TOOK YOUR DEPOSITION, YOU TOLD ME THAT MUSC

DID NOT TREAT YOU LIKE A CRIMINAL; ISN'T THAT TRUE?
A. PARDON ME?
Q. YOU TOLD ME THAT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA DID NOT TREAT YOU LIKE A CRIMINAL, DO YOU RECALL THAT?
A. NO, I DON'T RECALL THAT.

[PATRICIA WILLIAMS 244]

Q. COULD YOU TURN TO PAGE 139. THE QUESTION ACTUALLY BEGINS ON PAGE 138. QUESTION WAS, "JUST TELL ME TO THE BEST OF YOUR RECOLLECTION WHAT YOU REMEMBER?"
A. WHAT WAS THAT?
Q. THE QUESTION IS ON PAGE 138. YOUR ANSWER IS ON PAGE 139. OKAY. START - STARTING AT LINE 10, YOUR ANSWER WAS, "AND I HAD JUST HAD A TUBAL LIGATION AND EVERYTHING AND, YOU KNOW, I FED TEVON EVERY DAY. I WAS THERE. IT WASN'T LIKE I WAS A CRIMINAL. AND I WASN'T ALLOWED TO FEED THE BABY AND STUFF, YOU KNOW. I WAS TREATED LIKE NORMALLY -
A. RIGHT. YEAH. THAT WAS LIKE RIGHT AFTER I HAD HIM.
Q. "LIKE I DID WHEN I HAD NATASHA AND RICKY THERE"?
A. YES.
Q. IS THAT WHAT THAT SAYS?
A. YES.
Q. SO YOU WERE TREATED JUST THE SAME WAY?
A. AFTER I HAD HIM, YES.

Q. AND THEN YOU WERE, AT DISCHARGE, ARRESTED BY DETECTIVE WARING. DO YOU RECALL THAT?
A. YES.
Q. AND DETECTIVE WARING PUT THE HANDCUFFS ON YOU, PUT YOU IN A WHEELCHAIR AND PUT THE SHEET OVER YOUR HANDS. DO YOU RECALL THAT?
A. YES.
Q. SHE TOOK YOU DOWNSTAIRS AND PUT YOU INTO THE FRONT SEAT

[PATRICIA WILLIAMS 245]

OF HER CAR, CORRECT?
A. WELL SHE PUT - SHE PUT ME AND - YOU KNOW CUFFED ME AND EVERYTHING. AND SHIRLEY BROWN PROCEEDED TO TAKE ME OUT OF THE ROOM.
Q. WHEN YOU GOT TO DETECTIVE WARING'S CAR, SHE PUT YOU IN THE FRONT SEAT OF THE CAR, CORRECT?
A. YES.
Q. AND YOU WEREN'T MISTREATED AT ANY TIME BY THE POLICE, WERE YOU?
A. NOT THAT I CAN RECALL.
Q. THEY LET YOU USE THE PHONE?
A. YES.
Q. YOU DIDN'T REQUIRE ANY MEDICAL ATTENTION WHILE YOU WERE IN THE CUSTODY OF THE POLICE, CORRECT?
A. PARDON ME?
Q. YOU DIDN'T REQUIRE ANY MEDICAL ATTENTION WHILE YOU WERE IN JAIL?

A. WELL, I WAS - NO, I DIDN'T REQUIRE ANY MEDICAL ATTENTION.
Q. AND YOU WENT TO JAIL THURSDAY AND YOU WERE RELEASED ON FRIDAY, CORRECT?
A. TRUE.
Q. AND AT THE JAIL YOU TOLD THE JURY THAT THEY INVENTORIED YOUR POSSESSIONS. DO YOU REMEMBER THAT?
A. YES.

[PATRICIA WILLIAMS 246]

Q. AND AT THAT TIME YOU HAD TWELVE HUNDRED AND THIRTY-FOUR DOLLARS IN CASH IN YOUR POSSESSION; IS THAT RIGHT?
A. YES.
Q. BUT YOU'RE TELLING THIS JURY -
MS. DUNN: I DON'T KNOW WHAT THIS IS RELEVANT TO.
MS. SHOWERS: YOUR HONOR, SHE TOLD THE JURY THAT SHE COULDN'T GET TO SUBSTANCE ABUSE BECAUSE SHE COULDN'T HAVE TRANSPORTATION.
THE COURT: I OVERRULE THE OBJECTION.
Q. (BY MS. SHOWERS, CONTINUING) BUT YOU COULDN'T AFFORD TRANSPORTATION OR CHILDCARE TO GET TO A SUBSTANCE ABUSE TREATMENT CENTER TO HELP YOU AND YOUR BABY, IS THAT WHAT YOU TOLD THIS JURY?
A. YES.

Q. BUT YOU HAD TWELVE HUNDRED AND THIRTY-FOUR DOLLARS ON YOUR PERSON WHEN YOU WERE ARRESTED?
A. YES, I HAD JUST RECEIVED THAT BECAUSE - WELL I WORK AT THE SHIPYARD, AND THEN I HAD DONE GOT MY REFUND AND I JUST CASHED IT.
Q. YOU CONTINUED TO USE COCAINE AFTER YOU WERE RELEASED FROM JAIL; IS THAT RIGHT?
A. FOR A LITTLE WHILE, YES.
Q. AND YOU DID THAT BECAUSE YOU WERE BEING SPITEFUL, THAT'S WHAT YOU TOLD ME, DO YOU REMEMBER?
A. YES.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM GENERAL TRANSCRIPT
11/22/96

[GENERAL TRANSCRIPT 58]

MR. WHERRY: THANK YOU. THIS IS A LETTER FROM JOSEPH GOOD, GENERAL COUNSEL OF MUSC TO PAT HUDSON, SENIOR ASSISTANT ATTORNEY GENERAL IN SOUTH CAROLINA DATED DECEMBER 19TH OF '89. THE LAST THREE PARAGRAPHS READ:

"IF A WOMEN REFUSES TO ATTEND THE PRENATAL CARE AND OR THE CHARLESTON COUNTY DRUG ABUSE CLASS, SUCH NON-ATTENDANCE IS REPORTED TO THE CHARLESTON POLICE DEPARTMENT OR THE CHARLESTON COUNTY POLICE DEPARTMENT AND APPROPRIATE LEGAL ACTION IS TAKEN FROM THAT POINT.

THIS IS NOT A PERFECT PROGRAM AND I WOULD PREFER TO HAVE THE MOTHER SIGN AN INFORMED CONSENT FOR DRUG SCREEN AND FOR THE SAME PROCEDURE TO BE USED FOR HER CHILD. I WOULD ALSO PREFER THAT DSS BE NOTIFIED RATHER THAN LAW ENFORCEMENT. BUT THE REALITY IS THAT DSS CANNOT AT THIS TIME HANDLE THE VOLUME OF THIS TYPE OF CASE. NOTICES SENT TO DSS OVER THE PAST 12

MONTHS HAVE NOT BEEN SATISFACTORILY ADDRESSED.

THE OTHER WEAKNESS IN THIS PROGRAM IS THAT ALTHOUGH WE DO TEST CHILDREN WHO ARE REFERRED FROM OTHER FACILITIES, AS WELL AS THEIR MOTHERS, IF THEY MEET THE PROFILE, THE MAIN PROSECUTIONS HAVE BEEN AGAINST BLACK AND INDIGENT MOTHERS IN THE CHARLESTON AREA, WHICH TO THE UNEDUCATED OBSERVER WOULD APPEAR TO BE DISCRIMINATORY."

MR. HOOD: I WOULD LIKE TO PUBLISH THE ENTIRE DOCUMENT.

THE COURT: WHAT?

[GENERAL TRANSCRIPT 59]

MR. HOOD: I WOULD LIKE TO PUBLISH THE ENTIRE DOCUMENT.

GOOD MORNING. MY NAME IS BOBBY HOOD. THIS IS JOE GOOD, GOOD. JOSEPH C. GOOD, JR., IN-HOUSE ATTORNEY. HE IS GENERAL COUNSEL FOR THE MEDICAL UNIVERSITY. A FULL-TIME EMPLOYEE OF THE MEDICAL UNIVERSITY. I'M A PRIVATE LAWYER. WE'RE NOT RELATED.

IT'S A LETTER TO PAT HUDSON, WHO IS A LAWYER. SAYS SENIOR ASSISTANT ATTORNEY GENERAL. STATE ATTORNEY GENERAL'S OFFICE IN COLUMBIA. RE: MUSC POLICY ON MANAGEMENT OF DRUG ABUSE DURING PREGNANCY.

DEAR PAT: I HOPE THIS LETTER WILL FIND - I HOPE THIS LETTER FIND YOU AND YOUR FAMILY WELL AND READY FOR AN ENJOYABLE CHRISTMAS AND VERY PROSPEROUS NEW YEAR.

I HAVE TAKEN THE LIBERTY OF ENCLOSING THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S NEWLY ENACTED POLICY FOR THE MANAGEMENT OF DRUG ABUSE DURING PREGNANCY. AS YOU KNOW, THE NUMBERS OF EXPECTANT MOTHERS GIVING BIRTH TO DRUG ADDICTED BABIES HAS INCREASED DRASTICALLY WITHIN THE LAST FEW YEARS. BABIES BORN TO MOTHERS WHO HAVE TAKEN OR USED COCAINE OR OTHER TYPES OF DRUGS DURING PREGNANCY ARE USUALLY BORN PREMATURE AND THEIR CHANCE OF SURVIVAL IS QUITE SLIM. THOSE CHILDREN THAT DO SURVIVE ARE FREQUENTLY SEVERELY MENTALLY AND PHYSICALLY HANDICAPPED AND MANY CONTINUE TO BE WARDS OF THE STATE.

SEVERAL MONTHS AGO WE WERE CONTACTED BY SOLICITOR

[GENERAL TRANSCRIPT 60]

CONDON - REFERRING TO CHARLIE CONDON - WHO WANTED TO MEET WITH REPRESENTATIVES OF THE MEDICAL PROFESSION, THE DRUG ABUSE COUNSELLORS, SOCIAL WORKERS AND LAW ENFORCEMENT TO EDUCATE EACH OTHER AS TO THE SERIOUSNESS AND SEVERITY OF THIS PROBLEM

AND TO PLAN A UNITED ACTION TO ADDRESS IT. AT THE SUGGESTION OF LAW ENFORCEMENT AND THE SOLICITOR'S OFFICE AND ARMED WITH SECTION 20-7-510 OF THE SOUTH CAROLINA CODE OF LAWS -

THAT'S A CHILD ABUSE STATUTE, YOUR HONOR.

- THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WAS ASKED TO DEVELOP AND IMPLEMENT A MANAGEMENT PROGRAM FOR EXPECTANT MOTHERS WHO TESTED POSITIVE TO COCAINE OR OTHER SIMILAR DRUGS. THIS POLICY WAS NOT INTENDED TO BE PUNITIVE. AND WAS NOT TO BE EMPLOYED IN A DISCRIMINATORY MANNER.

THE COURT: JUST READ IT MR. HOOD.

MR. HOOD: EXPECTANT MOTHERS ADMITTED TO OUR FACILITIES WHO MET A CERTAIN PROFILE BASED ON OUR MEDICAL EXPERIENCE WERE DETERMINED TO HAVE GIVEN REASONABLE CAUSE TO MEDICAL OFFICIALS TO DO A BLOOD SCREEN ON THE PATIENT PURSUANT TO THE BLANKET CONSENT FORM SIGNED BY THE PATIENT UPON ENTRY INTO OUR FACILITIES. IF THE TEST RETURNED POSITIVE FOR COCAINE OR SIMILAR DRUGS, THE MOTHER WAS INFORMED THAT SHE MUST ATTEND THE PRENATAL COUNSELING. AN APPOINTMENT WAS MADE FOR HER AT THE CHARLESTON COUNTY SUBSTANCE ABUSE FACILITY.

THE PATIENT IS SHOWN A VIDEOTAPE AS TO THE DANGERS OF COCAINE USE AND ITS AFFECT ON UNBORN CHILDREN AND SHE SIGNS A FORM

[GENERAL TRANSCRIPT 61]

VERIFYING THAT SHE HAS VIEWED THE VIDEO ON SUBSTANCE ABUSE AND HAS TAKEN - SORRY. AND HAS BEEN ADVISED AS TO THE RISK TO HER AND TO HER BABY BY MEDICAL PERSONNEL OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA. SHE FURTHER SIGNS AN ACKNOWLEDGMENT WHEN HER APPOINTMENT WITH THE PRENATAL CLINIC WILL BE AND HER APPOINTMENT WITH THE CHARLESTON COUNTY SUBSTANCE ABUSE AGENCY. SHE IS FURTHER GIVEN A DIRECTIVE BY CAPTAIN R. H. ROBERTS OF THE CHARLESTON POLICE DEPARTMENT INFORMING HER OF THE CRIMINAL ASPECTS OF HER COCAINE USE AND A COPY OF THE PERTINENT STATUTE. SHE IS ALSO GIVEN AND SIGNS FOR A WARNING FROM SOLICITOR CONDON AS TO THE IMPORTANCE OF HER ATTENDING THE PRENATAL AND DRUG ABUSE FACILITY AND THE DANGER TO HERSELF AND HER CHILD SHOULD SHE NOT FOLLOW THIS PREVENTATIVE PROGRAM.

AND THE LETTER CONCLUDES - THE NEXT PARAGRAPHS HAVE ALREADY BEEN READ. I AM AWARE THAT GREENVILLE MEMORIAL

HOSPITAL HAS A SIMILAR PROGRAM AND I WOULD BE CURIOUS TO KNOW . WHETHER THEY HAVE ENCOUNTERED ANY OBJECTIONS TO THEIR PROGRAM. SINCERELY JOE GOOD, GENERAL COUNSEL. AND WITH THE ENCLOSURES.

THANK YOU VERY MUCH.

MR. WHERRY: WE CALL SANDRA POWELL, PLEASE, YOUR HONOR.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM GENERAL TRANSCRIPT
12/10/96

[GENERAL TRANSCRIPT 482]

MR. WHERRY: THEN I DO, SIR, BECAUSE HE IS LEAVING OUT WORDS AS HE IS READING.

THE COURT: WE'LL CORRECT THAT. WE'LL CORRECT THAT, BUT YOU JUST MAKE AN OBJECTION. LET'S GO BACK AND YOU START AT THAT PARAGRAPH.

MR. HOOD: I THINK THIS IS, AS I'M READING IT AHEAD NOW, I THINK THIS PARAGRAPH HAS BEEN READ ANYWAY. I'M GOING TO START AT THE NEXT PARAGRAPH.

THE COURT: WHICH ONE IS THAT?

MR. HOOD: THIRD PARAGRAPH, PAGE 1.

THE COURT: DO YOU NEED YOUR GLASSES?

MR. HOOD: THE CONTACTS ARE BIFOCAL, BUT SOMETIMES THEY GET SCREWED UP, AND PARTICULARLY FAR AWAY.

IT MAY BE OF SOME INTEREST TO THE RESIDENT STAFF TO HAVE SOME FURTHER INFORMATION ON THOSE PATIENTS WHO HAVE

TESTED POSITIVE IN RECENT WEEKS. THE FIRST PATIENT ARRESTED FROM OUR OB SERVICE WAS M.Y. THIS IS HER FIFTH ARREST FOR DRUG-RELATED OFFENSES AND SHE IS KNOWN WELL BY THE POLICE DEPARTMENT AS MULTIPLE OTHER MEMBERS OF HER FAMILY HAVE ALSO BEEN ARRESTED, AND SHE HAS TWO BROTHERS CURRENTLY JAILED FOR COCAINE DISTRIBUTION. SHE HAS BEEN CHARGED WITH BOTH THE MISDEMEANOR OF COCAINE POSSESSION BUT ALSO THE FELONY OFFENSE OF DISTRIBUTION TO A MINOR. THE PUBLIC DEFENDER, MICHAEL O'CONNELL, WHO HAS GREAT INTEREST IN THIS CASE HAS DECIDED THAT HE WILL NOT PERSONALLY DEFEND M.Y. BUT HAS REASSIGNED IT

[GENERAL TRANSCRIPT 483]

TO ONE OF HIS LOWER-RANKING PUBLIC DEFENDERS, PRESUMABLY BECAUSE HE DOES NOT WISH THAT THIS PATIENT BE THE TEST CASE. M.Y. CONTINUES IN JAIL AWAITING DELIVERY.

NEXT PARAGRAPH. THE SECOND PATIENT ARREST WAS L.G. AS YOU ARE AWARE, SHE HAS BEEN DELIVERED AND THE BABY HAS BEEN PLACED WITH A FOSTER FAMILY WHILE DSS INVESTIGATES THE POSSIBILITY OF THE GRANDMOTHER BEING RESPONSIBLE FOR THIS BABY. SHE WAS IN THE JAIL CHARGED WITH THE FELONY OF

POSSESSION FOR DISTRIBUTION TO A MINOR. BUT SINCE DELIVERY HAS RECEIVED A HEARING ONLY ON MISDEMEANOR CHARGE OF NEGLECT. AT THE TIME OF HER HEARING, SHE INFURIATED THE JUDGE BECAUSE OF REPEATED LYING AND ULTIMATELY CLAIMED THAT SHE WOULD CONTINUE TO DO WHAT SHE WANTS WITH HER LIFE. SHE ALSO WOULD NOT TESTIFY AS TO THE SOURCE OR AMOUNT OF HER INCOME, AND IT IS PRESUMED THAT SHE PROBABLY ALSO IS A COCAINE DISTRIBUTOR. THE INVESTIGATION INDICATES THAT SHE HAS A RELATIVELY GOOD INCOME FOR NO - FROM NO APPARENT SOURCE. THE JUDGE FINED HER CHILD SUPPORT AND ORDERED HER INTO SUBSTANCE ABUSE CLINIC. IF SHE GOES TO SUBSTANCE ABUSE CLINIC ALL OF HER FELONY AND MISDEMEANOR CHARGES WILL BE DROPPED, AND IF NOT, THE FELONY CHARGES WOULD BE INSTITUTED. SHE WAS RELEASED OPEN HER PERSONAL RECOGNIZANCE, WHICH CURIOUSLY THE PUBLIC DEFENDER TRIED TO BLOCK.

NEXT PARAGRAPH. THE PATIENT MOST RECENTLY ARRESTED EK, AND DISCUSSED AT OUR MEETING WAS A WOMAN WITH VERY LIMITED

[GENERAL TRANSCRIPT 484]

PRENATAL CARE ARRIVING AT THE MEDICAL UNIVERSITY AT 33 WEEKS

GESTATION. THE DECISION WAS MADE NOT TO PERFORM URINE DRUG SCREEN, HOWEVER, THE BABY WHO DELIVERED DEVELOPED IRREGULAR HEART RATE, JITTERINESS AND DIFFICULTIES TO CONSOLE AND HAD -

MR. WHERRY: OBJECTION. THE WORD IS DIFFICULTY.

MR. HOOD: DIFFICULT TO CONSOLE, AND HAD STRONGLY POSITIVE URINE DRUG SCREEN FOR COCAINE. AT THAT POINT THE URINE DRUG SCREEN ON THE MOTHER WAS NEGATIVE. AT THE TIME OF HER ARREST SHE WAS CHARGED WITH UNLAWFUL NEGLECT AND DSS IS CURRENTLY INVESTIGATING THE SITUATION FOR A DECISION ON CUSTODY. AGAIN, THE SOLICITOR PLANS TO DROP CHARGES AGAINST THE MOTHER IF SHE SUBMITS TO MANDATORY SUBSTANCE ABUSE.

MR. WHERRY: OBJECT, THE LAST WORD IS TREATMENT.

THE COURT: AGAIN, THE SOLICITOR PLANS TO DROP CHARGES AGAINST THE MOTHER IF SHE SUBMITS TO MANDATORY SUBSTANCE ABUSE TREATMENT. MR. HOOD LEFT OFF THE WORD TREATMENT.

MR. HOOD: THANK YOU. THE LETTER GOES ON. AND I BELIEVE THAT THE REST OF IT HAS BEEN READ.

WE'LL NOW RECALL SHIRLEY BROWN TO THE STAND.

THE COURT: COME BACK AROUND, MS. BROWN. I INSTRUCT,

YOU THAT YOU ARE STILL UNDER OATH.

***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPTS FROM GENERAL TRANSCRIPT
1/6/97

[GENERAL TRANSCRIPT 1222]

THE COURT: ANYTHING ELSE FROM THE DEFENDANT?
MR. HOOD: NO THANK YOU.
THE COURT: ANYTHING FROM THE PLAINTIFF?
MS. PALTROW: NO, SIR.
THE COURT: I'M SORRY ABOUT THE SKINNER CASE. MY MIND HAS BEEN JOGGED ON IT, AND I DO KNOW WHAT YOU MEAN BY SPECIAL NEEDS. AND OF COURSE THAT CASE HAD TO DO - AND SPECIAL NEEDS SEARCHES ARE NOT POLICE SEARCHES AND THEY'RE NOT GENERALLY IMPLICATED BY THE FOURTH AMENDMENT. AND TO GET TO THE POINT THAT I HAVE GOTTEN IN THIS CASE I HAVE ALREADY GOTTEN OVER THAT AND SAID THAT THIS IS A FOURTH AMENDMENT SEARCH.
SPECIAL NEED SEARCHES HAVE TO DO WITH ATHLETES THAT ARE TESTED FOR DRUGS, BUT THEY'RE NOT TURNED OVER TO THE POLICE. IN THE SKINNER CASE, THE RAILROAD TESTED PEOPLE BECAUSE OF EXTREMELY HIGH INCIDENCES OF DRUG USE AND ACCIDENTS

WITH TRAINS, AND THEREFORE DEVELOPED A POLICY TO TEST ALL - I GUESS ENGINEERS AND FIREMEN AND WHO WERE IN CONTROL OF A TRAIN AFTER AN ACCIDENT. BUT IN THAT PARTICULAR CASE THEY DID NOT TURN THEM OVER TO THE POLICE.

I THINK KIND THE SKINNER CASE, IF I RECALL CORRECTLY, ON SOME RARE OCCASIONS THEY WERE SUBPOENAED BY THE POLICE. BUT IT CERTAINLY WAS NOT A ROUTINE MATTER AND THOSE SEARCHES, IF WE CAN CALL THEM SEARCHES, WERE DONE FOR TOTALLY INDEPENDENT PURPOSES FROM POLICE PURPOSES. AND WHAT I FOUND

[GENERAL TRANSCRIPT 1223]

IN THIS CASE, RIGHTLY OR WRONGLY, IS - IS THAT THAT IS NOT THE CASE HERE. THAT THESE SEARCHES WERE NOT DONE BY THE MEDICAL UNIVERSITY FOR INDEPENDENT PURPOSES. IF THEY HAD BEEN THEN THEY WOULD NOT IMPLICATE THE FOURTH AMENDMENT.

OBVIOUSLY AS I POINT OUT THERE ON PAGE 4, NORMALLY URINE SCREENS AND BLOOD TESTS AND THAT TYPE THING CAN BE TAKEN BY HEALTH CARE PROVIDERS WITHOUT HAVING TO WORRY ABOUT THE FOURTH AMENDMENT. THE ONLY REASON THE FOURTH AMENDMENT IS IMPLICATED HERE IS THAT THE POLICE CAME IN AND THERE WAS AN

AGREEMENT REACHED THAT THE POSITIVE SCREENS WOULD BE SHARED WITH THE POLICE. AND THEN THE SCREEN IS NOT DONE INDEPENDENT OF POLICE, IT'S DONE IN CONJUNCTION WITH THE POLICE AND THAT IMPLICATES THE FOURTH AMENDMENT.

AND IT SAYS THAT YOU CAN'T DO IT UNREASONABLY. AND OF COURSE UNREASONABLY MEANS THAT YOU CAN'T DO IT WITHOUT A WARRANT OR SOME OTHER REASON. SAME AS WHAT WE RUN INTO IN THE CRIMINAL AREA, PLAIN VIEW, EXIGENT CIRCUMSTANCES, ETCETERA, TERRY STOPS AND THAT TYPE THING. BUT IN THIS PARTICULAR CONTEXT I THINK WE'RE DEALING WITH AN ENTIRELY DIFFERENT THING FROM WHAT WE'RE DEALING WITH SPECIAL CIRCUMSTANCES. BUT, I AM FAMILIAR WITH THOSE CASES AND I DID RULE.

OKAY. NOW, WHAT ABOUT - WHAT ABOUT - IN THE CHARGE I HAVE GENERALLY USED THE WORD REASONABLE SEARCH. AND I HAVEN'T DEALT WITH THE WORD, SEIZURE THAT MUCH. IN MY EXPERIENCE I HAVE ALWAYS USED THE WORD SEIZURE UNDER THE

[GENERAL TRANSCRIPT 1224]

FOURTH AMENDMENT AS AN ARREST. AND WE HAVE USED AN UNREASONABLE SEIZURE IS WHEN YOU ARREST SOMEBODY AND YOU

EXERCISE UNREASONABLE FORCE IN CONDUCTING THAT ARREST.

I DID ONE DAY THIS WEEKEND READ A CASE THAT DISTINGUISHED BETWEEN THE SEARCH AND THE TAKING OF INFORMATION AS BEING A SEARCH AND A SEIZURE. AND SO YOU COULD USE IT EITHER WAY IN THIS CASE, BUT WHEN I USE THE WORD SEARCH, I MEAN THE TAKING OF THE URINE SAMPLE AND THE TESTING OF THAT URINE SAMPLE, I DON'T KNOW WHY YOU HAVE TO USE SEARCH AND SEIZURE BUT YOU CAN USE EITHER ONE. OR BOTH. AND I DON'T KNOW THAT IT MAKES ANY DIFFERENCE. I HAVEN'T REALLY REACHED ANY CONCLUSION ON THE DEFENSE OF QUALIFIED IMMUNITY. I'M SURE THAT YOU HAVE NOTED THAT IT'S NOT INCLUDED IN MY INSTRUCTIONS.

I HAVE FOUND SUBSTANTIAL AUTHORITY TO THE EFFECT THAT QUALIFIED IMMUNITY WOULD NOT BE AVAILABLE IF NOT SUBSTANTIAL OR SOME REASONABLE AUTHORITY THAT SAYS QUALIFIED IMMUNITY WOULD NOT BE AVAILABLE UNDER THE EQUAL PROTECTION CLAIM. I THINK IT WOULD BE AVAILABLE UNDER THE UNREASONABLE SEARCH AND SEIZURE CLAIM. I'M NOT GOING TO CHARGE IT INITIALLY BECAUSE I WOULD LIKE TO BE ABLE TO DETERMINE WITH SOME DEGREE OF CLARITY EXACTLY WHY THE JURY IS DOING WHAT THEY

ARE DOING. AND I WOULD LIKE TO GET A DECISION FROM THEM ON THE FOURTH AMENDMENT CLAIM WITHOUT CLOUDING THAT DECISION WITH THE CONSIDERATION OF QUALIFIED IMMUNITY. BUT WHAT I MAY DO IS

[GENERAL TRANSCRIPT 1225]

IF THEY DO COME BACK AND THEY DO FIND FOR THE PLAINTIFFS OR ANY OF THE PLAINTIFFS ON THE FOURTH AMENDMENT CLAIM, I MAY THEN BIFURCATE THAT ASPECT OF IT AND CHARGE IT ON THE QUALIFIED IMMUNITY. THAT'S PROBABLY WHAT I WILL DO.

NOW WHETHER I WILL DO IT ON THE EQUAL PROTECTION CLAIM I'M NOT SURE. BUT IT JUST - I WANT TO KNOW WHAT THEY FIND ON THOSE CLAIMS AND NOT JUST THE BOTTOM LINE THAT WOULD INCLUDE A DECISION ON THE QUALIFIED IMMUNITY.

OKAY. ARE YOU READY TO GO? YOU WANT TO TAKE A MINUTE OR WHAT?

MS. PALTROW: NO, A MINUTE.

THE COURT: LET'S TAKE TEN MINUTES AND THEN WE'LL COME BACK.

(WHEREUPON, A BREAK WAS TAKEN OFF THE RECORD.)

THE COURT: I'LL HAVE A VERDICT FOR YOU. WE'LL LOOK AT IT BEFORE I GIVE IT TO THE JURY. IT'S KIND OF COMPLICATED

AND I DICTATED IT AND I WILL PROBABLY GET SOMETHING TYPED UP SHORTLY. AND WHENEVER I DO WE'LL START LOOKING AT IT AND I'LL GIVE IT TO YOU BEFORE WE SHOW IT TO THE JURY.

ONE THING THAT I DO NEED TO ADD TO MY CHARGE, IF YOU WANT THE CITY OF CHARLESTON LEFT IN, I HAVE GOT TO ADD SOME LANGUAGE IN THERE ABOUT THE ONLY WAY THEY CAN BE HELD IN IS IF IT IS SHOWN THAT CHIEF GREENBERG WAS A DECISION MAKER AND HIS DECISION TO BE INVOLVED IN THIS POLICY CONSTITUTED A POLICY OF THE CITY.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 3

Management of Drug Abuse During Pregnancy:
Review of the Current Policy

This is a DRAFT REPORT of a Meeting held January 9, 1990, in the vice President's Conference Room, Medical University of South Carolina, attended by:

For the Solicitor's Office: Charles M. Condon, Solicitor; Frampton Durban, Jr., Assistant Solicitor; Robert Bolchoz, Assistant Solicitor

For the Medical University of South Carolina: Dr. E. O. Horger, Maternal Fetal Care; Dr. V. DelBene, Medical Director; Shirley Brown, Nursing Coordinator, High Risk Obstetrics; Joe Good, Legal Counsel; Dr. Sarah Schuh, Pediatrics.

For the Department of Social Services: Nancy Worley, Program Director, Children, Family and Adult Services; Odessa Williams, Program Coordinator, Children Protective Services.

For the Charleston County Substance Abuse Commission: Dot Ellis.

The stated purpose of this meeting was to evaluate and revise the present policy concerning intervention in cases involving the use by pregnant women of cocaine during pregnancy, in light of the experience with that policy from its inception to the present. Medical University personnel note that statistics indicate that the policy appears to be having a

deterrent effect; with no significant decrease in the number of admissions or referrals, there has been only one positive drug screen identified since mid-December, 1989, following 12 referrals under the Cocaine screening policy from October 3, 1989 to December 1, 1989. Of the 12 cases referred under the Policy during that period, 8 were first identified following admission to the Hospital during labor, so there was no opportunity for the mother to enter drug treatment and avoid arrest prior to delivery.

The following amendments or revisions of the present Policy were suggested:

1. If a pregnant female tests positive for cocaine during a pre-natal visit, Medical University personnel will be responsible for:
   a. Presenting a film on the effects of drug usage during pregnancy to the patient, and.
   b. Having the patient execute the letter of agreement established by the original policy.

2. If a pregnant female tests positive for cocaine following a labor admission:
   a. Medical University personnel will report this fact to the Charleston County Department of Social Services under the mandatory reporting provision of the South Carolina Children's Code, as a report of suspected child abuse or neglect. This report will include the projected discharge date for the infant.
   b. DSS personnel will initiate an assessment based on the report from MUSC. If consistent with DSS policy, reports under this Policy

will be automatically classified as "founded" or "indicated."

c. DSS personnel will, as soon as possible after delivery, have the mother execute the Letter of Agreement provided by the current policy and will contact Substance Abuse to arrange for treatment.

d. If time permits based on the projected discharge date for the infant, DSS will attempt to locate a suitable family member for placement of the infant as an alternative to Emergency Protective Custody.

(1) If such a placement is available, a Services action will be initiated in lieu of Emergency Protective Custody.

(2) If such a placement is not available, or if time does not permit a full investigation into possible alternative placement, DSS will initiate an Protective Custody Action, either by Ex Parte Order or through Law Enforcement Emergency Protective Custody. Alternative placement will continue to be explored if available by the time of the Preliminary Hearing, within 10 days of Protective Custody.

3. Failure by the mother to execute the Letter of Agreement; to complete substance Abuse Counseling; to cooperate with DSS on alternative placement; or to maintain clean urine specimens consistent with the policies of the Charleston County Substance Abuse Commission will result in criminal prosecution consistent with the original Policy.

Participants wishing to revise or modify this Draft Report should contact Frampton Durban, Jr., Assistant Solicitor, at 724-0648.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 4

Medical University of South Carolina
March 1990

Management of Drug Abuse During Pregnancy

I. Identification of Drug Abuse

A. Pregnancies to be screened by urine drug testing:

1. No prenatal care
2. Late prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placenta
5. Intrauterine fetal death
6. Preterm labor "of no obvious cause"
7. IUGR "of no obvious cause"
8. Previously known drug or alcohol abuse
9. Unexplained congenital anomalies

B. Infants to be screened in both the well baby nursery and the newborn intensive care unit by urine or (meconium if possible) drug testing include those delivered following or with:

1. No maternal prenatal care
2. Late maternal prenatal care obtained after 24 weeks gestation.
3. Incomplete maternal prenatal care (fewer than five obstetrical visits)
4. Abruptio placenta
5. Preterm labor "of no obvious cause"

6. IUGR (SGA) "of no obvious cause"
7. Previously known maternal drug or alcohol abuse
8. Unexplained congenital anomalies
9. Clinical manifestations suggesting evidence of drug withdrawal

II. Education Efforts:

A. Prenatal visit (initial to clinic) or initial hospitalization:

1. Video presentation of harmful effects of drug abuse during pregnancy.
2. Written statement from OB service regarding harmful effects of drug abuse during pregnancy (see attached).
3. Statement to be signed by the mother, attesting that she has received counseling (see attached).

B. Protocol for follow-up after identification of drug abuse during pregnancy by positive urine drug screen:

1. The Case Manager for OB or designee will be notified by the resident of positive urine drug screen; on nights or holidays the Patient Care Coordinators will be notified.
2. Video presentation of harmful effects of drug abuse during pregnancy will be shown by nursing staff.
3. The Case Manager for OB or designee will give the written statement from OB service regarding harmful effects of drug abuse during pregnancy to the patient. (see attached).

4. Referral to Substance Abuse Clinic will be made by the OB Case Manager or designee and the OB clinic appointment will be made by the ward clerk. The OB Case Manager or designee will give the appointment letter to the patient. (see attached)

5. The OB Case Manager or designee will give the written statement from the solicitor's office to the patient. (see attached)

6. If any clinic appointments (substance abuse or OB clinic) are not kept, the police department will be notified. Substance abuse will notify the police department for any substance abuse appointments missed or positive urine drug screens obtained by them. (see attached statement from Captain Roberts).

7. If <u>any further</u> drug screens are positive, police department to be notified and patient will be arrested. (see attached statement from Captain Roberts)

C. Protocol for follow-up after identification of drug abuse for patient who has delivered an infant:

1. The neonatal Case Manager (or neonatologist) for outborn babies in the NICU and the obstetrical case manager for inborn NICU babies and 8 East Nursery will be notified by the resident in the respective nurseries of positive urine/meconium drug screens. On weekends or holidays the patient care coordinator will be notified.

2. The parent(s) will be given a written summary of the harmful effects of drug abuse during pregnancy and informed of the hospital

policy/procedure by case manager, neonatologist or patient care coordinator (see attached)

3. A referral will be made to the Department of Social Service Child Protective Services. (see attached statement from solicitor's office)

4. The Case Manager or designee will give the written statement from the solicitor to inborn babies mothers.

5. A SCAN report will be completed by a social worker with a copy placed on infant's chart and a copy sent to the Case Manager and SCAN coordinator.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 5

The State of South Carolina
[LOGO]
Solicitor, Ninth Judicial Circuit

SOLICITOR CHARLES MOLONY CONDON
CHARLESTON AND BERKELEY COUNTIES
COUNTY COURT HOUSE
POST OFFICE BOX 58
CHARLESTON, S.C. 29402-0058
TELEPHONE: 803-723-6714

October 18, 1989

Reference: Substance Abuse During Pregnancy

TO WHOM IT MAY CONCERN:

During your recent examination you tested positive for drugs. You have been counseled about the harmful effects of drugs to you and your baby and referred to Substance Abuse and Pre-Natal Care by the Medical University. By these referrals you are being afforded an opportunity to rehabilitate yourself for the good of yourself and your baby. Please understand that by using drugs during pregnancy you are risking death or at least severe long-term harmful effects to your baby. If you fail to attend Substance Abuse and Pre-Natal Care you will be arrested by Charleston City Police and prosecuted by the Office of Solicitor.

Sincerely yours,
/s/
Charles Molony Condon
Solicitor

CMC /aom

I have read and received a copy of the above letter.

_____	_____
PATIENT	WITNESS
DATE:_____	_____
	WITNESS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 6

The State of South Carolina
[LOGO]
Solicitor, Ninth Judicial Circuit

SOLICITOR CHARLES MOLONY CONDON
CHARLESTON AND BERKELEY COUNTIES
COUNTY COURT HOUSE
POST OFFICE BOX 58
CHARLESTON, S.C. 29402-0058
TELEPHONE: 803-723-6714

March 26, 1990

Reference: Substance Abuse During Pregnancy

TO WHOM IT MAY CONCERN:

During your recent medical examination conducted in connection with the birth of your child you tested positive for drugs. Before your release from the Hospital, you will be counseled on the harmful effects of drug usage to you and your child, and referred to Substance Abuse Counseling. This referral will give you the opportunity to rehabilitate yourself for the good of yourself and your child. A referral will also be made to the Charleston County Department of Social Services under South Carolina Child Protection Law. DSS will determine whether the best interests of your child require the removal of that child from your custody during your rehabilitation. If you fail to complete Substance Abuse Counseling, fail to cooperate with the Department of Social Services in the placement of your child and services to protect that child, or if you fail to maintain clean urine

specimens during your Substance Abuse rehabilitation, you will be arrested by the Police and prosecuted by the office of the Solicitor.

Sincerely yours,

Charles Molony Condon
Solicitor

CMC:fc

I have read and received a copy of this letter.

_____ Witness:_____
Patient

Date:_____ Witness:_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 7

[LOGO]
Solicitor, Ninth Judicial Circuit
SOLICITOR DAVID PRICE SCHWACKE
CHARLESTON AND BERKELEY COUNTIES
POST OFFICE BOX 70100
NORTH CHARLESTON, S.C. 29415-0100
TELEPHONE: 803-740-5850
FAX: 803-740-5858

Reference: Substance Abuse During Pregnancy

TO WHOM IT MAY CONCERN:

During your recent examination you tested positive for drugs. You have been counseled about the harmful effects of drugs to you and your baby and referred to Substance Abuse and Pre-Natal Care by the. Medical University. By these referrals you are being afforded an opportunity to rehabilitate yourself for the good of yourself and your baby. Please understand that by using drugs during pregnancy you are risking death or at least severe long-term harmful effects to your baby. If you fail to attend Substance Abuse and Pre-Natal Care you will be arrested by Charleston City Police and prosecuted by the Office of Solicitor.

Sincerely yours,
/s/
David P. Schwacke
Solicitor

DPS/shg

I have read and received a copy of the above letter.

_____ _____

PATIENT WITNESS

DATE:_____ _____

WITNESS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 8

MUSC MEDICAL CENTER

I have seen a video on substance abuse and have been advised of the risks to myself and my baby. I understand that the MUSC Medical Center staff is willing to assist me in obtaining assistance for drug abuse treatment

Patient's Signature:_____

Patient's Social Security Number:_____

Date:_____

Witness' Signature:_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 9

MUSC MEDICAL CENTER

Date: _____

To: _____
(Patient's Name)

_____
(Patient's Social Security Number)

From: Medical University of South Carolina Medical Center

During your recent examination you tested positive for drugs. These drugs may cause immeasurable harm to your unborn child. We have made an appointment for you at our Prenatal Clinic at_____o'clock on the_____day of_____, 19____. We have also made an appointment for you with the Charleston County Substance Abuse facility at_____at _____o'clock on the _____day of , 19___. We expect you to keep these appointments.

I have read and understand this and I agree to meet these appointments for my benefit and that of my unborn child.

_____(L.S.)
Patient's Signature

_____
Witness' Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 10

MEDICAL UNIVERSITY OF CAROLINA
Department of Obstetrics & Gynecology
Maternal and Fetal Medicine
(803) 792-2864

MUSC Medical Center [LOGO]
171 Ashley Avenue
Charleston, South Carolina 29425-2233

TO OUR PATIENTS:

The increasing use of street drugs, particularly Cocaine and crack, by pregnant women is a cause for great concern. The use of these drugs has been strongly associated with complications such as the death of the baby (stillbirth), premature delivery, bleeding due to the early separation of the afterbirth (abruptio placenta), retarded growth and mental development of the baby, and birth defects. Drug abuse during pregnancy is also associated with withdrawal symptoms and sudden death (SIDS) of the infant. It is very important that you understand the risks, not only to yourself, but also to your unborn baby if you are using drugs during pregnancy.

If you are using drugs, please stop! If you are unable to stop, please let your doctor know. We want to help mothers get off drugs for the benefit of both you and your baby. We will provide you counseling about the harms of drug abuse and will make arrangements for you to be seen at the Substance Abuse Clinic. We realize that drug abuse is a very difficult problem and we will do all that we can to help you.

If, however, we continue to detect evidence of drug abuse or a failure to follow recommended treatment, we will take action to protect your unborn child. The Charleston Police, the solicitor's office, and the Protective Service Division of DSS are also committed to the protection of unborn and newborn children from the harms of illegal drug abuse.

We hope that you can understand the tragedy which is being caused by the continued use of illegal drugs during pregnancy. This policy of providing warning, counseling and treatment for pregnant women using illegal drugs is the best way for us to help. For those women who fail this treatment, we must ask for help to protect the life and health of our most innocent unborn children

Sincerely,

Department of Obstetrics and Gynecology
Medical University of South Carolina Medical Center

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 11

CHLDREN'S HOSPITAL
Department of Pediatrics

DIVISION OF NEONATOLOGY
William B. Pittard III, M.D., Director
Abner H. Levkoff M.D.
Bruce W. Hollis Ph.D.
Thomas C. Hulsey. M.S.P.H., Sc.D.
Lakshmi Katikaneni, M.D.
Dilip Purohit, M.D.
Diane M. Anderson, M.S.R.D.
Bryan Ohning, M.D., Ph.D.
Celeste Patrick, M.D.
David J. Annibale M.D.
Paul C. Engstrom M.D.
Lawrence A. Wallin, M.D.
(803) 792-2112

MUSC Medical Center [LOGO]
MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina 29425-3313

Dear Parent:

Since your infant has been exposed to cocaine during your pregnancy it is important that you understand behaviors and/or problems that your infant may face. This letter is

intended to offer you tips to assist you in dealing with the infant.

The most significant problems for the babies of mothers using cocaine during pregnancy are decreased body and brain growth. Some reports of seizure activity as well as intestinal illness have also been made and abnormal bone, heart, and urinary system development has been reported in some babies.

Babies born to women who abuse cocaine throughout pregnancy can have small undergrown brains and may have abnormal brain function. They are fussy and irritable and feed poorly. These babies are frequently jittery and do not relate well to those taking care of them. Parents need to be aware that this unresponsive, fussy behavior is normal for these babies and is the way they respond to everyone, not just to their parents. If this behavior is noted, the pediatrician should be notified.

Finally, there is an increased incidence of sudden infant death among infants delivered to mothers who abuse cocaine. The incidence of sudden infant death in normal babies is about 2 in 1000. The incidence among neonates who are born to mothers who abuse cocaine is as high as 150 per 1000.

Thus, it is clear that cocaine use in pregnancy places the baby at very high risk for medical problems. The brain injury in the baby does not quickly heal and even after several months is still present. These infants require a great deal of patience from their parents and frequently special help from paramedical persons.

The nurses will go over the attached baby support techniques with you before the infant is discharged.

If you feel you need help with your baby after discharge and cannot find it, you can always call the Division

of Neonatology at 792-2480 and ask to talk with a neonatologist. He/she will make suggestions to you and direct you to support persons.

Sincerely,

Division of Neonatology

I. Poor Feeding

Wake infant every 3 hours to feed
Feed infants small quantities with increasing quantity per feeding overtime.
Allow infant to rest frequently during feeding
Feed infant in sitting position
After feeding, place infant on abdomen

II. Irritability and Difficulty in Sleeping

Keep the baby in a quiet room
Avoid bright lights
Wrap the baby firmly with a blanket
Carry infant in front-pack carrier
Rock infant slowly or walk with the baby
Offer the baby a pacifier
Warm bath
Respond to the baby's stress cues by stopping your activity when he is upset
On occasion soft music will help

III. Tremors

Wrap baby firmly and hold infant close
Hold infant in almost sitting position
with arms and shoulders forward... arms at midline
Hold infant so that arms and legs are close to body
Touch jittery areas firmly and calmly

IV. Stiffness and Rigidity

Bathe in warm water
Swaddle in flexion position with shoulders and arms close to body
Do not put the infant on its back

Breastfeeding

Cocaine is present in milk for at least 48 hours
Do not use cocaine or any drugs while breast-feeding

C: Rev. Coc

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

JOINT EXHIBIT # 14

MINUTES
HOSPITAL EXECUTIVE COMMITTEE
MUSC MEDICAL CENTER
NOVEMBER 27, 1989

MEMBERS:		REPRESENTED
Chairman, Executive Committee	P	Dr. Del Bene
Executive Director	P	Mrs. McCants
President, Medical Staff	P	Dr. Fitts
Director, Patient Care Services	P	Ms. Maguire
CHAIRMEN:		
Anesthesiology	P	Dr. Mahaffey
Dermatology	P	Dr. Maize
Family Medicine	P	Dr. Simpson
Medicine	R	Dr. Allen (MCKEE)
Neurology	P	Dr. Hogan
Neurosurgery	P	Dr. Perot
Obstetrics & Gynecology	P	Dr. Creasman
Ophthalmology	P	Dr. Apple
Oral & Maxillofacial Surgery/ Dentistry	P	Dr. DeChainplain
Orthopaedic Surgery	P	Dr. McGinty
Otolaryngology	A	Dr. Adkins
Pathology & Laboratory Medicine	P	Dr. Garvin
Pediatrics	R	Dr. Darby (LEVKOFF)
Physical Medicine & Rehabilitation	A	Dr. LeRoy
Psychiatry	P	Dr. Ballenger
Radiation Oncology	P	Dr. Jenrette
Radiology	R	Dr. Spicer (SCHABEL)

Surgery	P Dr. Crawford
Urology	P Dr. Turner

ALSO ATTENDING:

Dr. William Miller	Mrs. Candi Cooper
Dr. Ben Lawson	Ms. Rachel Herbert
Dr. John Manos	Mr. John Sanders
Dr. Stephen Schabel	Mr. John Cooper
Dr. Abner Levkoff	
Dr. Kelly McKee	
Mr. Fred Parker	

MINUTES
HOSPITAL EXECUTIVE COMMITTEE
MUSC MEDICAL CENTER
November 27, 1989 1:30 P.M.

CALL TO ORDER

I. ACTION ITEMS

A. Review and Approval of Previous Minutes

MOTION: To approve minutes as distributed.
ACTION: Approved by Committee.

B. Medical Committee Minutes

A synopsis of committee minutes was distributed and reviewed prior to this meeting. The summary is attached. The following items were discussed and presented for information and approval.

1. Accreditation Committee: 10/10/89
The Accreditation Committee identified areas during their mock surveys that are not performing quality assurance reviews properly. This could put our accreditation status in jeopardy. They also indicated that the Medical Center is not doing much with

regard to reviewing the quality of patient care in the out patient arenas.

2. Blood Usage Review Committee: 8/23/89
3. CPR Committee: 9/14/89
4. Critical Care Committee: 10/25/89
5. ICU Committee Minutes:
   a. Medicare: 9/14/89
6. Infection Control Committee: 9/19/89
   a. Dietary Services Policy Review and Revision

MOTION: To approve the revision of the Dietary Services Policy.

ACTION: Approved by Committee.

7. Medical Records Committee: 10/18/89

MOTION: To approve the following forms; Telemetry Form (revised); Post Anesthesia Care Unit Form (PACU) revised

8. Operating Room Committee: 9/20/89, 10/18/89
9. P & T Committee: 10/31/89

MOTION: Request approval for the following:

a. Drug study for prophylaxis of stress ulcers
b. Switch to Engerix-B vaccine as the only hepatitis-B vaccine on the Formulary. Request the following Formulary

Additions:

a. Ganciclovir (Cytovene ®) Anti CMV drug
b. Beclomethasone dipropionate nasal Spray-Anti-inflammatory topical nasal steroid
c. Zidovudine Syrup (Retrovir®)-Calcium channel blocker with increased ability to cross blood-brain barrier.

ACTION: Requests approved by Committee.

MUSC MEDICAL CENTER
November 27, 1989

C. Departmental Minutes

A synopsis of the following departmental; minutes was presented by Dr. Fitts and discussed by Committee. The summary is attached. No action was recommended.

1. Anesthesiology: Dept., 8/7/89, 9/28/89; M & M, 10/19/89
2. Dermatology: 9/20/89, 10/25/89
3. Family Medicine: Fac., 9/11/89; QA, 9/28/89, 10/26/89
4. Neurology: 10/12/89, 10/26/89
5. Ob-Gyn: QA, 10/25/89, 10/27/89
6. Oral & Max. Surgery: 10/9/89
7. Otolaryngology: 10/4/89, 10/25/89
8. Psychiatry: QA, 8/30/89, 10/17/89
9. Pathology & Lab. Medicine: 8/23/89; QA, June-Aug.'89
10. PM & R: 9/12/89
11. Radiology: 9/6/89, 11/1/89
12. Surgery: Dept, 9/18/89, 10/9/89; M & M, 9/15/89, 9/20/89, 10/27/89

D. Quality Assurance

A synopsis of Q. A. activities was distributed to and reviewed by Committee members prior to this meeting. The following was discussed and presented for approval.

A. Q. A. Committee, Minutes: November 1, 1989

B. Departmental QA: Reports:

1. Anesthesiology: 7/10/89, 8/7/89
2. Neurosurgery: 8/24/89
3. Ob-Gyn: 7/25/89, 8/9/89, 9/5/89
4. Orthopaedics: 3/21/89, 5/15/89, 6/6/89, 6/29/89, 8/1/89
5. Pathology & Lab. Medicine: 7/ 26/89, 8/23/89
6. Physical Medicine: 2/14/89, 3/14/89
7. Radiation Oncology: 5/25/89, 6/29/89, 7/27/89

MOTION: To approve minutes and studies as presented.

ACTION: Approved by Committee.

II. DISCUSSION ITEMS

A. Report of the Executive Director

Ms. McCants gave the following for information:
*Renovation update:
Scheduled openings - 6W, patients in December; 7W, turned over from contractor the end of December, available for patients 2-3 weeks after that; 9th floor, July 1990; 8W, March 1990; 3rd floor, March 1990, 2E will be rearranged to accommodate Radiology during their renovations;

A. Report of the Executive Director Continued

Ambulatory Surgery, February 1990; Low Risk OB to CMH, March 1990; 5th floor will not totally close, we will keep at least a ten bed ward. *We are still

recovering from HUGO and are working diligently to make repairs .

B. Report of the Director of Patient Care Services

Ms. Maguire indicated the Department is attempting to fill the case manager positions.
Dean Hoffman has appointed a Task Force with regarding
joint appointments with a report due out at the end of March.

C. Medical Record Delinquent Chart Count

November 1989	Currently 10 physicians without privileges
15-30 Days:	431 (29% of total)
> 30 Days:	941 (57% of total)

Dr. Del Bene reiterated that the medical record is the ultimate responsibility of the attending physician not the house officer.

D. Death & Autopsy Report: September 1989
Autopsy Rate: 45% Total Deaths: 31
Total Autopsies: 14

III. OLD BUSINESS

IV. NEW BUSINESS

A. Management of Drug Abuse During Pregnancy

This policy was distributed and reviewed by Committee prior to this meeting.

MOTION: To approve this policy for distribution throughout the MUSC-MC.

ACTION: Approved by Committee.

V. INFORMATION ITEMS

A. Quarterly Medical Staff Meeting: November 28, 1989, 7:30 AM

There being no further business, the meeting was adjourned.

Respectfully submitted,
/s/
Victor E. Del Bene, M.D.
Chairman

VDB/cjc

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 1

MEDICAL UNIVERSITY OF SOUTH CAROLINA
Department of Obstetrics & Gynecology
Maternal and Fetal Medicine
(803) 792-2864

[LOGO]
MUSC
Medical
Center
171 Ashley Avenue
Charleston, South
Carolina 29425-2233

June 30, 1989

MEMORANDUM

TO: OB/GYN Residents and MFM Staff

FROM: E. O. Horger III, M. D. /i/

RE: Cocaine Screening

The following obstetric admissions should have urine screening for cocaine:

1. No prenatal care
2. Abruptio placenta
3. Intrauterine fetal death
4. Preterm labor "of no obvious cause"
5. IUGR "of no obvious cause"
6. Previously known drug or alcohol abuse

EOH/fwm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 3

Office Mem [LOGO]
MOLONY CONDON
Judicial Circuit

SHIRLEY B. BROWN
Case Manager – Obstetrics
Medical University of South Carolina
171 Ashley Avenue
Charleston, S.C. 29425-2270
Telephone (803) 792-2127

TO: Charlie

FROM: Frank

SUBJECT: "Crack Babies"

1/89

I was @ the Med. U. the other day for a meeting w/Dr. Schuh & I Met a nurse who is the case manager for all cases admitted to the Hospital for Pre-Natal care. She knows all the statistics on"crack babies, etc. I believe she might be useful to us in our effort to form some policy on dealing w/mothers of "crack babies".

Please advise.

/i/

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 14

THE STATE OF SOUTH CAROLINA
[LOGO]
SOLICITOR, NINTH JUDICIAL CIRCUIT

SOLICITOR CHARLES MOLONY CONDON
CHARLESTON AND BERKELEY COUNTIES
COUNTY COURT HOUSE
POST OFFICE BOX 58
CHARLESTON, S.C. 29402-0058
TELEPHONE: 807-723-6714

October 24, 1989

Ms. Shirley Brown
RNMN Case Manager for OB
171 Ashley Avenue
Charleston, SC 29425

Dear Shirley:

Enclosed please find a draft of our policies that we discussed and several copies of the letter from our office to be presented to the mother who tests positive.

If you have any questions, please feel free to call me.

Sincerely,

Francis J. Cornely
Assistant Solicitor

FJC/jmb

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 19

MEDICAL UNIVERSITY OF SOUTH CAROLINA
Department of Obstetric & Gynecology
Maternal and Fetal Medicine
(803) 792-2864

MUSC [Logo]
MEDICAL CENTER
171 Ashley Avenue
Charleston, South Carolina 29425-2233

November 14, 1989

TO: OB/GYN Residents
FROM: Roger B. Newman, M. D.
RE: Drug abuse testing policy

This letter is in follow-up to the several very good questions raised at our recent discussion of our new policy regarding drug testing. The first question involves policies to be employed by Franklin C. Fetter, the various midwife clinics as well as the public health clinics. These policies which we have instituted at the Medical University will be conveyed to the staff at Franklin C. Fetter as well as to the various public health department midwife services. We will encourage them to initiate the same type of patient educational services as we are currently recommending here at MUSC. All obstetrical patients at MUSC whether private or public will receive the same educational material.

A second question regarded testing of patients in the 8-East exam room. Such testing would require specific patient consent because patients seen in the outpatient exam rooms who have not been seen through our prenatal clinics have not

consented to treatment at the Medical University. It would seem unlikely that such testing would be performed in the 8-East exam room as most of the indicators would be under conditions where hospitalization was likely. Dr. Gadsden informs us that the urine drug screen is a very effective test, that it is extremely reliable when it indicates positive screen but will occasionally miss the patient who has ingested such substances. The test will detect drugs for approximately 48 hours and we are assured that such drugs as Lidocaine or Marcaine will not cross-react with cocaine. It is important also to note that the neonatal nurseries will also be screening the urine of those babies born to mothers with the obstetrical indicators for drug abuse. We will address whenever possible the question of the treatment of those women arrested or in custody at the medical University Hospital. Obviously, these policies will ultimately be the determination of the police department but we will request flexibility in the treatment of these patients as much as possible. Similarly, we should attempt to see these patients as early as possible in the outpatient clinics so that they can be returned back to jail from clinic as soon as possible.

It may be of some interest to the resident staff to have some further information on those patients who have tested positive in recent weeks. The first patient arrested from our OB service was MY. This is her fifth arrest for drug-related offenses and she is known well by the police department as multiple other members of her family have also been arrested, and she has two brothers currently jailed for cocaine distribution. She has been charged with

both the misdemeanor of cocaine possession but also the felony offense of distribution to a minor. The public defender, Michael O'Connor, who has great interest in this case has decided that he will not personally defend MY but has reassigned it to one of his lower-ranking public defenders, presumably because he does not wish that this

patient be the test case. MY continues in jail awaiting delivery.

The second patient arrest was LG. As you are aware, she has been delivered and the baby has been placed with a foster family while DSS investigates the possibility of the grandmother being responsible for this baby. She was in the jail charged with the felony of possession for distribution to a minor, but since delivery, has received a hearing only on the misdemeanor charge of neglect. At the time of her hearing, she infuriated the judge because of repeated lying and ultimately claimed that she would continue to do what she wants with her life. She also would not testify as to the source or amount of her income, and it is presumed that she probably also is a cocaine distributor. The investigation indicates that she has a relatively good income from no apparent source. The judge fined her child support and ordered her into substance abuse clinic. If she goes to substance abuse clinic, all of her felony and misdemeanor charges will be dropped and if not, the felony charges would be instituted. She was released on her personal recognizance which curiously the public defender tried to block.

The patient most recently arrested, EK, and discussed at our meeting was a woman with very limited prenatal care arriving at the Medical University at 33 weeks' gestation. The decision was made not to perform urine drug screen; however, the baby who delivered developed irregular heart rate, jitteriness, was difficult to console, and had a strongly positive urine drug screen for cocaine. At that point, the urine drug screen on the mother was negative. At the time of her arrest, she was charged with unlawful neglect and DSS is currently investigating the situation for a decision on custody. Again, the solicitor plans to drop charges against the mother if she submits to mandatory substance abuse treatment.

We also received follow-up on a few patients with positive drug screens prior to the institution of this protocol. PM had

a positive urine drug screen for cocaine in August which was performed because of a lack of prenatal care. Her case was referred to DSS which was ineffectual. We know of her because of her child being re-hospitalized at one month of age with apnea and bradycardia as well as failure to thrive despite a full term gestational age and size. DSS has subsequently taken custody of the baby due to maternal neglect. Patient SB is a gravida 9, para 9 with 8 living children who had a positive urine drug screen in October. She may be remembered as the woman who refused to skip breakfast in order to have a tubal ligation. DSS referral was also ineffectual despite our request immediate evaluation. This patient was arrested on November 8 when police were called to her home when the children were reported as being unattended by a neighbor. The 8 children were found alone in the house. The mother was arrested for cocaine possession at another location. DSS has again subsequently taken custody of all the children and is considering placement of the children with the father.

Page 3

I do not present these case reports to justify the current policies that we are recommending at the Medical University as the weakest form of any argument is anecdotal case histories. I have no intention of continuing to provide follow-up on all women arrested at the Medical University. I present these cases solely to demonstrate how painfully sad and difficult this situation of drug abuse during pregnancy is. I believe it must be very difficult for anyone to claim the ethical, moral, or intellectual high ground in such a complicated scenario which involves protecting the rights, health, and future of fetuses, mothers, and newborns.

I would like to again reiterate the goals not only of the obstetrical department of the Medical University of South Carolina but also the goals of the police department and solicitor's office. Namely those goals are to first educate as many patients as possible regarding the harmful effects of

any and all drug abuse during pregnancy. Secondly, if despite education drug abuse is documented in a currently pregnant women, an effort will be made to institute a change in this lifestyle through education, counseling, and a mandatory attendance at substance abuse clinic. Thirdly, if a patient who is known to abuse drugs during pregnancy fails to comply with this treatment plan or is noted to be abusing drugs immediately preceding delivery, then she will be taken into custody by the Charleston City Police and charged with the various offenses described by the solicitor's office. While this may be considered punitive, again I urge you to understand that the purpose behind this is primarily to insure that DSS becomes involved in follow-up of that infant as well as providing the criminal justice system an opportunity to investigate the situation and probably in most instances to again mandate substance abuse treatment as a prerequisite for resuming maternal relationship with the child.

Thank you very much for your consideration and understanding of this policy.

Sincerely,

/s/

Roger B. Newman, M. D.

RBN/fwm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 44

OBSTETRICS	GYNECOLOGY
CLINICAL GENETICS	GYNECOLOGIC ONCOLOGY
ULTRASONOGRAPHY	REPRODUCTIVE ENDOCRINOLOGY
MATERNAL/FETAL MEDICINE	UROGYNECOLOGY
	RESEARCH

UNIVERSITY [LOGO] OF SOUTH CAROLINA
SCHOOL OF MEDICINE
Department of Obstetrics and Gynecology
Two Richland Medical Park, Suite 208
Columbia, South Carolina 29203
(803) 765-7243

October 26, 1990

Charles M Condon
Solicitor, Ninth Judicial Circuit
PO Box 58
Charleston, South Carolina 29402-0058

Dear Charles:

Enclosed is a copy of the recent issue off the Journal of the South Carolina Medical Association. Our article on "Cocaine in Pregnancy" appears as the lead article. I certainly appreciate your help in organizing and operating our program regarding the pregnant female.

In my discussions with Dr. Berry Campbell, the senior fellow in Maternal Fetal Medicine at MUSC, I understand that the number of cocaine positive urine drug screens increased in the past few months. However, I also understand that there has not been any need for any further arrests in that each patient has gone ahead with substance abuse counseling.

We have not initiated such a urine screening program here at RMH. I have discussed our protocol with several groups and in a couple of conferences here, and it was received quite well by all. I really am waiting until we can do something with the statewide screening project before going any further locally. It is very apparent that the SCMA has become quite interested in the problem and I hope that we can get something done on a statewide basis.

Thanks again for all of your cooperation.

Sincerely,

/s/

Edgar O. Horger III, MD
Professor of Obstetrics and Gynecology
Division of Maternal-Fetal Medicine

EOH/tp

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT 83a

CHARLES MOLONY CONDON
Office Memorandum Solicitor. Ninth Judicial Circuit

To: Robert Hemphill DATE: April 2, 1991

FROM: Charles Condon, Solicitor /i/

SUBJECT: Payment for Social Worker/Researcher

Please consider this your authorization to fund the position of social worker researcher in the Substance Abuse in Pregnancy Program through the Ninth Circuit Charleston County Pre-Trial Intervention Program. This position involves the tracking of those individuals who have tested positive for drug abuse during pregnancy for the Medical University of South Carolina and the judicial system. It is to be funded without benefits at the rate of $10.00 per hour. Starting next month, in order to better track the women who are arrested in our "cocaine baby" program but are not prosecuted, we will enroll them in our PTI program. I expect all fees will be waived because of the indigency of most of these women

cc: Drug Strike Force & Child Abuse Unit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 92

AUTHORIZATION TO RELEASE INFORMATION
TO MEDICAL UNIVERSITY HOSPITAL

TO: _____

_____

_____
(Person, address where request is to be sent)

The undersigned does hereby authorize the above named person or agency to release medical records or other information as specified below to the following:

RETURN ADDRESS: _____

DEPARTMENT OF _____

MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 ASHLEY AVENUE
CHARLESTON, SOUTH CAROLINA 29425

RE: _____ _____
(Patient's name) (Birthdate)

The information to be released includes the following:

_____ discharge summary

_____ operative report

_____ pathology report

_____ other: _____

_____

This authorization is subject to revocation at any time. Without prior revocation, it will expire 90 days from the date below.

The party executing this authorization has a right to receive a copy of it.

_____
(Patient or legal representative)

Dated this _____ day of _____, 19___

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFFS' EXHIBIT # 94

[LOGO]
MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina 29425

AUTHORIZATION FOR RELEASE OF INFORMATION
FROM MEDICAL RECORDS

The undersigned does hereby authorize the MUSC Medical Center to release to _____
_____ copies of medical records,
(Name of Person/Company to
Whom Records are to be Released)

Address _____

_____

or portions thereof as shown below, of _____
(Patient/Client's Name)
Date of Birth _____

who was admitted to the aforesaid hospital on _____
and discharged on _____ (Date)
(Date)

I understand that this information may include reference to psychiatric care, sexual assault, alcohol abuse and/or drug abuse and results of tests for all infectious diseases including AIDS/HIV.

The portion of the medical record to be released is the following: _____

The purpose or need for this disclosure is: ____
_____

This authorization is subject to revocation at any time. Without prior revocation, this authorization will automatically expire one year from the date hereof.

The party executing this authorization has a right to receive a copy of it.

_____
(Signature of Patient or Legal Guardian)

Date this _____day of _____, 19___

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 126

DEPARTMENT OF FAMILY MEDICINE
(803) 792-2411
Family Medicine Unit
(803) 792-3451
Fax (803) 792-3598

[LOGO]
MEDICAL UNIVERSITY OF
SOUTH CAROLINA
171 Ashley Avenue
Charleston South Carolina
29425-5820

MEMORANDUM

TO: Faculty, Residents, and Staff

FROM: Dena Clair, RN /i/

DATE: November 1, 1993

RE: MUSC Policy Regarding Substance Abuse in Pregnancy

I have recently had many questions related to this policy. Bottom line is that the policy does apply to Family Medicine and is to be followed.

Our role is to:

1. identify those who meet criteria for screening by urine drug screen. ** consent form must be signed

2. provide education requiring substance abuse in pregnancy. Patients are to be referred to me to view video, sign statement, etc.

3. refer to Shirley Brown RN, Case Manager OB/GYN or OB clinic if urine screen positive for cocaine only

   - If the patient is here in the office, notify Ms. Brown at that time. She will come over to see the patient (beeper 1500).

   - If the patient is not here, refer to the OB clinic. Indicate positive UDS and that patient is to see Ms. Brown.

We can continue to follow our patients if discussed with Ms. Brown and if we agree to follow protocol regarding appointments for OB visit and substance abuse.

If you have any questions, please call me. A copy of the policy will be at each nursing station.

DC/tab

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 127

Department of Family Medicine
(803) 792-2411
Family Medicine Unit
(803) 792-3451
Fax (803) 792-3598

[LOGO]
MEDICAL UNIVERSITY OF
SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina
29425-5820

M E M O R A N D U M

TO: John Sanders
Hospital Administrator

FROM: Barry L. Hainer, M.D. /i/
Associate Chair for Clinical Services
Dena Clair, R.N. /i/
Patient Educator

DATE: March 3, 1994

RE: Implementation of MUSC Policy M-7:
Substance Abuse in Pregnancy

In order to implement and comply with the policy, the Family Medicine Center will:

1. inform all residents, faculty, and clinical staff of the policy by memorandum and by follow-up discussion at patient care meetings.

2 include a copy of the consent for treatment in the OB packet that is placed on record at the time of the initial OB visit. Physician or nursing staff will be responsible for reviewing and having the consent signed.

3. refer all OB patients to Dena Clair, R.N., for routine prenatal patient education which includes substance abuse counselling, viewing of substance abuse video, signing of statement that the patient has received counselling and letter from OB service. If the consent form has not been signed, it will be done at this visit also. When possible, a same day appointment will be offered at the convenience of the patient or as soon as possible after initial OB visit. Referral may be initiated by M.D., nursing staff, or clerical staff.

4. establish a policy to allow R.N.s to order UDS if patient meets criteria.

5. review OB charts monthly to determine if the following policy regarding identification of patients who meet criteria referral for patient education, etc. If not, notation is made on the patient's record. Dr. Hainer will be informed of physicians who do not comply with this policy. Mrs. Clair will participate in OB chart review.

cc: Laurann Litchfield, R.N.
Nurse Supervisor

A. Cleve Hutson, M.D.
Chairman

Jeff Conklin
Business Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 128

DEPARTMENT OF FAMILY MEDICINE
(803) 792-2411
Family Medicine Unit
(803) 792-3451
Fax (803) 792-3598

[LOGO]
MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina 29425-5820

MEMORANDUM

TO: Residents, Faculty, and Clinical Staff

FROM: Barry L. Hainer, MD /i/
Dena Clair, RN /i/

DATE: March 10, 1994

RE: MUSC Policy Regarding Substance Abuse in Pregnancy

The purpose of this memo is to remind each of you that the Family Medicine Center is to comply with this MUSC policy. Our role in doing so is as follows:

1. Identify those who meet criteria for urine drug screen (UDS)

    - No prenatal care
    - Late prenatal care after 24 weeks

- Incomplete prenatal care
- IUGR "of no obvious cause"
- Previously known alcohol or drug abuse
- Abruptio placentae
- IUFD
- Preterm labor "of no obvious cause"
- Unexplained congenital anomalies

UDS may be ordered by the MD or RN. The consent form MUST be signed prior to doing so.

2 Refer all OB patients to Dena Clair for routine prenatal counselling which includes substance abuse counselling required by policy.

3. Refer patients with positive UDS (cocaine only) to Shirley Brown, RN, MSN Case Manager, for OB/GYN .

- if the patient is here in the office, page Ms. Brown (Beeper 1500). She will come here to see the patient.
- if the patient is not here, refer to the OB clinic. Indicate on the consult positive UDS and that patient is to see Ms. Brown.

We may continue to follow our patients if discussed with Ms. Brown and if we agree to follow the protocol regarding appointments for OB care and substance abuse.

A copy of the policy is at each nursing station.

DC/tab

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 225

COLLEGE OF NURSING [LOGO]
MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina
29425-2402

MEMORANDUM

TO: Nurse-Midwives and Staff
Rutledge Avenue Clinic

FROM: Kathleen M. Higgins /i/
Director of Nursing Services

DATE: March 23, 1994

RE: Drug Abuse Film

I have been asked to assure our compliance with the directives of Medical University Hospital in regards to orientation of maternal clients to risks of drug use during pregnancy.

Please incorporate an opportunity for each prenatal patient to view the video tape supplied by John Sanders and request that each client read and sign the attached form.

If there is any anticipated difficulty complying with this directive, please respond as soon as possible.

lrp

POLICY M-7

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

MUSC MEDICAL CENTER

I have seen a video on substance abuse and have been advised of the risks to myself and my baby. I understand that the MUSC Medical Center staff is willing to assist me in obtaining assistance for drug abuse treatment.

Patient's Signature: _____

Patient's Social Security Number: _____

Date: _____

Witness' Signature: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

PLAINTIFF'S EXHIBIT # 258

MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

PURPOSE:

Pregnant women abusing illegal drugs is a growing problem that poses potentially fatal consequences for the unborn child. This threat to human life has necessitated police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

POLICY:

The MUSC Medical Center will cooperate with the City Of Charleston Police Department and courts of law in reporting pregnant women who have tested positive for illegal drugs. The following criteria will be used to determine who will be screened for urine drug testing:

A. Pregnancies to be screened by urine drug testing:

1. No prenatal care
2. Late prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placentae
5. Intrauterine fetal death
6. Pre-term labor "of no obvious cause"
7. IUGR "of no obvious cause"
8. Previously known drug or alcohol abuse
9. Unexplained congenital anomalies

B. Infants to be screened in both the well baby nursery and the newborn intensive care unit by urine or (meconium if possible) drug testing include those delivered following or with:

1. No maternal prenatal care
2. Late maternal prenatal care after 24 weeks gestation
3. Incomplete maternal prenatal care (of fewer than five obstetrical visits)
4. Abruptio placenta
5. Pre-term labor "of no obvious cause"
6. IUGR (SGA) "of no obvious cause"
7. Previously known maternal drug or alcohol abuse
8. Unexplained congenital anomalies
9. Clinical manifestations suggesting evidence of drug withdrawal

The MUSC Medical Center will provide the following educational information concerning drug abuse to patients on their initial visit to a clinic or initial hospitalization:

1. Video presentation of harmful effects of drug abuse during pregnancy.
2. Written statement from OB service regarding harmful effects of drug abuse during pregnancy (see attached).
3. Statement to be signed by the mother, attesting that she has received counselling (see attached).

The following protocol will be followed after identification of drug abuse during pregnancy by positive urine drug screen:

1. The Case Manager for OB or designee will be notified by the resident of positive urine drug screen; on nights or holidays the Patient Care Coordinators will be notified.

2. Video presentations of harmful effects of drug abuse during pregnancy will be shown by nursing staff.

3. The Case Manager for OB or designee will give the written statement from OB service regarding harmful effects of drug abuse during pregnancy to the patient (see attached).

4. Referral to Substance Abuse Clinic will be made by the OB Case Manager or designee and the OB clinic appointment will be made by the ward clerk. The OB Case Manager or designee will give the appointment letter to the patient. (see attached)

5. The OB Case Manager or designee will give the written statement from the solicitor's office to the patient. (see attached)

6. If any clinic appointments (substance abuse or OB clinic) are not kept, the police department will be notified. Substance abuse will notify the police department for any substance abuse appointments missed or positive urine drug screens obtained by them. (see attached statement from Captain Roberts).

7. If any further drug screens are positive, police department to be notified and patient will be arrested. (see attached statement from Captain Roberts)

Protocol for follow-up after identification of drug abuse for patient who has delivered an infant:

1. The neonatal Case Manager (or neonatologist) for out-born babies in the NICU and the obstetrical case manager for inborn NICU babies and 8 East Nursery will be notified by the resident in the respective nurseries of positive urine/meconium drug screens. On weekends or holidays the patient care coordinator will be notified.

2. The parent(s) will be given a written summary of the harmful effects of drug abuse during pregnancy and informed the hospital policy/procedure by case manager, neonatologist or patient care coordinator (see attached).

3. A referral will be made to the Department of Social Service Child Protective Services. (see attached statement from the solicitor's office)

4. The Case Manager or designee will give the written statement from the solicitor to inborn babies mothers.

5. A SCAN report will be completed by a social worker with a copy placed on infant's chart and a copy sent to the Case Manager and SCAN coordinator.

If a patient presents themselves for care at the MUSC Medical Center and has failed to keep scheduled appointments for pre-natal care and/or substance abuse therapy, MUSC personnel will notify the Detective Division of the Police Department. A criminal report will be made and an arrest warrant issued for the accused.

The arrest will be made at the patients discharge. The Nurse Case Manager will notify MUSC Security and Hospital Administration of the arrest. A MUSC officer will escort the representative from the police department to the patient. The Director of Family Clinical Services will be present to represent the hospital during the hours of 8:00 am to 5:00 pm. Any arrest made during the remaining hours will be attended by a Patient Care Coordinator. The PCC will alert the Administrator on call of the arrest. The Director of Family Clinical Services and the PCC are to insure that proper procedure is being used and that the patient is escorted out of the hospital in an inconspicuous manner.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

DEFENDANT'S EXHIBIT # 156

How the Policy at MUSC Worked if Urine tested Positive for Cocaine

1. General Consent form signed at admission.
2. Video reviewed and letter signed.
3. If met criteria, UDS performed.
4. If UDS positive:
   a) shown video again;
   b) met with OB Case Manager;
      1) Harmful effects of cocaine explain;
      2) Hx taken;
      3) Explained requirement to report positive UDS and offer of amnesty by Solicitor
      4) Solicitor letter reviewed and signed;
      5) Appointment made at Substance Abuse Treatment Center for evaluation.
5. If Patient failed to successfully complete substance abuse treatment or returned to MUSC with another positive UDS during prenatal care or at delivery, OB Case Manager would report to the police as reporting statute required.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

[Title Omitted in Printing]

EXCERPT OF JURY CHARGE 1/6/97

[JURY CHARGE 17]

IN OTHER WORDS, THE EVIDENCE MUST AT LEAST REASONABLY LEAD YOU TO THE INFERENCE THAT THE DEFENDANTS POSITIVELY OR TACITLY CAME TO A MUTUAL UNDERSTANDING TO TRY TO ACCOMPLISH A COMMON AND IMPROPER PLAN.

LET'S LOOK MORE CLOSELY NOW AT THE CONSTITUTIONAL CLAIMS AND WHAT IS NECESSARY TO BE SHOWN FOR THERE TO BE A VIOLATION OF THE FIRST THE FOURTH AMENDMENT AND THEN NEXT THE FOURTEENTH AMENDMENT.

AS I STATED EARLIER, THE FOURTH AMENDMENT STATES IN PERTINENT PART THAT THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED. THE FOURTH AMENDMENT, WHICH I JUST READ, USUALLY FOCUSES ON POLICE ACTION. WHEN WE RUN INTO THE FOURTH AMENDMENT, WE ALMOST ALWAYS DO IT WHERE A POLICE OFFICER HAS MADE AN IMPROPER SEARCH OR AN IMPROPER SEIZURE OF PROPERTY. A SEARCH OR SEIZURE WITHOUT A WARRANT.

NORMALLY ON THE OTHER SIDE OF THE COIN, PERSONNEL WORKING IN A HEALTH CARE FACILITY, SUCH AS THE MEDICAL. UNIVERSITY OF SOUTH CAROLINA, COULD ROUTINELY TEST A PATIENT'S URINE OR TEST A PATIENT'S BLOOD OR PERFORM OTHER DIAGNOSTIC TESTS WITHOUT BEING SCRUTINIZED UNDER THE FOURTH AMENDMENT. BUT WHAT MAKES THIS CASE UNUSUAL AND WHAT BRINGS IT WITHIN THE COVERAGE OF THE FOURTH AMENDMENT IS THE FACT THAT YOU HAVE LAW ENFORCEMENT AND MEDICAL SERVICE PEOPLE ACTING TOGETHER.

IT IS THE FACT THAT THE SO-CALLED SEARCH, THE TAKING

[JURY CHARGE 18]

OF THE URINE SAMPLE AND THE TESTING OF IT FOR COCAINE, WAS TO BE USED NOT ONLY FOR MEDICAL DIAGNOSIS, BUT IF IT WAS POSITIVE IT WAS ALSO GOING TO BE USED FOR POLICE AND PROSECUTORIAL PURPOSES. IT IS THAT CONCERT, THAT JOINING TOGETHER BY THESE TWO GROUPS OF PEOPLE TO PERFORM THIS SEARCH THAT BRINGS IT WITHIN THE SCOPE OF THE FOURTH AMENDMENT.

THE FOURTH AMENDMENT SPEAKS OF UNREASONABLE SEARCHES AND SEIZURES. USUALLY WHEN WE SPEAK OF UNREASONABLE SEARCHES AND SEIZURES WE ARE SPEAKING OF SEARCHES AND SEIZURES WHERE

THERE IS NOT A SEARCH WARRANT. THERE ARE, HOWEVER, UNDER OUR LAW, A NUMBER OF RECOGNIZED EXCEPTIONS TO THAT RULE. THERE ARE A NUMBER OF CASES IN WHICH A WARRANTLESS SEARCH AND SEIZURE CAN BE REASONABLE UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

THERE WERE NO SEARCH WARRANTS IN THIS CASE. THERE WERE SOME SEARCH WARRANTS ISSUED LATER IN THE PROSECUTION TO OBTAIN MEDICAL RECORDS, BUT THERE WERE NO SEARCH WARRANTS ISSUED BY A MAGISTRATE OR ANY OTHER PROPER JUDICIAL OFFICER TO PERMIT THESE URINE SCREENS TO BE TAKEN. THERE NOT BEING A WARRANT ISSUED, THEY ARE UNREASONABLE AND IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, UNLESS THE DEFENDANTS HAVE SHOWN BY THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFFS CONSENTED TO THOSE SEARCHES.

NOW, THERE IS A LAW THAT HAS BEEN READ TO YOU HAVING TO DO WITH THE REPORTING OF CHILD ABUSE. IT'S SECTION

[JURY CHARGE 19]

20-7-510. THAT LAW IS SOMETHING THAT YOU CAN CONSIDER IN DETERMINING WHAT INTENT THE DEFENDANTS HAD WHEN THEY DID

WHATEVER THEY DID IN THIS CASE. AND I DON'T MEAN TO BE FACETIOUS WHEN I SAY THAT THEY DID WHATEVER THEY DID, BUT IT'S YOUR JOB TO FIND THE FACTS. AND WHEN YOU DO THAT, YOU WILL FIND WHAT EVERYBODY DID. AND THIS STATUTE IS RELEVANT TO SHOW THEIR INTENT AND WHY THEY DID WHAT THEY DID. YOU DON'T HAVE TO SAY THIS SHOWS THEIR INTENT, BUT IT IS JUST ONE OF THE FACTORS THAT YOU CAN CONSIDER IN THAT REGARD. BUT THIS STATUTE CANNOT GIVE SOMEONE THE RIGHT TO VIOLATE THE FOURTH AMENDMENT TO THE CONSTITUTION.

THE SEARCHES OF THE URINE IN THIS CASE WERE, AS I HAVE STATED, UNREASONABLE UNLESS THEY WERE CONSENTED TO. AND SO LET ME DISCUSS JUST A MOMENT WHAT WE MEAN BY CONSENT, BECAUSE IT IS CONCEDED BY THE PARTIES THAT IF THE SEARCHES WERE CONSENTED TO THEN THEY ARE CONSTITUTIONAL. AND AGAIN YOU MAY REACH A DIFFERENT CONCLUSION AS TO CONSENT FROM PLAINTIFF TO PLAINTIFF. THAT DOESN'T HAVE TO BE SO, THAT'S DICTATED BY THE FACTS. BUT IT DOESN'T MEAN THAT IF THERE IS CONSENT IN ONE CASE THAT THERE IS NECESSARILY CONSENT IN THE OTHER OR VICE VERSA. AGAIN, YOU HAVE TO LOOK AT THE FACTS THAT RELATE TO EACH PLAINTIFF AND REACH A DECISION ON THE QUESTION OF

CONSENT.

AS I HAVE STATED EARLIER, NOT ONLY IS IT NECESSARY THAT CONSENT BE SHOWN IN THIS CASE FOR THESE SEARCHES NOT TO

[JURY CHARGE 20]

BE IN VIOLATION OF THE CONSTITUTION, THE BURDEN IS ON THE DEFENDANTS' TO SHOW THAT. CONSENT IS A QUESTION OF FACT TO BE DETERMINED BY YOU. IT IS A QUESTION OF FACT TO BE RESOLVED IN THE LIGHT OF ALL OF THE CIRCUMSTANCES IN THE CASE. IT IS SOMETIMES SAID THAT YOU MUST LOOK AT THE TOTALITY OF THE CIRCUMSTANCES.

SOME OF THE FACTORS THAT YOU MIGHT TAKE INTO CONSIDERATION IN DETERMINING WHETHER OR NOT CONSENT TO THE SEARCH WAS GIVEN BY A PARTICULAR PLAINTIFF INCLUDES THE AGE OF THE - ONE OF THE PLAINTIFFS. HIS OR HER - OR HER LACK OF EDUCATION OR HER EDUCATION. HER INTELLIGENCE OR THE LEVEL HER INTELLIGENCE. THE LACK OF ANY ADVICE FROM AN ATTORNEY OR THE PRESENCE OF SUCH ADVICE.

THE MATTER OF CONSENT MORE OFTEN THAN NOT IS DISCUSSED IN TERMS OF VOLUNTARINESS AND WILLINGNESS TO GIVE

THE CONSENT. BUT BEFORE THERE CAN BE ANY VOLUNTARINESS, BEFORE THERE CAN BE ANY CONSENT, THERE MUST BE KNOWLEDGE. THE PERSON GIVING THE CONSENT MUST HAVE KNOWLEDGE OF WHAT SHE IS DOING. IT'S BASIC THAT BEFORE YOU CAN CONSENT TO SOMETHING

YOU HAVE GOT TO KNOW WHAT IT IS. YOU HAVE TO HAVE ENOUGH INFORMATION TO KNOW WHAT IS BEING DONE BEFORE YOU CAN CONSENT TO IT. AND THE SCOPE OF THE CONSENT MUST BE BROAD ENOUGH INCLUDE THE SEARCH IN QUESTION. CONSENT FOR ONE PURPOSE MAY BE BROAD ENOUGH TO COVER ONE ACTOR, BUT MAY NOT BE BROAD ENOUGH TO COVER ANOTHER ACTOR.

[JURY CHARGE 21]

THE WRITTEN CONSENT IN THIS CASE MAY BE SUFFICIENT TO COVER THE TAKING OF A URINE SAMPLE AND THE TESTING THEREOF BY MEDICAL UNIVERSITY OF SOUTH CAROLINA OFFICIALS ALONE, BUT IT IS NOT SUFFICIENT TO COVER THE SHARING OF THAT INFORMATION WITH LAW ENFORCEMENT OFFICIALS. THAT WRITTEN CONSENT IS NOT SUFFICIENT CONSENT TO WARRANT A SEARCH WHERE THE SEARCH INFORMATION IS FURNISHED TO LAW ENFORCEMENT OFFICERS. THERE MUST BE SOMETHING IN ADDITION TO THAT WRITTEN CONSENT BEFORE

YOU CAN SAY THAT THESE WERE CONSENT SEARCHES.

I'M NOT SUGGESTING OR SAYING THERE WAS NOT CONSENT. I'M JUST SAYING THAT THE WRITTEN DOCUMENT ITSELF DOES NOT CONSTITUTE SUFFICIENT CONSENT TO NOTIFY THESE PLAINTIFFS THAT THESE TESTS WILL BE TURNED OVER TO LAW ENFORCEMENT PEOPLE UNDER CERTAIN CONDITIONS. THEY HAD NO REASON FROM READING THE CONSENT TO KNOW THAT THE INFORMATION WOULD BE SHARED BY THE MEDICAL PEOPLE WITH THE LAW ENFORCEMENT PEOPLE. AND THEREFORE TO SHOW THAT THERE IS A VALID CONSENT IN THIS CASE THERE MUST BE SOMETHING ELSE THAT CONVINCES YOU THAT THE PLAINTIFFS CONSENTED NOT ONLY TO THE TAKING OF THIS URINE FOR THE USE BY THE MEDICAL PEOPLE, BUT ALSO THE SHARING OF IT WITH LAW ENFORCEMENT PEOPLE FOR THE POSSIBILITY OF PROSECUTION FOR DRUG OFFENSES.

I CHARGE YOU FURTHER IN REGARD TO THE WRITTEN CONSENT FORMS, THAT THE PLAINTIFFS ARE BOUND BY THOSE FORMS AND THE TERMS OF THOSE FORMS WHETHER IT HAS BEEN SHOWN THAT

* * *

FILED JAN 23 1997
LARRY W. PROPES, CLERK
CHARLESTON, SC

ENTERED1-23-97

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Civil Action: 2:93-2624-2

Crystal M. Ferguson, Theresa Joseph, Darlene M. Nicholson, Paula S. Hale, Ellen L. Knight. Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and LaVerne Singleton,
PLAINTIFFS

-v-

The City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker, Jr., Dr. Charles B. Hanna, Dr. Cotesworth P. Fishburne, Dr. E. Conyers Obryan Melvyn Berlinsky, Patricia T. Smith, M. J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W. Peoples, Dr. Carroll V. Bing, Jr., Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., Melesia Henry, R. N.,
DEFENDANTS

PARTIAL JUDGMENT

This action came before the Court for a trial by jury, Chief Judge C. Weston Houck presiding. The issues have been tried, and the jury has rendered its verdict.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that as to the causes of action for Unreasonable Search and Seizure under the Fourteenth Amendment and Race Discrimination under the Equal Protection Clause of the Fourteenth Amendment the plaintiffs take nothing, that the said actions to the extent they pray for damages be dismissed with prejudice, and that the defendants The City of Charleston, South Carolina, Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., Melesia Henry, R.N., recover their costs from the Plaintiffs.

IT IS FURTHER ORDERED AND ADJUDGED that as to the causes of action based on Abuse of Process, the Right to Refuse Medical Treatment under the Fourteenth Amendment, the Right to Due Process under the Fourteenth Amendment, Gender Discrimination under the Fourteenth Amendment, and the Federal Confidentiality Statute, the motion of all Defendants for judgment as a matter of law is granted and all said causes of action are dismissed with prejudice as to all plaintiffs.

IT IS FURTHER ORDERED AND ADJUDGED that as to the causes of action based on the Right to Privacy in Medical Records under the Fourteenth Amendment and the Right to Procreate under the Fourteenth Amendment, the motion of all defendants for judgment as a matter of law is granted, and said causes of action to the extent they pray for damages are dismissed with prejudice as to all plaintiffs.

LARRY W. PROPES, CLERK OF COURT

/s/

By: Lisa H. Walpole, Deputy Clerk

APPROVED: /s/
C. WESTON HOUCK, CHIEF UNITED STATES DISTRICT JUDGE

Charleston, South Carolina

[TRANSCRIPT OF HEARING 1]

IN THE UNITED STATES DISTRICT COURT
STATE OF SOUTH CAROLINA
CHARLESTON DIVISION

PLAINTIFFS' CASE NO: CA: 93-CV-2624

CRYSTAL FERGUSON, ET AL,

-VS-

CITY OF CHARLESTON, ET AL,

DEFENDANTS.

THE ABOVE-ENTITLED CASE CAME ON FOR HEARING BEFORE THE HONORABLE C. WESTON HOUCK, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT IN CHARLESTON, SOUTH CAROLINA, ON THIS 13TH OF AUGUST, 1997.

NORMA JEAN CARROW,
OFFICIAL REPORTER

APPEARANCES:

SUSAN KING DUNN
ATTORNEY AT LAW
171 CHURCH STREET
CHARLESTON, SC 29401

PRICILLA J. SMITH
CENTER FOR REPRODUCTIVE LAW & POLICY
120 WALL STREET
NEW YORK, NY 10005

APPEARING ON BEHALF OF PLAINTIFF

ROBERT H. HOOD
BARBARA WYNNE SHOWERS
JOSEPH C. WILSON, IV
MOLLY CRAIG
CHRISTIE COMPANION
HOOD & ASSOCIATES
P.O. BOX 1508
CHARLESTON, SC 29402
APPEARING ON BEHALF OF DEFENDANTS

[TRANSCRIPT OF HEARING 2]

THE COURT: GOOD MORNING. KEEP YOUR SEAT. OKAY. THIS IS CIVIL ACTION 93-2624. CRYSTAL M. FERGUSON, ET AL, PLAINTIFFS AGAINST THE CITY OF CHARLESTON, ET AL, DEFENDANTS. THIS IS A CASE THAT WE TRIED I GUESS IN MARCH; IS THAT RIGHT?

MS. DUNN: NOVEMBER THE 2ND TO JANUARY.

MR. HOOD: NOVEMBER TO JANUARY.

THE COURT: OKAY. I DO REMEMBER THAT WE TRIED IT. I TRIED ONE IN MARCH AND ONE IN NOVEMBER, AND SOMETIMES I FORGET EXACTLY WHICH ONE IT WAS. WE TRIED IT. AND AS I RECALL IT, WE SUBMITTED TO THE JURY ONE OF THE CONSTITUTIONAL CLAIMS OF THE PLAINTIFF THAT HAVING TO DO WITH THE ALLEGED

UNCONSTITUTIONAL SEARCH. WE SUBMITTED THAT TO THE JURY AND HAD THEM TO DETERMINE WHETHER OR NOT THAT SEARCH OR THOSE SEARCHES OF THE PLAINTIFFS WERE CONSENTED TO.
WE FOUND THAT THERE WERE SEARCHES THAT WERE COVERED BY THE CONSTITUTION AND THAT UNLESS THEY WERE CONSENTED TO THAT THEY WERE WARRANTLESS SEARCHES FOR WHICH THE PLAINTIFFS COULD RECOVER. THE JURY CAME BACK AND FOUND IN EACH CASE THAT THE PLAINTIFFS DID CONSENT TO THOSE SEARCHES. AND THAT RESULTED IN THEM RETURNING A VERDICT FOR THE DEFENDANTS' IN THOSE CASES.
WE HAVE POST-TRIAL MOTIONS AS FAR AS THAT VERDICT IS CONCERNED THAT WE ARE HERE TO CONSIDER THIS MORNING. WE ALSO HAVE A NONJURY MATTER, A CLAIM THAT WAS BROUGHT UNDER TITLE

[TRANSCRIPT OF HEARING 3]

6. THAT CLAIM ALLEGES THAT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA WAS RECEIVING FEDERAL MONEY AND THAT THEREFORE THEY'RE COVERED BY TITLE 6. AND THAT THEY DISCRIMINATED AGAINST THE PLAINTIFFS BECAUSE OF THEIR RACE, AND THAT BECAUSE OF THAT THE PLAINTIFFS' HAVE A CLAIM UNDER TITLE 6.

SINCE THAT'S A NONJURY MATTER, I SAID AT THE BEGINNING OF THE CASE THAT WE WOULD MAKE A RECORD ON THAT CASE WHILE WE WERE TRYING THE OTHER CLAIMS. AND THEN AT SOME LATER DATE I WOULD MAKE A DECISION ON THE NONJURY MATTER. WE HAVE IT FOR ARGUMENT TODAY, IF YOU WISH TO OFFER ANY ARGUMENT.

AND THEN WE HAVE THE PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF. AS I UNDERSTAND THE CLAIMS FOR INJUNCTIVE RELIEF, THEY RELATE TO TWO AREAS. ONE IS THE ALLEGED DENIAL OR INTERFERENCE WITH THE PLAINTIFFS' RIGHT TO PROCREATE. TO BRING THEIR BABIES TO TERM, AS I UNDERSTAND THAT RIGHT TO PROCREATE CAN BE MORE CLEARLY DEFINED.

AND, SECONDLY, A RIGHT, A - AN INJUNCTION PROHIBITING THE VIOLATION OF THE PLAINTIFFS' RIGHTS TO PRIVACY.

WE SAID ON THE RECORD DURING THE TRIAL THAT THERE WAS NO EVIDENCE THAT ANY OF THE DEFENDANTS VIOLATED THE PLAINTIFFS' RIGHT TO PRIVACY BY MAKING PUBLIC OR DISTRIBUTING THEIR CONFIDENTIAL MEDICAL RECORDS. WE WERE NOT CALLED UPON TO MAKE A FINDING IN THIS REGARD, BUT WE DID CONCLUDE AND SAY SO ON THE RECORD THAT ONE OF THE EMPLOYEES OF THE MEDICAL

[TRANSCRIPT OF HEARING 4]

UNIVERSITY DID APPEAR TO HAVE VIOLATED THAT RIGHT OF THE PLAINTIFF BY DISTRIBUTING CERTAIN INFORMATION TO THE SOLICITOR'S OFFICE AND OTHERS THAT MET WITH THESE - IN THE GROUP WHERE THEY DISCUSSED THESE PEOPLE THAT WERE IN THE POLICY.

THE QUESTION TODAY IS WHETHER OR NOT THAT VIOLATION OF THE PLAINTIFFS' RIGHTS TO CONFIDENTIALITY IS SOMETHING THAT WOULD ENTITLE THE PLAINTIFFS TO INJUNCTIVE RELIEF. SO IT SEEMS TO ME THAT THOSE ARE THE ISSUES THAT WE HAVE TO DEAL WITH THIS MORNING. I'M NOT SURE THAT I MENTIONED THE POST-TRIAL MOTION BUT WE HAVE A POST-TRIAL MOTION AS FAR AS JUDGMENT NOV AS FAR AS THE CLAIM THAT WENT BEFORE THE JURY.

I THINK THE PLAINTIFFS ARE THE MOVING PARTIES IN ALL OF THOSE MATTERS, AND SO I'LL BE GLAD TO HEAR FROM YOU FIRST.

AND I TRIED TO TOUCH ALL OF THE MATTERS. I'M NOT READING FROM NOTES, I'M READING FROM MEMORY. AND IT MAY BE THAT I MISSED SOMETHING. AND IF I DID I WILL EXPECT YOU TO CALL IT TO MY ATTENTION. AND BY MENTIONING SOMETHING, I'M NOT SUGGESTING

THAT YOU NEED TO ARGUE ALL OF THOSE POINTS, IT JUST SEEMS TO ME THAT THAT SET THE STAGE FOR OUR HEARING THIS MORNING. AND WHICHEVER OF THOSE POINTS YOU WOULD LIKE TO ARGUE, FEEL FREE TO DO SO.

I WILL PROBABLY - MY PRESENT INTENTION IS AS TO THE TITLE 6, I'LL PROBABLY ISSUE AN ORDER AS TO IT OR ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW. I'M NOT SURE THAT I

[TRANSCRIPT OF HEARING 5]

WILL AS TO THE OTHER MATTERS. I MAY RULE ON THEM TODAY.
OKAY.

MS. DUNN: OKAY.

THE COURT: IF I CAN RULE ON THEM TODAY I'LL CERTAINLY DO IT RATHER THAN PREPARE AN ORDER.

MS. DUNN: YOUR HONOR, I'M NOT SURE WHICH ORDER YOU WANT TO -

THE COURT: I DON'T HAVE ANY.

MS. DUNN: MY CO-COUNSEL IS GOING TO ADDRESS THE TITLE 6 CLAIM. I WOULD JUST LIKE TO SUMMARIZE THE PLAINTIFFS' POSITION AS TO THE INJUNCTIVE RELIEF.

THE COURT: OKAY.

MS. DUNN: AND BE AVAILABLE TO ANSWER ANY QUESTIONS.

THE COURT: ARE THERE ANY ISSUES THAT ARE OUT THERE

THAT ARE TO BE DECIDED THAT I DID NOT MENTION?

MS. DUNN: ONLY ONE I THINK THAT WAS SORT OF IMPLIED BUT NOT ARTICULATED SPECIFICALLY BY THE COURT IS INJUNCTIVE RELIEF IN CONNECTION WITH THE FOURTH AMENDMENT CLAIM AS WELL.

THE COURT: SURE.

MS. DUNN: THERE WAS A CLAIM FOR INJUNCTIVE RELIEF, I THINK THEY GO HAND-AND-HAND.

THE COURT: ABSOLUTELY YOU'RE RIGHT AND I SHOULD HAVE MENTIONED.

MS. DUNN: ALL OF THOSE ISSUES ARE VERY INTERTWINED AND THE PLAINTIFFS DO CONTINUE TO REQUEST AN INJUNCTION THAT

[TRANSCRIPT OF HEARING 6]

WOULD DEAL WITH PREVENTING OF CONTINUED VIOLATION OF THE FOURTH AMENDMENT. THE COURT HAS ARTICULATED, I BELIEVE, THE ONLY TWO INJUNCTIVE RELIEFS THAT REMAIN AFTER THE COURT'S RULING IN THE TRIAL, WHICH WOULD BE THOSE AS TO PROCREATION AND THOSE AS TO THE RIGHT OF PRIVACY.

ADDRESSING -

THE COURT: LET ME ASK YOU THIS. THE POLICY, IF THAT'S - I THINK THAT'S THE WORD WE USE, IS NOT IN EFFECT AT THE PRESENT TIME. IT WAS DISCONTINUED BEFORE WE HAD OUR TRIAL

IN THIS CASE. I DON'T RECALL THERE BEING ANY EVIDENCE OFFERED AS TO THE CIRCUMSTANCES UNDER WHICH IT WAS TERMINATED, ANY DETAILS AS TO THE CIRCUMSTANCES, BUT THAT IT'S BEEN INFERRED THAT IT WAS TERMINATED BECAUSE OF SOME PRESSURE BROUGHT TO BEAR BY THE FEDERAL GOVERNMENT. THAT THE FEDERAL GOVERNMENT EITHER THREATENED OR SOMEHOW THE MEDICAL UNIVERSITY WAS AT RISK OF HAVING A NUMBER OF FEDERAL GRANTS TERMINATED IF THEY CONTINUED THE PROGRAM.

NOW, FIRST OF ALL I WOULD LIKE TO KNOW WHETHER THAT'S YOUR UNDERSTANDING OF THE CIRCUMSTANCES UNDER WHICH IT WAS TERMINATED. AND SECONDLY, IF THAT IS YOUR UNDERSTANDING, WHETHER OR NOT THERE IS ANY AGREEMENT BY THE MEDICAL UNIVERSITY, WAS ANY AGREEMENT AT THAT TIME THAT THEY WOULD NOT INITIATE THE PROGRAM AGAIN?

MS. DUNN: I MEAN, OBVIOUSLY I THINK THE DEFENDANTS ARE IN A BETTER POSITION TO PRESENT SOME OF THAT INFORMATION,

[TRANSCRIPT OF HEARING 7]

BUT I'LL BE HAPPY TO PRESENT MY UNDERSTANDING.

THERE WERE TWO INDEPENDENT INVESTIGATIONS INITIATED IN CONNECTION WITH THIS POLICY THAT INVOLVED FEDERAL

GOVERNMENT AGENCIES. THERE WAS AN OCR INVESTIGATION THAT INVOLVED SPECIFICALLY AND ONLY TITLE 6. IT IS MY UNDERSTANDING THAT THE MEDICAL UNIVERSITY, AND WE HAVE A COPY OF THE WRITTEN MEMORANDUM OF UNDERSTANDING, THAT THE MEDICAL UNIVERSITY ONLY, THE ONLY DEFENDANT THAT WAS INVOLVED IN IT, DID AGREE WITH THE OFFICE OF CIVIL RIGHTS TO SUSPEND THE POLICY. AND THEY AGREED TO DO THAT IN A SPECIFIC MEMORANDUM THAT DID AGREE THAT THE MEDICAL UNIVERSITY WOULD NOT THREATEN ARREST AND WOULD TELL THE POLICE DEPARTMENT AND SOLICITOR'S OFFICE THAT THEY WOULD NOT THREATEN ARREST. THAT AGREEMENT WAS - A SUSPENSION OF IT WAS PENDING THIS CASE.

SO THERE WAS AN UNDERSTANDING THAT THIS CASE WOULD GO FORWARD AND MAKE A DETERMINATION OF THE TITLE 6. AND THAT THE ESSENTIAL DEAL WAS THAT THE MEDICAL UNIVERSITY WOULD ENTER INTO THAT AGREEMENT. AND AS A RESULT OF THAT THE FEDERAL GOVERNMENT WOULD SUSPEND ITS INVESTIGATION SO IT WOULDN'T GO FARTHER IN THE INVESTIGATION. SO IT WAS SORT OF A PRELIMINARY. IT WASN'T AN AGREEMENT AFTER THE END OF A FACT FINDING, IT WAS SIMPLY AT THAT POINT WHEN THEY REACHED THAT

AGREEMENT THEN THEY SUSPENDED THE FACT FINDING AND DID NOT DO
A VOLUMINOUS INVESTIGATION HERE AND THAT SORT OF THE TRADE --
OFF WAS THAT THEY WOULD SUSPEND IT.

[TRANSCRIPT OF HEARING 8]

THE COURT: I UNDERSTAND.
MS. DUNN: THAT DID HAPPEN. BUT EVEN AFTER THAT, CERTAINLY THE POSITION ARTICULATED IN THIS COURT AND BY THE ATTORNEYS ON BEHALF OF ALL OF THE DEFENDANTS IS THAT THERE IS INTENT TO REESTABLISH THE POLICY IN ITS FULL FORCE AND THAT THEY ARE SIMPLY WAITING THE DETERMINATION OF THIS COURT.
NOW I DON'T KNOW IF THAT'S THE PRESENT FORMAL POSITION OF THE MEDICAL UNIVERSITY OR ANY OF THE OTHER DEFENDANTS', BUT THAT HAS BEEN THE - THE ARGUMENT THAT HAS BEEN ARTICULATED.
THE COURT: OKAY.
MS. DUNN: THERE WAS ALSO ANOTHER INVESTIGATION THAT INVOLVED THE EXPERIMENTATION WITH HUMANS AND THERE WASN'T - THERE WAS MORE OF AN INFORMAL AGREEMENT INVOLVED WITH THAT, BUT NOT SOMETHING THAT INVOLVED THE SUSPENSION OF THE POLICY, BECAUSE IT CAME AFTER THE AGREEMENT OF THE POLICY HAD BEEN SUSPENDED ANYWAY. BUT I DON'T THINK ANY OF THOSE MAKE THE QUESTION FOR INJUNCTIVE RELEASE MOOT, IF THAT WAS THE QUESTION.
THE COURT: THAT WAS NOT MY QUESTION.

MS. DUNN: THAT'S WHERE WE STAND.

THE COURT: IT MAY BE THE QUESTION, BUT IT WAS NOT MY QUESTION.

MS. DUNN: THAT'S WHERE WE STAND.

THE COURT: OKAY. YOU CAN GO AHEAD.

[TRANSCRIPT OF HEARING 9]

MS. DUNN: WE DO BELIEVE THAT THE COURT'S FINDING IN THE CONTEXT OF THE TRIAL THAT THE CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED WITHIN THE CONTEXT OF THIS POLICY WOULD STILL REQUIRE THAT INJUNCTIVE RELIEF BE GRANTED FOR THE PLAINTIFFS IN ORDER TO PREVENT ANY FUTURE DAMAGES TO THAT PARTICULAR CONSTITUTIONAL RIGHT FOR OTHER WOMEN THAT MAY COME UNDER THIS POLICY OR UNDER SOME NEWLY CONFIGURED POLICY.

THE COURT: WHAT FINDING DID I MAKE THAT CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED?

MS. DUNN: I BELIEVE THAT YOU MADE THAT FINDING IN CONNECTION WITH YOUR DECISION THAT THERE WAS NOTHING TO SEND TO THE COURT FOR DAMAGES BECAUSE THERE WAS NOT A DEFENDANT AGAINST WHOM DAMAGES COULD BE ASSESSED.

THE COURT: YOU'RE TALKING ABOUT AS FAR AS THE MEDICAL RECORDS ARE CONCERNED?

MS. DUNN: IT WAS MY UNDERSTANDING THAT YOUR DETERMINATION WAS THAT THE TESTIMONY BEFORE THE COURT, PARTICULARLY IN RELATIONSHIP TO THOSE MEETINGS AT THE MEDICAL UNIVERSITY, INVOLVED AN EXCHANGE OF INFORMATION THAT WAS THE KIND OF INFORMATION THAT WAS PRIVATE AND THAT WOULD HAVE BEEN PROTECTED BY A CONSTITUTIONAL CLAIM TO A RIGHT TO PRIVACY BUT THAT IT WASN'T A DAMAGE ISSUE, IT SIMPLY WOULD WAIT FOR THE COURT TO DEAL WITH WHAT KIND OF INJUNCTIVE RELIEF COULD BE FASHIONED THAT WOULD PROTECT THAT KIND OF VIOLATION IN THE FUTURE.

[TRANSCRIPT OF HEARING 10]

AND WE BELIEVE THAT ISSUE IS STILL BEFORE THE COURT. AND THE PLAINTIFFS DO WANT INJUNCTIVE RELIEF THAT WOULD PROTECT NOT ONLY THE MEDICAL UNIVERSITY BUT ALL OF THE DEFENDANTS THAT - TO PREVENT THE POLICY OF THAT KIND OF FREE FORM SHARING OF MEDICAL INFORMATION SIMPLY BY THE TESTING OF A WOMEN POSITIVE WHO IS PREGNANT, AND WE WOULD ASK FOR THAT INJUNCTIVE RELIEF.

AS FAR AS THE PROCREATION CLAIM, IT WAS STILL UNCLEAR TO ME AT THE END OF THE TRIAL IF EVERYBODY WAS ALL ON THE SAME PAGE IN TERMS OF WHAT THAT CLAIM WAS ABOUT. I WOULD CANDIDLY TELL THE COURT -

THE COURT: I NEVER UNDERSTOOD WHAT IT WAS ABOUT.

MS. DUNN: I BELIEVE THAT THE INFORMATION THAT WAS PRESENTED CONCERNING SOME -

THE COURT: I MEAN, I UNDERSTAND WHAT YOU SAID, BUT I NEVER COULD SEE ANY EVIDENCE THAT SUPPORTED THAT CONTENTION. I UNDERSTAND WHAT YOU WERE SAYING ABOUT THE RIGHT TO PROCREATE BEING INTERFERED WITH, BUT I NEVER SAW, IF THE RIGHT WORD IS A PATTERN OF CONDUCT, ON THE PART OF THE DEFENDANT THAT SUPPORTED THAT ALLEGATION. THERE WAS ONE ISOLATED INCIDENT WHERE ONE WOMEN SAID THAT SHE WAS TOLD THAT IF SHE DIDN'T HAVE THIS BIRTH CONTROL DEVICE INSERTED, THAT IF SHE DIDN'T CONSENT TO IT, THEY WERE GOING TO DO IT ANYWAY. AND THEN SHE CONSENTED TO IT.

SO, I REALLY DON'T KNOW WHERE THAT LEAVES YOU ON

[TRANSCRIPT OF HEARING 11]

THAT. IF SHE HADN'T CONSENTED TO IT AND THEY HAD DONE IT,

WOULD THAT ONE ISOLATED INCIDENT HAVE BEEN ENOUGH TO SAY THAT THERE WAS A POLICY THAT NEEDED TO BE ENJOINED, OR ARE WE SAYING THAT THAT ONE TECHNICIAN WAS OVER ZEALOUS IN TRYING TO SELL HIS SERVICES TO A PATIENT. I DON'T KNOW. BUT THAT'S THE ONLY EVIDENCE THAT I SAW THAT COULD EVEN BE STRETCHED TO SUPPORT A CLAIM FOR INTERFERENCE WITH THEIR RIGHT TO PROCREATE.

MS. DUNN: YOUR HONOR, I DO UNDERSTAND THAT THAT WAS CERTAINLY THE IMPRESSION THAT I GOT IN THE COURSE OF THE TRIAL. BUT THE INFORMATION ACTUALLY CONCERNING THE PERHAPS FORCED BIRTH CONTROL ON ONE PARTICULAR PLAINTIFF WAS REALLY TANGENTIAL AND NOT CENTRAL TO THE PLAINTIFFS' ARGUMENT CONCERNING PROCREATION. IT WAS NOT A PARTICULAR PLAINTIFF BEING PUT IN A PARTICULAR POSITION OF HAVING TO CHOOSE BETWEEN CARRYING A CHILD TO TERM OR BEING FORCED INTO BIRTH CONTROL, THAT WAS THE ISSUE WE WERE ATTEMPTING TO ARTICULATE. OBVIOUSLY WE DIDN'T DO IT VERY ARTFULLY OR YOU WOULD UNDERSTAND THAT ARGUMENT, SO LET ME TRY IT AGAIN.

THE COURT: I READ A CASE THAT YOU CITED AND NO CASE WENT AS FAR AS YOU SUGGESTED I SHOULD GO. I SAW NO CASE THAT

YOU CITED, OR ANYBODY ELSE CITED, THAT SUPPORTED THE KIND OF - I MEAN THE CASES THAT HAVE CITED ARE CLEARLY DEFINED ACTS BY STATES AND PEOPLE IN STATE AGENCIES THAT INTERFERE WITH SOMEONE'S RIGHT TO PROCREATE. I MEAN, THERE IS NO DOUBT ABOUT

[TRANSCRIPT OF HEARING 12]

IT, YOU READ THE FACTS AND YOU SAY, BINGO, HERE IT IS, AND I READ THE FACTS IN THIS CASE, AND THEY NEVER -

MS. DUNN: I UNDERSTAND, BECAUSE WE WERE USING CASES THAT WERE DEALING WITH AN INDIVIDUAL PERSON'S CLAIM IN RELATIONSHIP TO A PARTICULAR PREGNANCY. AND I THINK IT IS HARD TO TAKE THOSE CASES AND APPLY IT TO THIS POLICY. AND I THINK IT'S ONE OF THE THINGS THAT WE HAVE LEARNED OVER THE COURSE OF THIS CASE IS THAT THIS CASE IS KIND OF PECULIAR. YOU KNOW, WE'RE TRYING TO TAKE THINGS THAT WE LEARN AND ATTACH IT TO A POLICY THAT IS PRETTY UNIQUE. AND IT'S OUR POSITION THAT THE ENTIRE POLICY ON ITS FACE, BY ITS DESIGN, IN ITS JUSTIFICATION, IS FOCUSED ONLY ON WOMEN WHO CHOSE TO TAKE THEIR PREGNANCY TO TERM. AND THAT BECAUSE OF THAT, IT IS PUNISHING THOSE WOMEN WHO MAKE THAT CHOICE.

SO IT'S THE ENTIRE NATURE OF THE POLICY. IF YOU REMEMBER I BELIEVE IT WAS DOCTOR NEUMAN, WHEN HE WAS ARTICULATING THE REASON WHY THE POLICY WOULD APPLY TO WOMEN WHO HAD ALREADY GIVEN BIRTH, YOU KNOW THE BABY, THAT BABY WAS ALREADY HERE, THAT THE REASON WE WERE ARRESTING THEM, THE REASON WE WERE STILL CONTINUING THIS POLICY, WE WERE INTENDING TO EFFECT THE FUTURE PREGNANCIES OF THESE WOMEN. IT WAS INTENDED TO CONTROL, MANIPULATE IN ITS EFFECT, PUNISH AND COERCE WOMEN WHO CHOSE TO BE PREGNANT, CHOSE TO CARRY THEIR PREGNANCY TO TERM, WERE THE ONLY ONES WHO WERE AFFECTED BY THE PUNITIVE INTRUSIVE NATURE OF THIS POLICY.

[TRANSCRIPT OF HEARING 13]

SO IT'S THAT PIECE OF IT. YOU KNOW, NOT THAT A PARTICULAR CLIENT WAS FORCED INTO A PARTICULAR DECISION, BUT THAT SHE WOULD NOT HAVE BEEN CAUGHT IN THIS NET. THAT ONLY PREGNANT WOMEN WERE PUNISHED, AND THAT IS AN INFRINGEMENT OF THE RIGHT TO PROCREATE THAT IS PRECIOUS. ABSOLUTELY PRECIOUS IN EVERY FAMILY. THAT'S WHAT - THAT'S WHAT WE WERE TRYING TO ARTICULATE. AND I REALIZE THAT WE DIDN'T DO IT IN A WAY THAT

MADE THAT CLEAR.
BUT BY HOW THEY SET IT UP, AND IT'S ONLY THIS PARTICULAR CATEGORY OF PEOPLE THAT WOULD BE PUNISHED, YOU KNOW, BY CRIMES THAT ARE NOT PARTICULAR TO PREGNANCY. USING IT, YOU KNOW, TO CONTROL, MANIPULATE AND COERCE WOMEN WHO CHOSE TO CONTINUE WITH THEIR PREGNANCIES. WOMEN WHO LOST THEIR BABIES WERE NOT STILL UNDER THE POLICY. YOU KNOW THE WOMEN - AND THAT'S WHAT WE ARE TALKING ABOUT. IT'S THAT PIECE OF EFFECTING THE CHOICE TO PROCREATE IN GENERAL FOR A WHOLE CATEGORY OF PEOPLE. AND EVERY ONE OF OUR CLIENTS FIT INTO THAT CATEGORY. SO THERE ARE PEOPLE THAT CAN ARTICULATE THAT CLAIM. THAT'S -
ANY OTHER QUESTIONS AS TO THOSE THREE PARTS?
THE COURT: NO. YOU GO AHEAD WITH YOUR ARGUMENT.
MS. DUNN: AND I BELIEVE THAT OUR MOTIONS AND BRIEFS AFTER THE LAST MOTION IN RELATION TO THE FOURTH AMENDMENT DID ANSWER THE SPECIFIC QUESTIONS THAT THE COURT ASKED IN TERMS OF LOOKING AT EACH PARTICULAR ONE OF THE PLAINTIFFS AND

[TRANSCRIPT OF HEARING 14]

ADDRESSING THE DOCUMENTS AND OTHER KINDS OF INFORMATION. FOR

INSTANCE, THE VIDEO OR PUBLIC SERVICE ANNOUNCEMENT, AND WHAT RELATIONSHIP EACH ONE OF THESE PLAINTIFFS COULD HAVE HAD. IT SEEMS TO ME THAT THERE ARE ONLY A FEW, YOU KNOW, PARTICULAR ISSUES THAT PERHAPS THE COURT WOULD WANT TO HEAR MORE ARGUMENT ON. ONE OF THOSE I WOULD DEFER TO MY CO-COUNSEL, WHICH IS THE ISSUE OF THE STANDING OF ELLEN KNIGHT IN TERMS OF THE FOURTH AMENDMENT CLAIM WHEN IT WAS THE CHILD WHO TESTED POSITIVE.

THE OTHER ISSUES WERE SIMPLY IN CONNECTION WITH THIS DEAR PATIENT LETTER, THE JOINT EXHIBIT 10 AND WHO SAW IT AND WHEN THEY MIGHT HAVE SEEN IT. CERTAINLY WE COULD FIND NO DIRECT INFORMATION THAT ANY ONE OF THE PLAINTIFFS SAW THAT EXHIBIT PRIOR TO TESTING POSITIVE. AND AS WE LOOKED THROUGH IT, PARTICULARLY ADDRESSING THAT ISSUE, WE COULD FIND THAT - NOTES IN ONE OF OUR CLIENT'S RECORD THAT INDICATES THAT SHE WAS GIVEN THE LETTER, BUT IT RECORDED THAT SHE RECEIVED THE LETTER AFTER SHE WAS TESTED. NO INDICATION THAT THAT LETTER WAS PRESENTED AT THE TIME, THE FORMAL FORMULATION OF THE POLICY, WHICH WOULD SEEM TO INDICATE THAT NONE OF OUR CLIENTS WHO WERE TESTED PRIOR TO THAT WOULD HAVE HAD THE POSSIBILITY

OF SEEING THAT LETTER.
AND WE ALSO FEEL THAT WE NEED TO SAY ONCE AGAIN THAT
WE CAN - WE HAVE READ THAT LETTER AND READ THAT LETTER AND
READ THAT LETTER, AND CAN'T FIGURE OUT HOW THAT LETTER WOULD

[TRANSCRIPT OF HEARING 15]

GIVE ANY KIND OF NOTICE THAT THE TEST WAS BEING DONE. AND
THAT WHAT WOULD HAPPEN WITH THAT TEST BEFORE A PARTICULAR
TEST. IT REFERS NOTHING TO UDS SCREENS. IT MAKE NO SPECIFIC
REFERENCE TO THAT AT ALL. AND IN FACT, IF ANYTHING, A
MISLEADING REFERENCE IN THAT IT INDICATES THAT IF YOU CONTINUE
TO USE DRUGS, NOT JUST IF YOU WERE USING DRUGS WHEN YOU SHOWED
UP HERE FOR THE FIRST DAY, BUT IF YOU CONTINUE TO USE DRUGS,
THEN THERE WOULD BE SOME KIND OF A POSSIBLE REPORT, WHEN IT
WAS CLEAR UNDER THIS POLICY THAT IT WAS THAT INITIAL DRUG
SCREEN, THAT INITIAL DRUG SCREEN IS WHAT TRIGGERED A LAW
ENFORCEMENT EVENT FOR ALL OF THESE WOMEN. THEY WERE SUBJECT
TO THAT THE MINUTE THAT FIRST TEST WAS TAKEN. IT HAD NOTHING
TO DO WITH A CONTINUED PATTERN. THE CONTINUED PATTERN MIGHT
HAVE HAD SOMETHING TO DO WITH HOW THE POLICY WAS THEN APPLIED

TO THEM, BUT IT DIDN'T CHANGE THE NATURE OF THAT FIRST UDS SCREEN FOR OUR PATIENTS OR ANY OTHER PATIENT WHO HAPPENED TO COME UNDER IT.

THE COURT: GO AHEAD.

MS. DUNN: I BELIEVE THAT THOSE WERE THE SPECIFIC ISSUES THAT THE COURT ASKED US TO BRIEF AS TO OUR CLIENTS, AND WE HAVE DONE SO. IF THERE ARE ANY PARTICULAR QUESTIONS ABOUT THAT ADDITIONAL INFORMATION I WOULD BE HAPPY TO ANSWER THEM IF I CAN.

THE COURT: OKAY.

MS. DUNN: I'LL DEFER TO CO-COUNSEL THEN AS TO THAT

[TRANSCRIPT OF HEARING 16]

SPECIFIC ISSUE AS TO ELLEN KNIGHT AND THE TITLE 6 CLAIM.

THE COURT: OKAY. GOOD.

MS. SMITH: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

MS. SMITH: I THINK, UNLESS THERE ARE ANY SPECIFIC ISSUES ABOUT THE THREE PLAINTIFFS THAT YOU INDICATED THAT YOU WERE INCLINED TO RULE HAD NOT CONSENTED, LORI GRIFFIN, SANDRA POWELL AND LAVERN SINGLETON, I'LL PUT THEM ASIDE FOR A MOMENT. I DON'T BELIEVE THAT THERE WAS ANY NEW EVIDENCE THAT CAME UP IN THE BRIEF ABOUT THEM THAT HADN'T BEEN FULLY

DISCUSSED BEFORE, SO I REALLY WANT TO CONCENTRATE ON ELLEN KNIGHT AND ALSO PAMELA PEAR.

FIRST AS TO ELLEN KNIGHT, THERE ARE TWO ISSUES REALLY THAT I THINK ARE CENTRAL TO HER CASE. ONE IS THAT SHE WAS TESTED HERSELF. THAT TEST WAS NEGATIVE. AND SHE WAS NOT ARRESTED BASED ON THAT TEST. BUT THERE WAS A SEARCH DONE AND IT WAS DONE BEFORE THE SEARCH EVEN ON LAVERN SINGLETON, EARLY IN THE POLICY BEFORE JOINT EXHIBIT 10. BEFORE AT LEAST THERE IS ANY EVIDENCE THAT JOINT EXHIBIT 10 WAS AVAILABLE. SO THERE WAS A SEARCH ON HER. SO EVEN THOUGH IT'S NEGATIVE, WE HAVE TO RECOGNIZE THAT THAT WAS ALSO A SEARCH.

IF THE POLICE BROKE INTO YOUR HOME AND DIDN'T CATCH YOU DOING ANYTHING, THEY STILL MAY HAVE VIOLATED YOUR FOURTH AMENDMENT RIGHTS. AND IN FACT THAT IS WHAT HAPPENED TO ELLEN KNIGHT.

[TRANSCRIPT OF HEARING 17]

THE SECOND ISSUE THEN IS THAT THERE WAS A SEARCH ON HER BABY, ON HER INFANT WHO HAD JUST BEEN BORN. AND WE CITED TO THE COURT CASES THAT I BELIEVE RECOGNIZE THAT PARENTS HAVE THE RIGHT TO CONSENT TO THE INFANT'S - A SEARCH OF THE

INFANT.

NOW, I AGREE WITH OPPOSING COUNSEL THAT THOSE CASES ARE NOT ALWAYS CLEAR. THEY USUALLY COME UP IN ANOTHER CONTEXT THAT IS IN ADMINISTRATIVE SEARCHES, WHICH IS A DIFFERENT DOCTRINE THAN IS APPLIED TO CRIMINAL SEARCHES. THOSE ARE SEARCHES UNDER THE TLO LINE OF CASES. AND SO THOSE CASES HAVE DONE SOMEWHAT OF A DIFFERENT ANALYSIS THAN I THINK WE NEED TO DO HERE. BUT THE ONE CASE THAT WAS CITED BY OPPOSING COUNSEL, THE FOURTH CIRCUIT CASE, WILDER, THAT WAS A CASE DIFFERENT FROM THIS, BUT I THINK WITH TEACHINGS THAT ARE HELPFUL TO US HERE, IT INVOLVED AN INVESTIGATIVE VISIT BY A SOCIAL WORKER, NOT A CRIMINAL INVESTIGATION, BUT A SOCIAL WORKER'S INVESTIGATION INTO A SUPPOSED FOSTER CARE MOM, A WOMEN WHO WAS APPARENTLY TAKING CARE OF A BUNCH OF KIDS WITHOUT ANY AUTHORITY TO DO SO AND WITH NO FORMAL ARRANGEMENT OF ANY OF THEM. ONE WAS HER OWN CHILD BUT THE REST WERE NOT. I BELIEVE ANOTHER ONE HAD BEEN OFFICIALLY ADOPTED AND THE OTHER SEVEN WERE OTHER PARENTS' KIDS. AND THE PARENTS CAME AND MADE A COMPLAINT TO THE SOCIAL WORKING SAYING WE WANT OUR KIDS BACK, WE THINK THERE IS SOMETHING GOING ON THERE. AND THERE WERE

SEARCHES IN THAT CONTEXT AS PART OF THE ADMINISTRATIVE PROCESS

[TRANSCRIPT OF HEARING 18]

OF THE DEPARTMENT OF HEALTH TO FIND OUT WHAT WAS HAPPENING.

AND EVEN IN THAT CASE, THE COURT FOUND THAT IT SAID

THAT OR AT LEAST RECOGNIZED THAT SHE HAD AN ATTENUATED PRIVACY

CONCERN EVEN OVER KIDS THAT WEREN'T IN HER OFFICIAL CONTROL.

BUT THEN FOUND THAT THERE WAS NO VIOLATION AND INDEED IT WAS

AN INVESTIGATIVE VISIT AND THESE WERE KIDS THAT WEREN'T REALLY

- DIDN'T BELONG TO HER ANYWAY.

BUT THE MOST IMPORTANT HOLDING IN THAT CASE I

BELIEVE WAS THAT THAT WAS REALLY A CASE ABOUT THE REAL PARENTS

COMING IN AND WANTING TO GET THEIR KIDS BACK. AND SO THE

POLICE WERE ACTING ON THE BASIS OF THAT AUTHORITY, AND HAD

EVERY RIGHT TO DO SO TO GET THE KIDS BACK FOR THE REAL PARENTS

AND SO HAD QUALIFIED IMMUNITY.

THE OTHER CASES THAT WE CITED, I BELIEVE, DO

INDICATE THAT THE PARENT HAS THE FOURTH AMENDMENT RIGHT FOR

THE INFANT. IF THAT WERE NOT TRUE, THE INFANT COULD BE

SEARCHED IN EVERY INSTANCE. THERE WOULD BE NO ABILITY OF THE

INFANT TO CONSENT. AND I THINK THERE IS A REAL DIFFERENCE

BETWEEN THE INFANT AND SAY A 14 YEAR OLD OR 15 YEAR OLD WHO HAS THE POWER TO CONSENT AND THE KNOWLEDGE AND CAN SAY NO. WITH AN INFANT NOBODY ELSE HAS THAT POWER EXCEPT FOR THE PARENT. THE MEDICAL UNIVERSITY ALSO -

THE COURT: ARE WE TALKING ABOUT THE POWER TO CONSENT OR ARE WE TALKING ABOUT STANDING TO SUE FOR THE VIOLATION?

[TRANSCRIPT OF HEARING 19]

MS. SMITH: WELL THOSE ARE TWO DIFFERENT.

THE COURT: AND AREN'T THEY DIFFERENT?

MS. SMITH: I THINK THEY ARE DIFFERENT ISSUES.

THE COURT: THERE IS NO QUESTION I HAVEN'T BEEN INVOLVED IN IT IN YEARS, BECAUSE I JUST HAVEN'T PRACTICED LAW, BUT I MEAN YOU HAVE GUARDIAN AD LITEMS AND GENERAL GUARDIANS FOR CHILDREN, AND SOME INSTANCES THE PARENTS CAN ACT FOR THE CHILDREN.

MS. SMITH: YES.

THE COURT: AND BE THEIR VOICE OF CONSENT. BUT THAT' DOES NOT MEAN THAT WHEN THAT CHILD IS INJURED OR SOMETHING ELSE HAPPENS, THAT THE PARENT HAS THE CAUSE OF ACTION. THE PARENTS USED TO HAVE A CAUSE OF ACTION FOR MEDICAL BILLS AND

LOSS OF SERVICES, THAT'S AN OLD COMMON LAW CAUSE OF ACTION. I THINK IT PROBABLY STILL EXISTS, BUT THAT'S THE SERVICES THAT YOU HAVE ON THE CHILD. I NEVER QUITE UNDERSTOOD IT WHETHER IT WAS TO CUT YOUR GRASS OR WHATEVER, OR PARK THE CAR, BUT THAT'S A CLAIM THAT THE PARENTS HAVE FOR THEIR DAMAGES FOR LOSS OF MEDICAL FOR WHICH THEY'RE LEGALLY RESPONSIBLE AND LOSS OF SERVICES.

MS. SMITH: RIGHT.

THE COURT: BUT THAT'S NOT THE CLAIM FOR THE CHILD'S INJURY, YOU HAVE GOT AN ENTIRELY DIFFERENT SITUATION.

MS. SMITH: I AGREE THOSE ARE DIFFERENT. I THINK IF YOU LOOK AT THE DURRELL (PH.) CASE FROM THE 7TH CIRCUIT, THAT

[TRANSCRIPT OF HEARING 20]

WAS A CASE WHERE THE PARENTS ASSERTED THEIR OWN FOURTH AMENDMENT RIGHTS AND WHICH THE COURTS LOOKED TO SEE WHETHER OR NOT THERE HAD BEEN CONSENT BY THE PARENTS TO THE SEARCH. AND THEY WERE IN FACT REVERSED ON SUMMARY JUDGMENT FOR THE DEFENDANT ON THE PARENTS' FOURTH AMENDMENT CLAIM. I THINK THE COURT AT LEAST RECOGNIZED THAT THE PARENTS HAD A VALID INTEREST THERE. THAT'S ALSO TRUE IN THE TENTH CIRCUIT CASE

FRANCE VERSUS LITTLE, WHICH ALSO I BELIEVE WAS THE PARENTS' FOURTH AMENDMENT CLAIM. AND THE COURT WAS LOOKING TO SEE WHETHER OR NOT THERE HAD BEEN ANY CONSENT BY THE PARENTS.

I DON'T THINK THERE IS CLEAR AUTHORITY FROM THE FOURTH CIRCUIT ON THE ISSUE, BUT I THINK ESPECIALLY IN THE CONTEXT OF THIS CASE, WHERE YOU'RE TALKING ABOUT A WOMEN WHO JUST GAVE BIRTH, YOU'RE TALKING ABOUT A WOMEN WHOSE BABY IS IN THE NEXT ROOM, AS IT WERE, VERY CLOSE TO HER, A WOMAN FROM WHOM THE MEDICAL UNIVERSITY ITSELF SOUGHT CONSENT TO TREAT THE CHILD, RECOGNIZING HER CONTROL OVER THE CHILD IN THAT REGARD, THAT ALL OF THOSE THINGS MILITATE IN FAVOR OF FINDING FOR ELLEN KNIGHT AND THAT IT WAS HER RIGHT THAT WAS VIOLATED.

I ALSO BELIEVE THAT WE HAVE IN OUR COMPLAINT CLAIMS FOR VIOLATIONS OF THE RIGHT TO PRIVACY GENERALLY, WHICH COULD INCLUDE THE RIGHT TO FAMILIAL PRIVACY WHICH WOULD BE VIOLATED AS WELL. THAT'S A SEPARATE ISSUE.

AS TO PAMELA PEAR, THERE IS A NOTATION IN THE MEDICAL RECORD THAT WE PRESENTED TO THE COURT INDICATING THAT

[TRANSCRIPT OF HEARING 21]

JOINT EXHIBIT 10 WAS SHOWN TO HER ON JULY 23, 1990, AFTER SHE HAD TESTED POSITIVE. THERE IS NO INDICATION THAT THAT WAS THE SECOND TIME THAT SHE HAD SEEN THE FORM, THAT SHE HAD EVER SEEN THE FORM BEFOREHAND. AND I THINK SHOWS THAT THAT IS THE WAY THAT FORM WAS USED, JUST LIKE THE SOLICITOR LETTER, WHICH WAS CLEARLY USED AFTER THE TESTS WERE MADE AND CONDUCTED.

IN ADDITION, AND I THINK THAT CALLS INTO QUESTION IN FACT THE USE OF JOINT EXHIBIT 10 WITH THE REST OF THE PLAINTIFFS, WHEN WAS THAT IN FACT SHOWN. I DON'T BELIEVE THAT THE DEFENDANTS HAVE GIVEN US ANY DIRECTIVE AND SAID THAT IT WAS SHOWN TO THE PLAINTIFFS BEFOREHAND, AND I THINK IT'S THEIR BURDEN TO DO SO.

ALSO, I BELIEVE THAT IT'S THERESA JOSEPH, WHO WAS TESTED WHEN SHE CAME IN FOR, NOT FOR PRENATAL CARE, BUT I BELIEVE IT WAS CELLULITIS OR AN INJURY TO HER FOOT. SHE WAS THERE FOR - IN THE GENERAL MEDICAL AREA NOT IN THE PRENATAL CARE AREA. SO IF IT WAS TRUE THAT JOINT EXHIBIT 10 WAS USED IN PRENATAL CARE UNIT, SHE HAD NO OPPORTUNITY TO SEE JOINT EXHIBIT 10 BEFORE SHE WAS TESTED, EITHER.

I'LL MOVE ONTO THE TITLE 6 CLAIMS UNLESS YOU WANT -

THE COURT: YES.
MS. SMITH: I JUST WANT TO BRIEFLY GO THROUGH WHAT I SEE ARE THE FIVE DECISION POINTS THAT I THINK ALL OF WHICH I BELIEVE FOCUSED THE POLICY ON A SMALLER AND SMALLER GROUP OF WOMEN THAT WAS MORE - BECAME MORE DISPROPORTIONATELY AFRICAN

[TRANSCRIPT OF HEARING 22]

AMERICAN AS WE WENT ALONG.
THE COURT: YOU'RE TALKING ABOUT STATISTICAL EVIDENCE OR THE DIRECT EVIDENCE?
MS. SMITH: I'M SORRY?
THE COURT: YOU'RE TALKING ABOUT THE STATISTICAL EVIDENCE OR DIRECT EVIDENCE OF DISCRIMINATION?
MS. SMITH: I'M TALKING ABOUT STATISTICAL EVIDENCE.
THE COURT: OKAY.
MS. SMITH: THE FIRST - AND OF COURSE THE DIRECT EVIDENCE HAS SOME RAMIFICATIONS AS WELL AS FOR THE STATISTICAL EVIDENCE AND THE WEIGHT OF IT. BUT I WOULD LIKE TO GO THROUGH THE FACTS AND THE DEVELOPMENT OF THE POLICY AND WHAT I THINK WE NEED TO LOOK AT FOR TITLE 6 PURPOSES.
THE FIRST DECISION WAS TO IMPLEMENT THE POLICY AT MUSC. AND THAT WAS A DECISION MADE JOINTLY BY MUSC, THE

SOLICITOR'S OFFICE AND AT THE POLICE DEPARTMENT.
NOW I BELIEVE THAT BOTH THE SOLICITOR'S OFFICE AND
THE CITY POLICE DEPARTMENT ARE PROPER TITLE 6 DEFENDANTS.
THEY RECEIVE FEDERAL FUNDS AND THEREFORE THEY'RE LIKE ANY
OTHER ENTITY THAT RECEIVES FEDERAL FUNDS. AND IF THEY'RE -
THEY RECEIVE FEDERAL FUNDS FOR ONE PROGRAM OR ACTIVITY, SAY A
HEALTH DEPARTMENT OR EDUCATION OR PARKS, THEN ANY OTHER
PROGRAM OR ACTIVITY UNDER THEIR JURISDICTION ALSO IS COVERED
BY TITLE 6 JUST LIKE A UNIVERSITY WOULD BE.
AND THE INTERAGENCY GROUPING WAS CERTAINLY A PROGRAM

[TRANSCRIPT OF HEARING 23]

OR ACTIVITY OF THOSE TWO DEPARTMENTS AND THEREFORE THEIR
CHOICE TO APPLY THE POLICY ONLY TO MUSC I THINK COMES UNDER
TITLE 6 HERE. THERE WAS EVIDENCE DURING THE TRIAL THAT THAT
CHOICE IN AND OF ITSELF HAD A SIGNIFICANT DISPROPORTIONATE
IMPACT ON AFRICAN AMERICANS BECAUSE THE POPULATION OF AFRICAN
AMERICANS AT MUSC WAS AROUND 60 PERCENT, WHILE AS THE
POPULATION AT OTHER HOSPITALS WAS AROUND 33 PERCENT.
SECOND DECISION-

THE COURT: I THOUGHT TITLE 6 WAS CONFINED TO ADDRESS DISCRIMINATION UNDER ANY PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE. THAT'S BASICALLY A QUOTE FROM TITLE 6.

MS. SMITH: WELL, YOUR HONOR, YOU MAY RECALL THE GROVE CITY VERSUS BELL CASE, I BELIEVE IT WAS, WHICH WAS THE CASE THAT HELD - IT IN MANY WAYS GUTTED THE IMPACT OF TITLE 6 FOR A PERIOD BECAUSE IT HELD THAT IN A UNIVERSITY WHERE THE UNIVERSITY UNDER ONE ARM RECEIVES FEDERAL FUNDS SAY FOR ITS RESEARCH AND SCIENCE POLICIES, PEOPLE WERE ATTEMPTING TO USE TITLE 6 TO SAY THAT YOU HAVE TO - YOU CAN'T DISCRIMINATE IN YOUR ATHLETIC DEPARTMENTS. AND THEY SAID IN GROVE CITY VERSUS BELL, WELL, NO, IT ONLY APPLIES TO THE ONE PROGRAM OR ACTIVITY UNDERNEATH THE UNIVERSITY, IT DOESN'T APPLY TO THE OTHERS.

THE COURT: WELL, LET'S ADDRESS - LET'S APPLY THAT FACTUAL SITUATION TO THIS.

MS. SMITH: WHAT HAPPENED IS -

[TRANSCRIPT OF HEARING 24]

THE COURT: TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA BECAUSE IT CAN BE APPLIED TO THEM.

MS. SMITH: BUT WHAT HAPPENED - I'M SORRY.
THE COURT: BUT THE PROBLEM IS THAT YOU TAKE THE CITY OF CHARLESTON, THAT THE EXAMPLE THAT YOU GET IS THAT THEY'RE GETTING MONEY FROM THE FEDERAL GOVERNMENT FOR STREETS FOR INSTANCE, OR PARKS I THINK IS THE EXAMPLE THAT YOU USED.
MS. SMITH: UMM-HMM.
THE COURT: AND THAT PARK PROGRAM OR THAT STREET PROGRAM DOESN'T HAVE ANYTHING TO DO WITH THIS.
MS. SMITH: THAT'S RIGHT. BUT WHAT HAPPENED WAS, IF GROVE CITY -
THE COURT: IS THERE ANY AUTHORITY THAT SAYS IF YOU GET IT FOR ANY PURPOSE THEN ANYTHING THAT YOU DO IS SUBJECT TO TITLE 6.
MS. SMITH: YES, YOUR HONOR. IN FACT GROVE CITY V. BELL IS NO LONGER GOOD LAW BECAUSE CONGRESS AMENDED TITLE 6 SPECIFICALLY TO OVERRULE THAT DECISION AND TO SAY THAT'S NOT WHAT WE MEANT. WE MEANT IF THE UNIVERSITY GETS FUNDS FOR ITS SCIENCE PROGRAMS AND RESEARCH FACILITIES THEN IT GOVERNS THROUGHOUT THE ENTIRE.
THE COURT: READ ME THAT LANGUAGE.
MS. SMITH: I'M SORRY, YOUR HONOR, I THINK I HAVE A

CASE THAT SUPPORTS THAT HERE IN MY FOLDER IF YOU WILL BEAR WITH ME. I MAY NOT HAVE IT IN FRONT OF ME. I CERTAINLY CAN

[TRANSCRIPT OF HEARING 25]

PROVIDE IT TO THE COURT LATER. AND THERE ARE CASES THAT HAVE HELD THAT THAT IS EXACTLY WHAT - WHAT CONGRESS DID WHEN IT AMENDED TITLE 6 AND THAT IT DOES MEAN IT TO APPLY THROUGHOUT THE UNIVERSITY.

(PAUSE.)

MS. SMITH: I'S SORRY, I KNOW I HAVE IT BACK IN THE OFFICE AND I DIDN'T BRING IT TO THE COURT HOUSE WITH ME TODAY.

BUT CONTINUING ON, ASSUMING THAT THAT IS THE LAW, AND THAT IT DOES APPLY TO THE CITY AND THE SOLICITOR'S OFFICE, THEN THAT CHOICE TO IMPLEMENT ONLY AT MUSC WAS A VERY SIGNIFICANT CHOICE.

I THINK THE SECOND CHOICE WAS TO APPLY THE POLICY ONLY TO ILLEGAL DRUGS RATHER THAN TO SAY ALCOHOL OR CIGARETTES, WHICH AS WE HAVE TESTIMONY DURING THE TRIAL ARE JUST AS HARMFUL AS ILLEGAL DRUGS IN SOME INSTANCES. I DON'T THINK WE KNOW THE EXACT IMPACT OF THAT DECISION ON AFRICAN AMERICANS. WE DON'T HAVE A BREAKDOWN FROM THE MEDICAL

UNIVERSITY OF - WE HAD PEOPLE WHO TESTED POSITIVE FOR ALL DRUGS INCLUDING CIGARETTES, ALCOHOL AND ALL ILLEGAL DRUGS, AND WE NEVER HAD SOMETHING THAT BROKE OUT CIGARETTES AND ALCOHOL AND COULD BREAK DOWN BY RACE THAT WAY, SO I DON'T THINK WE REALLY KNOW WHAT THE IMPACT WAS THERE.

THE THIRD DECISION WAS TO ONLY APPLY THE POLICY TO PEOPLE WHO TESTED POSITIVE FOR COCAINE. AND THAT CLEARLY WAS

[TRANSCRIPT OF HEARING 26]

A SECOND MOST SIGNIFICANT DECISION WHERE WHEN WE APPLY THE POLICY TO COCAINE USERS WE HAVE A GROUP OF PEOPLE THAT WAS 90 PERCENT AFRICAN AMERICAN VERSUS 10 PERCENT WHITE, AND WE COMPARE THAT TO THE GENERAL POPULATION AT MUSC WHICH WAS ABOUT 67/33. SO THERE WAS A VERY SIGNIFICANT DIFFERENCE BETWEEN THOSE TWO POPULATIONS.

THE COURT: WHAT IS THE COCAINE FIGURE?

MS. SMITH: THE COCAINE FIGURE WAS 120 WOMEN OUT OF 133 COCAINE POSITIVES WERE AFRICAN AMERICANS AND THAT EQUALS 90 PERCENT. AND 13 OF 133 WERE WHITE, OR 10 PERCENT.

THE FOURTH DECISION POINT HERE WAS THE USE OF

SUBJECTIVE CRITERIA IN ORDER TO DETERMINE WHO TO TEST. ONCE WE DECIDE WE'RE TESTING AT MUSC, ONCE WE DECIDE WE'RE TESTING FOR DRUGS, THEN WE DECIDE WE'RE TESTING FOR COCAINE. OKAY, NOW WHICH OF THESE WOMEN ARE WE GOING TO TEST FOR COCAINE.

THE COURT: YOU'RE SUGGESTING THAT THE USE OF SUBJECTIVE CRITERIA WOULD BE BETTER THAN OBJECTIVE?

MS. SMITH: NO, QUITE THE OPPOSITE. I'M SUGGESTING THAT THE USE OF SUBJECTIVE CRITERIA WAS ANOTHER DECISION POINT THAT RESULTED IN A DISPARATE IMPACT ON AFRICAN AMERICAN WOMEN, AND WE HAVE EVIDENCE OF TWO SOURCES FOR THAT. THE FIRST -

THE COURT: WELL, IS THERE ANY QUESTION BUT THAT THOSE CONCERNS THAT ARE EVIDENCED BY THE CRITERIA ARE LEGITIMATE MEDICAL CONCERNS?

MS. SMITH: THERE IS QUESTION ABOUT THAT. IN FACT

[TRANSCRIPT OF HEARING 27]

DOCTOR CHASNOFF TESTIFIED THAT SAYING LACK OF PRENATAL CARE, FOR EXAMPLE, WAS NOT THE APPROPRIATE CRITERIA TO USE IN DETERMINING WHO TO TEST FOR DRUGS BECAUSE WHAT THAT DID WAS THAT IT HIGHLIGHTED WHO IS LOW INCOME, WHO DOESN'T HAVE

MEDICAL CARE, WHO IS A DRUG USER. AND THAT WHEN YOU DO THAT, WHEN YOU USE CRITERIA LIKE THAT THAT ARE SO SUBJECTIVE AND OPEN ENDED, YOU END UP TESTING AFRICAN AMERICAN WOMEN AT A MUCH GREATER RATE.

THE COURT: BUT THE - WASN'T IT DOCTOR HORGER.

MS. SMITH: I'M SORRY.

THE COURT: WAS IT DOCTOR HORGER, WASN'T HE THE DOCTOR FROM THE MEDICAL UNIVERSITY THAT WAS ONE OF THE FIRST ONES TO DEVELOP THE PROGRAM?

MS. SMITH: YES.

THE COURT: AND AS I RECALL IT, HE TESTIFIED THAT THE FACT THAT THEY HAD EVIDENCE OF THESE PROBLEMS IN PREGNANT WOMEN, THESE PROBLEMS BEING THE ONES THAT ARE IDENTIFIED IN THE CRITERIA, THE FACT THAT THOSE PROBLEMS WERE PREVALENT IN THE POPULATION OF THE MEDICAL UNIVERSITY, LED THEM TO THIS PROGRAM.

MS. SMITH: I THINK HE DID TESTIFY.

THE COURT: AND THEY WANTED TO FIND OUT WHY THEY WERE HAVING THESE PROBLEMS. THEY SAW THERE WAS SOME RELATIONSHIP BETWEEN THOSE PROBLEMS AND COCAINE USE AND THAT THAT IS WHAT LED TO THEM. NOW, IS THERE ANY EVIDENCE THAT

[TRANSCRIPT OF HEARING 28]

THAT WASN'T TRUE?

MS. SMITH: WELL I THINK DEFINITELY THERE IS EVIDENCE THAT THE USE OF CRITERIA INADEQUATE PRENATAL CARE AND LACK OF PRENATAL CARE WERE NOT COORDINATED PROPERLY WITH COCAINE USE. WE DON'T KNOW THAT THEY WERE. THERE IS NO EVIDENCE THAT THEY WERE. PERHAPS SOMETHING LIKE INTRAUTERINE GROWTH RETARDATION OR PLACENTA PREVIA.

THE COURT: IS THERE ANY EVIDENCE THAT THAT WASN'T A LEGITIMATE CONCERN OF THE MEDICAL STAFF.

MS. SMITH: I THINK DEFINITELY ANYONE WHO DOESN'T HAVE PRENATAL CARE, THAT IS A CONCERN AND YOU WANT TO GET PEOPLE PRENATAL CARE, BUT THERE IS DIFFERENCE IN SAYING YOU SHOULD GET INTO PRENATAL CARE AND LET'S MAKE SURE THAT YOU HAVE IT, THAN SAYING THAT MAKES YOU MORE LIKELY TO BE LIKELY A DRUG USER. WHAT IT IS MORE LIKE IS, IS THAT YOU'RE AFRICAN AMERICANS AND POOR.

THE COURT: WOULD THE SAME THING APPLY TO CAUCASIANS AND POOR AND NOT HAVE INSURANCE PROGRAMS?

MS. SMITH: IT WOULD. IT WOULD APPLY - POOR PEOPLE IN GENERAL ARE MORE LIKELY NOT TO HAVE INSURANCE PROGRAMS.

THE COURT: I WOULD THINK THERE IS NO REAL QUESTION.
MS. SMITH: THAT IS ABSOLUTELY A QUESTION. BUT WHAT IS ALSO TRUE IF YOU'RE AFRICAN AMERICAN YOU'RE MORE LIKELY TO BE POOR THAN IF YOU'RE WHITE. THERE IS DISPROPORTIONATE IMPACT WHEN YOU - WHEN YOU FOCUS ON POOR PEOPLE THAT COMES

[TRANSCRIPT OF HEARING 29]

OUT ON AFRICAN AMERICAN PEOPLE BY ITSELF. THE OTHER PIECE OF THAT THAT DR. CHASNOFF TESTIFIED, AND I THINK THAT IS SUBSTANTIATED BY THE EVIDENCE, THE NUMBERS THAT WE HAD, IS THAT WHEN YOU HAVE SUBJECTIVE CRITERIA PEOPLE ARE GOING TO - THEY'RE GOING TO TEST AFRICAN AMERICAN PEOPLE MORE BECAUSE THEY CORRELATE THEM WITH DRUG USE, EVEN IF IT'S NOT TRUE. AND THAT PEOPLE'S SUBJECTIVE BELIEF AND SUBJECTIVE, LET'S CALL IT RACISM, COMES OUT IN THAT WAY. AND IT MAY NOT BE INTENTIONAL, IT MAY NOT BE MALEVOLENT, BUT THERE IS AN ASSUMPTION. AND THAT'S BORNE OUT FIRST BY DR. CHASNOFF'S STUDY IN WHICH THEY FOUND THAT AFRICAN AMERICANS WERE TEN TIMES MORE LIKELY TO BE TESTED FOR DRUGS, REPORTED TO THE POLICE AND HAVE THEIR CHILDREN TAKEN AWAY THAN WERE SIMILARLY SITUATED CAUCASIAN

FOLK.

AND NOT ONLY THAT, WE ALSO SAW IN THE NUMBERS OF WOMEN TESTED FOR DRUGS, AFTER THE POLICY WAS IMPLEMENTED, THAT THERE WAS A - THERE WAS A HUGE INCREASE UP TO 75 PERCENT OF THE PEOPLE BEING AFRICAN AMERICAN. SO THAT AFRICAN AMERICANS BEGAN TO BE TESTED AT A MUCH GREATER RATE AS SOON AS THE SUBJECTIVE CRITERIA WAS IMPLEMENTED. WHICH I THINK SUBSTANTIATES WHAT I THINK REALLY MAKES SENSE TO ME, WHICH IS WHEN YOUR SUBJECTIVE BELIEFS ARE ALLOWED TO GOVERN AN ASSOCIATION LIKE THAT, WHEN YOU DON'T JUST USE OBJECTIVE MEDICAL CRITERIA, BUT YOU OPEN IT UP, THEN YOUR SUBJECTIVE PREJUDICES, BENIGN OR MALEVOLENT -

[TRANSCRIPT OF HEARING 30]

THE COURT: WHAT DO YOU MEAN BY OPEN IT UP? WHAT DO YOU MEAN BY THAT?

MS. SMITH: WHEN YOU USE A CRITERIA LIKE INADEQUATE PRENATAL CARE OR LACK OF PRENATAL CARE, YOU ALLOW SUBJECTIVE BELIEF TO COME IN. ALLOW THE DECISION MAKER TO MAKE A DECISION BASED ON WHAT THEY THINK IS RIGHT. AND WHEN YOU ALLOW SUBJECTIVE BELIEFS TO COME IN, THEN SUBJECTIVE PREJUDICE

COMES IN. AND THAT IS ONE OF THE THINGS THAT TITLE 6 WAS DESIGNED TO PROTECT AGAINST, AND TITLE 7 AND ALL OF THE REST OF THE CIVIL RIGHTS STATUTES WERE DESIGNED TO PROTECT NOT ONLY AGAINST INTENTIONAL DISCRIMINATION, BUT ALSO AGAINST THE PREJUDICES THAT WE HOLD AND THAT INFLUENCE THE WAY WE BEHAVE.

AND I THINK THAT CARRIES INTO WHAT I SEE AS THE LAST DECISION POINT IN THE POLICY. WHICH IS THE DECISION OF WHO GETS ARRESTED. AND THAT DECISION WHICH NURSE BROWN DISCUSSED AND TALKED ABOUT, AND SHE TALKED ABOUT THE - IN SOME CASES HER ABILITY TO PUT SOMEBODY INTO AN ALTERNATIVE TREATMENT PROGRAM SO THAT THEY WOULDN'T GET ARRESTED. AND WE SAW THE DIFFERENCE IN TREATMENT BETWEEN SOMEBODY LIKE CRYSTAL FERGUSON AND DARLENE NICHOLSON AND WHO WAS ARRESTED AND WHO WAS GIVEN A TREATMENT PROGRAM, WHO WAS WORKED WITH MORE FULLY AND WHO WAS NOT, THAT THAT IS ANOTHER AREA IN WHICH SUBJECTIVE BELIEFS CAME IN. AND, AGAIN, WE SEE THE DISPROPORTIONATE IMPACT ON AFRICAN AMERICANS.

NOW EACH ONE OF THESE POINTS I THINK STANDING ALONE

[TRANSCRIPT OF HEARING 31]

COULD BE GROUNDS FOR A TITLE 6 CLAIM. BUT, ALL TOGETHER, ALL FIVE OF THESE POINTS, OR FOUR, IF YOU TAKE OUT THE ONE POINT WHERE WE'RE NOT SURE WHAT THE DISPROPORTIONATE IMPACT IS, THAT IS CHOOSING ILLEGAL DRUGS RATHER THAN JUST ALL HARMFUL SUBSTANCES, EVEN IF YOU TAKE THAT ONE OUT AND YOU'RE LEFT WITH JUST THOSE FOUR, ALL FOUR TOGETHER RESULTED IN THE POLICY THAT WE HAD WHERE 30 OF THE WOMEN - THERE WERE 30 WOMEN ARRESTED AND 28 WERE AFRICAN AMERICAN, ONE THERE WAS DISPUTE ABOUT EVEN THOUGH SHE CALLS HERSELF AFRICAN AMERICAN AND OTHERS CALL HER WHITE AND SOMETIMES SHE MIGHT CHECK ONE BOX AND SOMETIMES ANOTHER. AND THEN WE HAVE THE WHITE WOMEN WHO WAS ASSOCIATED WITH A BLACK PERSON. SO WE END UP WITH A - WITH, FROM A GROUP THAT WAS ALREADY DISPROPORTIONATE, WHICH IS THE COCAINE POSITIVE GROUP OF 90 PERCENT AFRICAN AMERICAN, THEN WE GET THE ARRESTED POPULATION, WHICH END UP BEING EITHER A HUNDRED PERCENT OR CLOSE TO IT AFRICAN AMERICAN.

I THINK THAT HAS A DEVASTATING IMPACT AND THERE WERE EASY WAYS FOR THE MEDICAL UNIVERSITY TO AVOID THAT. THEY COULD HAVE TESTED EVERY PREGNANT WOMEN FOR ILLEGAL

SUBSTANCES. THEY COULD HAVE TESTED EVERY PREGNANT WOMEN FOR ALL HARMFUL SUBSTANCES AND REPORTED THEM TO DSS AND INITIATED AN INVESTIGATION INTO WHETHER THERE WAS REALLY AN ABUSE GOING ON THERE. WHY NOT TEST EVERYONE IF IT'S SUCH A HUGE PROBLEM? AS LONG AS YOU GET THEIR CONSENT FIRST, IF YOU'RE GOING TO USE IT FOR CRIMINAL PURPOSES OF COURSE. BUT I JUST - I SEE ONE

[TRANSCRIPT OF HEARING 32]

DECISION AFTER ANOTHER, AND THE GROUP OF PEOPLE TARGETED GETTING SMALLER AND SMALLER AND MORE AND MORE AFRICAN AMERICAN WOMEN IN THAT GROUP AS WE GO.

THE COURT: OKAY.

MR. HOOD: THANK YOU.

MS. SMITH: YOUR HONOR, IF I CAN MAKE ONE OTHER COMMENT. I THINK INJUNCTIVE RELIEF IS ALSO RELEVANT TO THE TITLE 6 CLAIM.

THE COURT: SURE.

MR. HOOD: GOOD MORNING.

JOE WILSON BRIEFED THE TITLE 6 ISSUES, AND HE IS A PARTNER IN MY OFFICE AND HE WILL ADDRESS THOSE WHEN I SIT DOWN.

IN TO ANSWER YOUR QUESTION, I DON'T KNOW. WE ARE NOT AWARE OF ANY PLANS TO REINSTITUTE THE POLICY.

THE COURT: COUNSEL FOR THE PLAINTIFFS' SAID THAT DURING THE TRIAL, AND CORRECT ME IF I MISSTATE WHAT SHE SAID, IT WAS ASSERTED BY THE DEFENDANT THAT THEY WERE GOING TO REINSTITUTE THE POLICY. AND I DIDN'T RECALL ANY.

MR. HOOD: THERE IS NO PROOF OF THAT IN THE RECORD AND I HAVE NO KNOWLEDGE OF THAT.

THE COURT: OKAY. AND THERE WAS SOME STATEMENT THAT WAS QUOTED IN THE PAPER FROM MR. CONDON AND THAT NOT ONLY WAS HE GOING TO REINSTATE IT, BUT HE WAS GOING TO DO IT STATEWIDE AFTER HE GOT A VERDICT FOR THE DEFENDANTS.

[TRANSCRIPT OF HEARING 33]

MR. HOOD: HE IS TALKING ABOUT WORKING WITH THE SOLICITORS AND DEALING WITH THE PROBLEMS STATEWIDE. HE IS NOT TALKING ABOUT THE MEDICAL UNIVERSITY. AND IT IS A HUGE MONEY PROBLEM FOR THE PEOPLE OF THIS STATE THAT SHOULD BE ADDRESSED. BUT EVERYBODY IS WAITING ON HOW SHOULD WE ADDRESS IT CONSTITUTIONALLY. WE WANT TO DO IT RIGHT. AND THAT'S ALL.

THE MEDICAL UNIVERSITY, THERE IS NO FUTURE PLAN THAT I'M AN AWARE OF, AND I WOULD BE CONTACTED I'M SURE, THERE

IS NOTHING IN THE RECORD ABOUT IT. THIS SCAN REPORT, IT DOESN'T EXIST ANYMORE. THAT PROGRAM IS OVER WITH. MS. HILDEBRAND WASN'T A POLICYMAKER, SHE WAS A NURSE. THE MEDICAL UNIVERSITY HAS NO POLICY TO DISSEMINATE THIS TYPE OF INFORMATION, AND OF COURSE IT WASN'T DISCLOSED TO THE GENERAL PUBLIC.

AS TO PROCREATION, NO ONE WAS NOR DOES THE RECORD REFLECT THAT ANYONE WAS THREATENED WITH STERILIZATION OR ARREST. AND MS. NICHOLSON IS THE ONLY ONE THEY POINT TO UPON THE SUBJECT OF PROCREATION. SHE SIGNED THE CONSENT FORM, SHE TESTIFIED THAT NO ONE FORCED HER TO SIGN IT. DOCTOR NEUMAN TESTIFIED THAT IT IS THE POLICY OF THE MEDICAL UNIVERSITY TO REQUIRE CONSENT BEFORE AND DURING AN OPERATION. SHE HAD AN OPERATION. THERE IS NO WAY IN TH[illegible] WORLD, AND WE CLEARLY PROVED, THAT SHE WOULD NOT HAVE HAD THAT NORPLANT INSERTED WITHOUT HER CONSENT AND PERMISSION.

[TRANSCRIPT OF HEARING 34]

AND OF COURSE THERE IS NO LIKELIHOOD OF WHATEVER THEY'RE CLAIMING TO BE REPEATED ANYWAY. DOCTOR NEUMAN ALSO EXPLAINED THAT IT'S COMMON FOR AN OBSTETRICIAN TO TALK TO HIS

PATIENT AFTER THE DELIVERY OF A CHILD ABOUT BIRTH CONTROL.
AND THAT'S THE STANDARD OF CARE AND THAT'S WHAT A DOCTOR
SHOULD DO.
THEN YOU ASK AT THE LAST HEARING, I WAS OUT OF TOWN
AND THAT'S WHY I WASN'T HERE, MS. SHOWERS ADDRESSED IT AND WE
HAVE NOW BRIEFED IT FOR YOU IN DETAIL ABOUT THE THREE
PLAINTIFFS. AND MS. SHOWERS COULD GO THROUGH THE DETAILS OF
ANY ONE OF THE PLAINTIFFS THAT YOU'RE INTERESTED IN AS TO WHY
WE ARE ABSOLUTELY CERTAIN THIS RECORD PROVES EACH AND EVERY
PLAINTIFF WAS EITHER AWARE OF THE POLICY, OR TWO OF THEM DID
NOT COME WITHIN THE POLICY, THEREFORE THE CONDUCT OF THE
MEDICAL UNIVERSITY WAS NOT AN ACTOR UNDER THE FOURTH
AMENDMENT.
I THINK AS I WAS PREPARING TO TALK TO YOU ON THIS
ARGUMENT TODAY, I THINK IT'S IMPORTANT FOR US TO LOOK BACK AT
WHAT THE FOURTH CIRCUIT SAYS WE'RE DOING HERE AT A JNOV
PROCEEDING. THE WINANT V BOSTIC CASE, '93 FOURTH CIRCUIT
OPINION, I'M SURE YOUR HONOR IS FAMILIAR WITH, I JUST THINK
THE STANDARD OUGHT TO BE SINCE WE SPENT SO MUCH TIME TRYING
THIS CASE AND THERE IS SO MUCH IN THE RECORD, AND I HAVE JUST

HEARD ARGUMENT FROM COUNSEL WITH A LOT THAT IS NOT IN THE RECORD, THAT WE'LL POINT OUT IN A LITTLE BIT, AND WHERE WE ARE

[TRANSCRIPT OF HEARING 35]

RIGHT NOW IS THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY DRAWING EVERY LEGITIMATE INFERENCE IN THAT PARTY'S FAVOR. AND THE JUDGE MUST DETERMINE THAT THE ONLY CONCLUSION A REASONABLE TRIER OF FACT COULD DRAW FROM THE EVIDENCE IS IN FAVOR OF THE , MOVING PARTY.

DR. NEUMAN, UNCONTROVERTED, TESTIFIED UNDER OATH THAT EVERY PERSON WAS GIVEN EXHIBIT 10. EVERY PERSON KNEW ABOUT THE POLICY. AND TWO OF THEM WERE TESTED BEFORE THE POLICY, SO THE POLICY DOESN'T APPLY TO THEM. THEY DON'T HAVE A FOURTH AMENDMENT CLAIM BECAUSE THERE WAS NO ACTION AS THE FOURTH AMENDMENT PERSON BY THE MEDICAL UNIVERSITY PEOPLE, THEY WERE DOING WHAT THE CHILD ABUSE STATUTE REQUIRED THEM TO DO. YOU WERE CITED -

THE COURT: EXPLAIN THAT TO ME. IF YOU DON'T HAVE A POLICY, YOU DON'T HAVE A POLICY. BUT YOU TAKE SOMEBODY AND YOU TEST THEM WITH THE INTENTION OF GIVING THAT TO THE LAW ENFORCEMENT PEOPLE IF THEY DON'T GO INTO COUNSELING IF IT'S

POSITIVE, WHAT IS THE DIFFERENCE?
MR. HOOD: THEY DON'T TAKE IT WITH THE INTENTION OF GIVING IT TO ANYONE. THEY DO THE URINE DRUG SCREEN.
THE COURT: EVERY ONE OF THESE PLAINTIFFS, THE DRUG SCREENS WERE TAKEN WITH THE UNDERSTANDING THAT IF THEY WERE POSITIVE THEY WERE GOING TO GIVE IT TO THE SOLICITOR OR CHIEF OF POLICE OR WHOEVER THEY GAVE IT TO, RIGHT?
MR. HOOD: NO, SIR. TWO OF THEM WERE GIVEN URINE

[TRANSCRIPT OF HEARING 36]

DRUG SCREENS BEFORE THE POLICY WAS IN EFFECT. THE SOLICITOR WASN'T A FACTOR.
THE COURT: WHICH TWO ARE THOSE?
MR. HOOD: THAT'S THE TWO - YOU WERE INTERESTED IN THREE INDIVIDUALS AT THE LAST HEARING. AND THESE ARE TWO OF THOSE INDIVIDUALS WHICH ARE MRS. SINGLETON - I'M SORRY. MRS. POWELL AND MRS. GRIFFIN. POWELL WAS TESTED ON 10/13/89 BEFORE THE POLICY. GRIFFIN WAS TESTED OF 10/7/89 BEFORE THE POLICY.
SO WE ARE JUST TAKING THEIR ARGUMENT ABOUT THOSE TWO INDIVIDUALS AND SAYING, OKAY, IF YOU'RE CORRECT IT'S BEFORE THE POLICY, THERE IS NO AGREEMENT TO DO ANYTHING WITH THE

SOLICITOR, IT'S MERELY MEDICAL PROCEDURE. IF IT'S POSITIVE UNDER THE CHILD REPORTING STATUTE THEY'RE DOING THEIR JOB AND REPORTING AND THAT'S ALL THAT OCCURRED. THERE IS NO FOURTH AMENDMENT ACTOR INVOLVED.

MRS. SINGLETON IS IN THE ONLY CATEGORY OF A PERSON AND SHE WAS THE THIRD ONE YOU WERE INTERESTED IN. SHE WAS TESTED 11/9/89, BUT SHE RECEIVED EXHIBIT 10. AND SHE KNEW SHE WAS GOING TO BE TESTED. IN FACT HER RECORDS SAY THAT SHE GAVE PERMISSION BECAUSE SHE THOUGHT SHE WAS CLEAN, AND THAT'S IN QUOTATIONS. THAT'S EXHIBIT 180 THAT IS IN EVIDENCE. SHE WAS - SHE WAS ARRESTED AFTER MS. KNIGHT, IT WAS ALL OVER THE TELEVISION LOCALLY. SHE WAS AWARE OF THAT. SHE ADMITTED UNDER OATH THAT SEEING THE TELEVISION SHOW. SHE WAS AWARE OF THE HARM TO HER FETUS TO USE COCAINE. THAT'S AT PAGE 28 OF

[TRANSCRIPT OF HEARING 37]

THE TESTIMONY OF BROWN. THE - SHE SIGNED THE GENERAL CONSENT FORM AND AMBULATORY CARE FORM.

AND THAT REALLY IN A NUTSHELL ANSWERS WHAT YOU WERE INTERESTED IN I THINK AT THE LAST HEARING ABOUT THE THREE INDIVIDUALS. ALL OF THE OTHERS CLEARLY WERE AWARE OF IT. ALL

OF THE OTHERS, UNREFUTED TESTIMONY BY DOCTOR NEUMAN, GOT EXHIBIT 10. ALL WOMEN WERE INFORMED OF THE POSSIBILITY OF TURNING OVER THE RESULTS TO THE POLICE PRIOR TO GIVING A SAMPLE. DOCTOR NEUMAN, PAGE 279 OF HIS TESTIMONY. UNREFUTED IN THE RECORD.

THAT'S WHAT WE ARE DEALING WITH WHEN WE TALK ABOUT INFERENCES IN THE LIGHT MOST FAVORABLE OR NOT FAVORABLE. THE POLICY BEGAN 10/1/89, ACCORDING TO DOCTOR NEUMAN, PAGE 198. REASONABLE INFERENCE THAT THE PLAINTIFFS RECEIVED EXHIBIT 10 AND HAD KNOWLEDGE PRIOR TO TESTING AND IN THE ARREST.

I REALLY - I MEAN, IT WAS A LONG CASE. LET ME MAKE SURE I HAVE COVERED WHAT I - THERE WAS SOME NOTE ABOUT MS. KNIGHT, I THINK I SHOULD ANSWER THOSE FOR YOU. SHE WAS TESTED EARLIER IN THE POLICY. SHE DID NOT TEST POSITIVE. THEY TESTED HER BABY. AND THEN THERE WERE SOME CONVERSATIONS ABOUT A CASE CALLED WILDER VERSUS FREDRICK COUNTY. THE CASE DOESN'T STAND FOR WHAT COUNSEL CITED IT FOR. I HAVE GOT A COPY THAT I'LL BE GLAD TO HAND IT UP.

WHAT IT DOES SAY IS WHAT WE HAVE BEEN TALKING ABOUT, AND THAT IS CHILD ABUSE, IF IT'S BEFORE THE POLICY, THE FOURTH

[TRANSCRIPT OF HEARING 38]

CIRCUIT SAYS, AND THEY CITE A 7TH CIRCUIT OPINION, VICTIM OF CHILD ABUSE, I'M QUOTING ON PAGE 373, CAN ONLY BE UNDERTAKEN WHEN THE STANDARDS OF PROBABLE CAUSE ARE WARRANTED. THE DISTRICT COURT PROPERLY DECIDED THE MEDICAL EXAMINATION OF THE CHILDREN DID NOT VIOLATE PLAINTIFF'S RIGHTS.

AND THAT'S WHAT WE'RE TALKING ABOUT WITH MS. KNIGHT. AND IF SHE WAS ARRESTED BEFORE EXHIBIT 10, THAT WAS BEFORE THE POLICY AND SHE DOESN'T COME WITHIN THE POLICY. MS. PEAR WAS THE OTHER ONE SHE MENTIONED. SHE WAS, AND IT'S IN THE RECORD, SHOWN EXHIBIT 10, AND THAT'S BEEN PROVEN AND IT'S UNREFUTED IN THE RECORD. THAT WAS ON 7/23/1990.

LEGAL ARGUMENT ON THE TITLE 6 WILL BE FOR MR. WILSON. WE HAVE GOT BLOWUPS, WE HAVE GOT EVERYTHING THAT WE THINK THAT WAS OF INTEREST TO YOU READY TO TALK ABOUT, BUT I DON'T WANT TO OVERDO IT. IF YOU DON'T WANT TO HEAR IT, I'M GOING TO SIT DOWN.

THE COURT: OKAY.

MR. HOOD: IF THERE IS A QUESTION WE CAN ANSWER, JUST TELL US BECAUSE WE CAN ANSWER EVERY QUESTION THAT YOU HAVE GOT.

I HAVE GOT ONE QUESTION, YOUR HONOR. YOU MENTION YOU MAY AFTER TODAY DECIDE TITLE 6. WOULD YOU LIKE FOR COUNSEL ON BOTH SIDES TO PREPARE CONCLUSIONS AND FINDINGS OF LAW AND FINDINGS OF FACT?

THE COURT: IF YOU HAVE GOT THEM I'LL TAKE THEM.

[TRANSCRIPT OF HEARING 39]

MR. HOOD: I MEAN, AFTER TODAY'S HEARING. WE HAVE DONE SOME, BUT DO YOU WANT US TO DO MORE THAN WE HAVE DONE?

THE COURT: LET ME THINK ABOUT IT.

MR. HOOD: WE JUST WANT TO HELP.

MS. SHOWERS: IF I COULD JUST ADD ONE THING, OR ACTUALLY TWO THINGS. MS. PEAR TESTIFIED THAT SHE RECEIVED THE JOINT 10 AND THEY CONTEND THIS WAS AFTER SHE TESTED POSITIVE. BUT I THINK THE TESTIMONY OF MS. HILDEBRAND, SHE IS THE ONE THAT PRESENTED JOINT 10 WHEN SHE WAS COVERING FOR SHIRLEY BROWN. IN AN EXERCISE OF CAUTION AND THE INFERENCE THERE SHE HAD ALREADY RECEIVED JOINT 10 WHEN SHE REGISTERED FOR PRENATAL CARE, WHICH THERE IS NO QUESTION ABOUT, AND ALSO SAID THAT SHE WAS AWARE OF WHAT WAS GOING ON AT THE MEDICAL UNIVERSITY ANYWAY.

DOCTOR NEUMAN SAID THAT THE POLICY BEGAN ON 10/1, BUT HE MEANT THAT THAT IS WHEN THE MEDICAL UNIVERSITY BECAME AWARE THAT THEY HAD TO REPORT UNDER THE STATUTE THAT THERE WAS MANDATORY REPORTING. IN OTHER WORDS, THERE WAS NO POLICY OF AMNESTY OR SOMETHING LIKE THAT CAME LATER WHEN THE SOLICITOR AND THE POLICE DEPARTMENT TO NOT HAVE THESE WOMEN ARRESTED RIGHT AWAY. SO, THERE WAS NO FOURTH AMENDMENT IMPLICATION, THE DOCTORS WERE DOING IT FOR MEDICAL REASONS, BUT THEY HAD TO REPORT IT, IT WAS BECAUSE OF THESE ARRESTS THAT THE POLICY WAS DEVELOPED SO THAT THESE WOMEN -

THE COURT: I THOUGHT, AND I DON'T HAVE A - MY

[TRANSCRIPT OF HEARING 40]

NOTES RIGHT IN FRONT OF ME, I HAVE THEM AVAILABLE, I THOUGHT THAT THE POLICY FOR TESTING FOR MEDICAL PURPOSES WAS TERMINATED IN JUNE OR JULY OF '89?

MS. SHOWERS: TERMINATED? YOU MEAN INTERAGENCY POLICY INITIATED?

THE COURT: NO. I THOUGHT IT WAS INITIATED PRIOR TO THAT AND THE TESTIMONY WAS THAT IT DID NOT WORK.

MS. SHOWERS: NO, SIR.

THE COURT: ON A VOLUNTARY BASIS, AND THAT'S WHY

THEY WENT INTO THIS BUSINESS OF GETTING AN AGREEMENT WITH THE SOLICITOR.

MS. SHOWERS: WELL, AS I RECALL DOCTOR HORGER TESTIFIED THAT HE BECAME AWARE OF ALL OF THIS MEDICAL EVIDENCE, AT A SEMINAR AND HE CAME BACK AND DEVELOPED SOME SORT OF GUIDELINE THAT THESE ARE THE PEOPLE THAT WOULD BE TESTED. AND THEN WHEN THEY HAD ALL OF THESE TESTS COME UP POSITIVE, AND REFERRING WOMEN TO TREATMENT AND THEY DIDN'T GET ANYONE TO GO, THAT THEY THEN SAID WE HAVE GOT TO DO SOMETHING.

THE COURT: WHEN DID THAT - WHAT IS THAT DATE?

MS. SHOWERS: IT WAS INTO OCTOBER. IT CAME AFTER HUGO AT SOME POINT. BUT ALSO THERE WAS TESTIMONY THAT MR. GOOD, THE GENERAL COUNSEL, TELEPHONED THE SOLICITOR'S OFFICE TO DETERMINE IF THEY HAD TO REPORT THIS BECAUSE THEY BECAME AWARE OF IT.

SO YOU HAVE THIS GOING ON AT THE HOSPITAL, THESE

[TRANSCRIPT OF HEARING 41]

POSITIVE SCREENS. AND THEY HAVE TO REPORT IT. AND THE WOMEN GOING TO JAIL AND THEY'RE NOT GETTING TREATMENT. SO - I'M SORRY. THAT THEY DEVELOPED THIS POLICY OF AMNESTY WHICH

BECAME THE POLICY, WHICH IS WHEN JOINT 10 WAS ESTABLISHED TO TELL THESE WOMEN WE'RE CONCERNED ABOUT DRUG USE AND IF YOU DON'T GET TREATMENT YOU'RE GOING TO HAVE TO DO SOMETHING ABOUT IT. AND THE GUIDELINES CAME OUT AND THE POLICY WAS APPROVED AT THE MEDICAL UNIVERSITY IN I BELIEVE LATE NOVEMBER. I THINK THE POLICE HAD SOME GUIDELINES SOMETIME IN OCTOBER, BUT BY EVERYONE'S ADMISSION, EVEN IN THE PLAINTIFFS' BRIEF, GRIFFIN, POWELL AND SINGLETON, AND I THINK THEY EVEN SAY MS. KNIGHT, WERE BEFORE THE POLICY.

IF THEY'RE BEFORE THE POLICY, THEN THERE IS NO JOINT 10 AND THERE IS NO FOURTH AMENDMENT. AFTER THE POLICY THERE IS A JOINT 10, AND NOTE BY THE DOCTORS TELLING THEM THAT THEIR URINE WOULD BE TURNED OVER, WHICH IS DOCTOR NEWMAN'S TESTIMONY.

THE COURT: OKAY.

MS. SHOWERS: THANK YOU.

MS. SMITH: YOUR HONOR, I CERTAINLY AGREE THERE WAS NO JOINT 10 AT THE TIME, BUT IT'S THE FIRST TIME I HEARD THERE WAS NO POLICY UNTIL THE POLICY WAS CHANGED AND PEOPLE WERE ALLOWED AMNESTY.

THE COURT: LET ME HEAR FROM YOU HIM AND THEN I'LL COME BACK TO YOU.

[TRANSCRIPT OF HEARING 42]

MS. SMITH: OKAY. I'M SORRY.
MR. WILSON: I'LL TRY TO BE BRIEF JUST ON TITLE 6.
FIRST OF ALL I JUST WANT TO MAKE SURE OUR POSITION IS CLEAR.
IT'S OUR UNDERSTANDING THAT TITLE 6, WHEN THERE IS NO FINDING OF A DISCRIMINATORY INTENT, TITLE 6 ONLY GRANTS INJUNCTIVE RELIEF, NO DAMAGE RELIEF. SO WE'RE TALKING ABOUT JUST INJUNCTIVE RELIEF ON THE TITLE 6 RIGHT NOW, AND THAT'S GUARDIANS ASSOCIATION THE SUPREME COURT CASE. AND THERE IS A FOURTH CIRCUIT CASE, THE PANDAZIDES CASE.
I THINK IT'S IMPORTANT TO REMEMBER THAT WE DO HAVE A JURY FINDING OF NO INTENTIONAL DISCRIMINATION THAT CAN FORM OUR INQUIRY INTO THE DISPARATE IMPACT. REVIEWING THE STATISTICIANS' TESTIMONY, THEY REALLY SEEM TO BE IN AGREEMENT THAT THE DIFFERENCE THAT THERE WAS A DISPARATE - THE REASON THERE WAS A DISPARATE IMPACT HERE IS BECAUSE THE POLICY WAS AT MUSC, AND BECAUSE THERE WAS A FOCUS ON THE USE OF COCAINE.
AND THOSE TWO FACTORS COMPLETELY EXPLAIN THE DISPARATE IMPACT HERE.
THERE IS NO EVIDENCE THAT ANY DISPARATE IMPACT AROSE

OUT OF THE USE OF THE SUBJECTIVE CRITERIA, THERE IS NO TESTIMONY ON THAT WHATSOEVER. THERE IS ALSO NO TESTIMONY THAT ANY DISPARATE IMPACT WAS EVIDENCED IN THE ARREST - THE RATIOS FOR THE ARREST. IN FACT THE PLAINTIFFS' OWN EXPERT, DOCTOR SHAPIRO, AGREED TO THIS ON PAGE 240 OF HIS TESTIMONY, THAT THE ARRESTS WERE - WAS NOT ANY EVIDENCE OF DISPARATE IMPACT

[TRANSCRIPT OF HEARING 43]

THERE.

SO WE'RE JUST DEALING WITH THE DECISION TO LOOK AT MUSC AND THE DECISION TO IMPLEMENT THIS AT MUSC AND THE DECISION TO JUST LOOK AT THE - TO FOCUS ON COCAINE. AND I THINK THERE ARE TWO PROBLEMS WITH THIS. FIRST OF ALL THESE ARE NOT PRACTICES THAT ARE BARRED BY TITLE 6. DISCRIMINATORY PRACTICES ARE WHAT ARE BARRED BY TITLE 6. THIS IS AN ISSUE OF POPULATION THAT WE'RE DEALING WITH, NOT PRACTICES.

THE STATE, THE POLICE DEPARTMENT, THE HOSPITAL, HAS A RIGHT TO ADDRESS PROBLEMS LIKE THIS, ONE ISSUE AT A TIME. THEY CAN LOOK AT COCAINE, THEY CAN DO IT JUST AT MUSC. SO THIS IS JUST A - IT'S NOT A PRACTICE. IT'S THAT SIMPLE. IT

IS AN ISSUE OF THE POPULATION THAT IS BEING DEALT WITH.

SECONDLY, THESE DECISIONS ARE ENTIRELY JUSTIFIED.

THE COCAINE USE. AGAIN PLAINTIFFS' OWN EXPERT DOCTOR CHASNOFF SAID THAT AT THE TIME THE POLICY WAS IMPLEMENTED HE AGREED THAT SOMETHING HAD TO BE DONE IMMEDIATELY ABOUT THE USE OF COCAINE BY PREGNANT WOMEN. AND THERE IS PLENTY OF EVIDENCE TO SUPPORT THAT, PLENTY OF MEDICAL ARTICLES TO SHOW THAT THAT DECISION TO FOCUS ON COCAINE WAS A MEDICALLY LEGITIMATE DECISION.

THE ISSUE ABOUT MUSC, THERE IS NO EVIDENCE THAT ANYONE LIMITED WHAT OTHER HOSPITALS DID. IN FACT THE EVIDENCE, I THINK CAPTAIN ROBERTS DISCUSSED IT, WAS THAT THERE WAS SOME ENCOURAGEMENT THAT OTHER HOSPITALS LOOK INTO ADOPTING

[TRANSCRIPT OF HEARING 44]

SIMILAR POLICIES. YOU KNOW THEY -

THE COURT: DO YOU AGREE THAT TITLE 6 APPLIES TO THE CITY?

MR. WILSON: NO, WE'RE GOING TO HAVE TO LOOK AT THAT, BUT I THINK IF THERE ARE JUST FUNDS GOING TO OTHER PRACTICES, AND THEY DON'T HAVE ANYTHING TO DO WITH THIS

POLICY, I DON'T SEE HOW IT CAN JUMP OVER TO WHAT THE CITY OR THE POLICE DEPARTMENT HAS DONE WITH REGARD TO THIS POLICY. WE'LL BE GLAD TO BRIEF THAT AND LOOK AT THAT.

THE COURT: WELL IT'S A PRETTY IMPORTANT POINT.

MR. WILSON: EXCUSE ME?

THE COURT: IT'S A PRETTY IMPORTANT POINT AS FAR AS TITLE 6 IS CONCERNED.

MR. WILSON: YES, SIR, IT IS.

THE COURT: BECAUSE IF THE MEDICAL UNIVERSITY IS THE ONLY ONE COVERED BY TITLE 6 THEN IT CERTAINLY DOESN'T HAVE ANY CONTROL OVER ROPER. I MEAN, ALL YOU GOT TO DO IS PICK UP THE PAPER AND YOU CAN TELL THAT. AND SO - AND IT DOESN'T HAVE ANY CONTROL OVER OTHER HOSPITALS. AND SO IT'S A PRETTY TELLING POINT I THINK AS FAR AS TITLE 6 IS CONCERNED.

MR. WILSON: BUT EVEN -

THE COURT: IN OTHER WORDS, YOU'RE SAYING THAT THE CASE COUNSEL FOR THE PLAINTIFFS' RELIES ON TO SAY THAT IT APPLIES TO THE - SOME OTHER DEFENDANTS OTHER THAN MUSC, YOU'RE NOT FAMILIAR WITH THAT CASE?

[TRANSCRIPT OF HEARING 45]

MR. WILSON: THE GROVE CITY? I AM FAMILIAR.

THE COURT: NO. SHE SAYS THAT THAT IS NOT LAW ANYMORE, AND REFERS TO ANOTHER CASE THAT EXAMINES THAT THE MEANING OF THE - OF THE AMENDMENT TO TITLE 6.

MR. WILSON: I'M NOT FAMILIAR WITH THAT OTHER CASE.

THE COURT: YOU NEED TO GET THAT TO ALL OF US AND LET US SEE IT AND LOOK AT IT.

OKAY.

MR. WILSON: THE POINT, EVEN IF TITLE 6 DOES APPLY TO THE POLICE AND TO THE CITY, I STILL DON'T SEE THAT THEY EXERCISED ANY CONTROL TO STOP OTHER HOSPITALS FROM DOING THAT. SO I - THE END RESULT BEING THAT THE FOCUS ON MUSC AND COCAINE, THOSE - THOSE WERE NOT PRACTICES SUBJECT TO A DISCRIMINATORY IMPACT ANALYSIS UNDER TITLE 7.

AND THE LAST THING I JUST WANT TO SAY ABOUT THE CRITERIA AND THIS WHOLE ISSUE OF SUBJECTIVE CRITERIA, THE PLAINTIFFS SEEM TO BE SUGGESTING THAT YOU - ANY POLICY YOU CANNOT APPLY A CRITERIA IF IT HAS A CHANCE OF HAVING A DISCRIMINATORY IMPACT. IF IT HAS A CHANCE OF IMPACTING BLACKS OR POOR PEOPLE MORE OFTEN. AND I WOULD SUGGEST THAT THAT IS JUST NOT WHAT TITLE 6 IS ALL ABOUT.

YOU CAN HAVE A CRITERIA WHETHER THE PROGRAM IS FOR

WHAT WE HAVE HERE OR ANY OTHER POLICY. THE FACT THAT THOSE CRITERIA HAVE THE - HAVE A SIMILAR IMPACT OR HAVE A DISCRIMINATORY IMPACT STANDING ALONE JUST DOESN'T PROVE A

[TRANSCRIPT OF HEARING 46]

TITLE 6 VIOLATION. YOU HAVE TO LOOK AT THE JUSTIFICATION THAT IS OFFERED AND ITS RELATIONSHIP TO ALLOW LEGITIMATE STATE INTEREST. AND THERE IS JUST NO DOUBT THE TESTING, THAT TRYING TO DEAL WITH THIS EPIDEMIC OF COCAINE USE AMONG PRENATAL WOMEN WAS A VERY, VERY HIGH STATE INTEREST AND THAT THIS POLICY ADDRESSED THAT INTEREST.

AND, AGAIN, DOCTOR CHASNOFF AGREED THAT AT THAT TIME IN 1989,1990, WHEN THIS POLICY WAS IMPLEMENTED, THAT THERE WAS AN EPIDEMIC THAT HAD TO BE ADDRESSED IMMEDIATELY.

THE COURT: OKAY.

MR. WILSON: THANK YOU. YES, MA'AM.

MS. SMITH: YOUR HONOR, I FOUND THE CASE THAT I WAS REFERRING TO, ON TITLE 6 PREVIOUSLY, IT'S A CASE CALLED AYERS V. ALLAIN, AND IT'S FROM THE 5TH CIRCUIT, FEBRUARY 6, 1990, 893 F.2D SECOND 732.

THE COURT: IS THAT THE ONLY CASE THAT DEALS WITH THAT POINT?

MS. SMITH: I ACTUALLY HAVE A FOOTNOTE HERE FROM AN ARTICLE THAT CITES A NUMBER OF OTHER CASES.

THE COURT: IF IT'S IN THE BODY.

MS. SMITH: NO, ACTUALLY IT'S IN SOMETHING ELSE. LET ME GIVE YOU A CITE OF ONE OTHER CASE. RADCLIFF VERSUS LANDAU, 883 F.2D, 1481, AT 1483, 9TH CIRCUIT 1989 CONGRESS AMENDED TITLE 6 TO SPECIFY WHAT PROGRAM OR ACTIVITY MEANS, AND I QUOTE, ALL OF THE OPERATIONS OF A DEPARTMENT, AGENCY,

[TRANSCRIPT OF HEARING 47]

SPECIAL PURPOSE DISTRICT OR OTHER INSTRUMENTALITY OF A STATE OR OF A LOCAL GOVERNMENT OR THE ENTIRE PLANT OR COMPARABLE GEOGRAPHIC -

THE COURT: I CAN READ THE CASE.

MS. SMITH: OKAY. THAT'S FROM THE STATUTE ALSO.

THE COURT: BUT THE CASE IS QUOTED IN THE STATUTE?

MS. SMITH: IT QUOTES -

THE COURT: YOU'RE READING FROM THE CASE, ARE YOU NOT?

MS. SMITH: I WAS READING FROM THE STATUTE RIGHT THEN.

THE COURT: OKAY.

THE COURT: I CAN READ. THAT'S ALL RIGHT.
MS. SMITH: YOU CAN DO THAT.
THE COURT: ANYTHING ELSE?
MS. SMITH: JUST BRIEFLY, ON THE DATE OF THE POLICY. THERE WAS A MEETING THAT TOOK PLACE IN SEPTEMBER AT WHICH AN AGREEMENT WAS MADE.
THE COURT: WHO WAS AT THE MEETING AND WHAT IS THE AGREEMENT?
MS. SMITH: THE PEOPLE AT THE MEETING WERE MUSC, SOLICITOR OFFICE OFFICIALS AND PEOPLE FROM THE POLICE DEPARTMENT. THERE WAS THEN A POLICE DEPARTMENT MEMO THAT WAS AVAILABLE - I BELIEVE IT WAS OCTOBER 12, MEMORIALIZING BASICALLY WHAT WAS DECIDED AT THE MEETING. THERE WAS AN

[TRANSCRIPT OF HEARING 48]

AGREEMENT BY WITNESSES, INCLUDING SHIRLEY BROWN AND DOCTOR NEUMAN, THAT THE POLICY STARTED ON 10/1/89.
AND I THINK WHAT STARTED AT THE TIME WAS WE ARE GOING TO REPORT PEOPLE. AND BOTH LORI GRIFFIN, LAVERN SINGLETON AND ELLEN KNIGHT, SANDRA POWELL, THEY WERE ALL ARRESTED AFTER THAT DECISION HAD BEEN MADE AFTER THE FOLK HAD MET TOGETHER AND DECIDED TO DO IT.

WHAT HAPPENED IN JANUARY IS COMPLETELY IRRELEVANT. THAT WAS CHANGING THE POLICY TO ADD WHAT THEY CALL THE AMNESTY PROVISION. AND THAT I THINK IS IRRELEVANT TO WHAT WE'RE TALKING ABOUT.

THE COURT: SO THE DATE WAS OCTOBER 1ST.

MS. SMITH: THAT'S RIGHT, YOUR HONOR.

THE COURT: OKAY. OKAY. THANK YOU.

MS. DUNN: YOUR HONOR, I DID WANT TO CLARIFY THE ASSERTION THAT I REFERRED TO BY DEFENSE ATTORNEY THAT THE POLICY WAS GOING TO BE REINSTATED. THAT WAS NOT IN THE TRIAL BUT IN MOTIONS PRIOR TO THE TRIAL, AND I'LL BE HAPPY, I HAVE GOT THE TRANSCRIPT AND HAVE THE STATEMENT SPECIFICALLY, BUT IT WAS IN THAT CONTEXT, YOUR HONOR.

THE COURT: OKAY. LET'S TAKE ABOUT TEN MINUTES AND THEN -

MS. SHOWERS: CAN I RESPOND TO THE DATE OF THE POLICY?

THE COURT: SURE.

[TRANSCRIPT OF HEARING 49]

MS. SHOWERS: THERE WAS A MEETING AND I THINK THE TESTIMONY WAS SOMETIME AROUND HUGO, WHICH WAS LATE SEPTEMBER.

AND THAT WAS WHEN AFTER JOE GOOD TALKED TO THE SOLICITOR THEY BROUGHT THEM IN AND SAID YOU HAVE TO REPORT. THERE WAS NO POLICY. IT WAS JUST NOTICE TO THE PHYSICIANS THAT THIS WAS COMPLYING WITH THE LAW, ANYMORE THAN, YOU KNOW, IF JOE GOOD CALLED UP AND SAID, MR. CONDON, DO WE HAVE TO REPORT GUNSHOT WOUNDS. IT'S NOT A - IT'S NOT A CONSPIRACY WITH THE POLICE DEPARTMENT OR THE SOLICITOR'S OFFICE, IT'S TELLING THEM THAT THIS IS THE LAW, YOU HAVE TO COMPLY WITH IT.

SO NEUMAN, WHEN HE SAYS WE STARTED OCTOBER 1ST, THERE IS NO EVIDENCE THAT THERE WAS A POLICY. I'LL AGREE THAT THE FIRST EVIDENCE THAT THERE WAS ANY SORT OF AGREEMENT WAS THE OPERATIONAL GUIDELINES OF THE POLICE, WHICH IS DATED 10/12 OF '89 OR '88. '89. SO IT DIDN'T START AS FOR MS. GRIFFIN AND MS. POWELL.

THE COURT: WELL, WHAT IS THE DIFFERENCE FROM THE STANDPOINT OF THE FOURTH AMENDMENT IF - IF YOU TAKE SOMEBODY'S URINE SAMPLE, WHO IS A PATIENT IN YOUR HOSPITAL, AND IF IT TESTS POSITIVE, YOU'RE GOING TO TURN IT OVER TO THE SOLICITOR FOR PROSECUTION OF CHILD ABUSE. AND IF IT TESTS POSITIVE, YOU'RE GOING TO TURN IT OVER FOR PROSECUTION FOR A

DRUG ABUSE. WHAT IS THE DIFFERENCE?
MS. SHOWERS: IT'S THE PURPOSE OF THE DRUG TEST.
THEY DIDN'T GET TOGETHER AND SAY WE'RE GOING TO TEST THESE

[TRANSCRIPT OF HEARING 50]

PEOPLE FOR THE PURPOSE OF PROSECUTION, THEY WERE TESTING THEM
ALL ALONG FOR MEDICAL PURPOSES TO TREAT THE WOMEN AND HER
UNBORN CHILD. AND IT WAS BECAUSE THEY FOUND OUT THAT THAT WAS
ALSO -
THE COURT: I MEAN, I UNDERSTAND THAT ALL OF THE
WOMEN THAT WERE TESTED WERE ALLEGEDLY TESTED BECAUSE THEY WERE
BEING - THEIR PREGNANCIES WERE BEING TREATED AT THE HOSPITAL,
RIGHT?
MS. SHOWERS: RIGHT.
THE COURT: BUT, WELL THAT - IF THAT TEST IS DONE
FOR MEDICAL PURPOSES ALONE, AND - ANYTIME YOU GO INTO A
HOSPITAL YOU HAVE YOUR BLOOD DRAWN, AND YOU GIVE A URINE
SAMPLE MOST OF THE TIME, AND THAT'S USED FOR MEDICAL PURPOSES,
AND THAT DOES NOT IMPLICATE THE FOURTH AMENDMENT AGAINST
ILLEGAL SEARCHES AND SEIZURES. IT ONLY BECOMES IMPLICATED
WHEN YOU AGREE TO TAKE THAT SAMPLE, IF IT IS INCRIMINATING,
AND TURN IT OVER TO LAW ENFORCEMENT. THEN IT BECOMES A -

AGAIN BECOMES AN ILLEGAL SEARCH. SO IF -

MS. SHOWERS: THAT'S WHAT I'M SAYING.

THE COURT: SO IF THE ILLEGALITY IS BASED ON CHILD ABUSE OR ILLEGALITY IS BASED ON USING DRUGS, WHAT DIFFERENCE DOES IT MAKE? THAT - ALL OF THE PROSECUTIONS WERE FOR CHILD ABUSE WERE THEY NOT?

MS. SMITH: OR DRUG DELIVERY TO A MINOR AND SOME POSSESSION.

[TRANSCRIPT OF HEARING 51]

MS. SHOWERS: SOME POSSESSION AND DELIVERY.

THE COURT: YOU SAY THERE WASN'T A POLICY. THERE WAS A POLICY. THERE WAS A POLICY TO TAKE THESE SAMPLES AND IF THEY WERE POSITIVE TO TURN THEM OVER TO THE SOLICITOR BECAUSE OF CHILD ABUSE.

MS. SHOWERS: IT'S NOT -

THE COURT: AND THAT STARTED OCTOBER THE 1ST.

MS. SHOWERS: NO, SIR. THAT WAS ALWAYS THE LAW THAT THEY HAD TO TURN OVER, ANYTIME A CHILD COMES INTO THE MEDICAL UNIVERSITY AND THERE IS EVIDENCE OF ABUSE, THEY ARE REQUIRED UNDER LAW TO REPORT IT. THE DOCTORS WERE UNAWARE THAT SOUTH CAROLINA LAW REQUIRED THAT THEY REPORT EVIDENCE OF DRUG ABUSE

AND A PREGNANT WOMEN AS A CHILD ABUSE. THAT'S WHEN THEY ACQUIRED THAT KNOWLEDGE IN OCTOBER. THEY WEREN'T DOING THIS TO PROSECUTE WOMEN, THEY WERE DOING IT TO TREAT.

THE COURT: I UNDERSTAND THAT, BUT THAT DOESN'T REALLY ADDRESS - THEY FOUND OUT ABOUT THAT IN OCTOBER AND THEY STARTED TURNING OVER IT TO THE SOLICITOR, AND THEN THAT DEVELOPED INTO THE POLICY THAT YOU CALL -

MS. SHOWERS: RIGHT. BUT IT WASN'T GOVERNMENT ACTION WHEN THE MEDICAL DOCTOR OR THE URINE SPECIMEN, HE DID IT TO TREAT THE WOMEN. HE DIDN'T DO THE DRUG TEST TO -

THE COURT: WHAT CHANGED?

MS. SHOWERS: WELL, ALTHOUGH WE DISAGREE WITH THE RATIONAL OF THE COURT, WHEN THE POLICE, AND THERE WAS THIS

[TRANSCRIPT OF HEARING 52]

MEETING THAT EVERYONE WOULD COORDINATE THEIR EFFORTS AND MEET TOGETHER TO TURN OVER THIS INFORMATION AND GET THIS WOMEN TREATMENT, THAT WAS MY UNDERSTANDING THAT THE COURT FOUND THAT THAT SORT OF CONSPIRACY WAS GOVERNMENT ACTION. THAT'S WHAT TURNED THE MEDICAL TESTS INTO GOVERNMENT ACTION BY THESE

PRIVATE MEDICAL DOCTORS ACTING FOR MEDICAL PURPOSES. IF THERE IS NO AGREEMENT TO SHARE THIS INFORMATION AT THE TIME THAT THE TEST IS DONE, THEN THERE IS NO GOVERNMENT ACTION.

THE COURT: WELL WHEN DID THEY START AGREEING TO SHARE IT WITH THE SOLICITORS? OCTOBER THE 1ST?

MS. SHOWERS: NO, OCTOBER 12TH IS THE FIRST GUIDELINE, ACCORDING TO -

THE COURT: I DIDN'T ASK YOU ABOUT THE GUIDELINE. I SAID WHEN DID THEY FIRST AGREE TO SHARE THESE POSITIVE TESTS WITH THE SOLICITOR'S OFFICE OR THE POLICE DEPARTMENT?

MS. SHOWERS: AFTER THE OPERATIONAL GUIDELINES.

THE COURT: GIVE ME A DATE?

MS. SHOWERS: OCTOBER 12, 1989.

THE COURT: WHAT HAPPENED TO GRIFFIN, HERS WAS TAKEN ON OCTOBER 7TH, SHE TESTED POSITIVE.

MS. SHOWERS: YES, SIR.

THE COURT: WHAT HAPPENED TO THAT POSITIVE TEST?

MS. SHOWERS: AFTER THEY LEARNED THAT, THEY HAD THAT TURNED OVER TO THE POLICE.

THE COURT: JUST WHAT HAPPENED?

[TRANSCRIPT OF HEARING 53]

MS. SHOWERS: SHE WAS ARRESTED.
THE COURT: THEY TURNED THAT TEST OVER TO THE POLICE?
MS. SHOWERS: YES, SIR.
THE COURT: AND SHE WAS ARRESTED?
MS. SHOWERS: YES, SIR.
THE COURT: NOW WHY WAS IT TURNED OVER TO THE POLICE WHEN IT WAS TAKEN ON OCTOBER 7, AND YOU SAY THAT NOTHING TOOK PLACE UNTIL OCTOBER THE WHAT?
MS. SHOWERS: I GUESS I'M NOT MAKING MYSELF CLEAR. IT'S JUST THAT THEY TURN IT OVER -
THE COURT: I AM JUST ASKING YOU SOME QUESTIONS. I MEAN, I'M JUST ASKING YOU TO ANSWER THOSE QUESTIONS.
MS. SHOWERS: THEY TURNED IT OVER TO THE POLICE UNDER THE CHILD ABUSE STATUTE.
THE COURT: AND THEY STARTED DOING THAT EFFECTIVE WHAT DATE?
MS. SHOWERS: SOMETIME IN OCTOBER. DOCTOR NEUMAN DID TESTIFY THAT IT WAS OCTOBER 1ST THAT THEY STARTED DOING THAT.
THE COURT: ALL RIGHT. NOW, THE POLICY THAT YOU REFERRED TO, THAT THEN BEGAN OFFERING AN ALTERNATIVE TO THE PEOPLE THAT TESTED POSITIVE, THAT THEY COULD GO INTO DRUG TREATMENT, RIGHT.

MS. SHOWERS: WELL, NO. THE POLICY THAT I'M TALKING

[TRANSCRIPT OF HEARING 54]

ABOUT WAS THE COORDINATED, YOU KNOW, THESE ARE THE CRITERIA. THIS IS WHEN YOU WILL TEST, THE BOARD APPROVED IT AND THAT WAS LATE NOVEMBER OF '89. MS. SMITH WAS REFERRING TO THE LATER AMENDMENT TO THIS EVOLVING POLICY IN JANUARY OF 1990. BUT THE OFFICIAL WRITTEN POLICY WAS IN NOVEMBER OF 1989.

THE COURT: OKAY. ANYTHING ELSE? LET'S TAKE ABOUT TEN MINUTES.

(WHEREUPON, A BREAK WAS TAKEN OFF THE RECORD.)

THE COURT: KEEP YOUR SEATS. OKAY. LET ME PREFACE MY REMARKS BY SAYING SOMETHING THAT IS TOTALLY IRRELEVANT TO EVERYBODY BUT ME. THIS IS WITHOUT ANY QUESTION THE TOUGHEST CASE I HAVE EVER HAD. IT PRESENTS MORE NOVEL ISSUES, IT PRESENTS THEM IN A UNIQUE FASHION THAT MAKES IT VERY, VERY DIFFICULT TO DETERMINE WHAT THE APPLICABLE LAW REALLY IS AND WHAT LEGAL RULINGS ARE CORRECT. I SAID TO MY STAFF MONTHS AND MONTHS AGO WHILE WE WERE TRYING THIS CASE, THAT THERE WASN'T MUCH DOUBT IN MY MIND THAT I WAS GOING TO BE REVERSED IN THIS

CASE. AND THEY SAID, WELL, IF YOU ARE GOING TO BE REVERSED AND YOU KNOW IT, WHY DON'T YOU DO SOMETHING DIFFERENT. AND I SAID BECAUSE I DON'T KNOW WHY I'M GOING TO BE REVERSED, I JUST KNOW THAT IT IS ALMOST IMPOSSIBLE FOR ANYBODY TO TRY A CASE THAT HAS GOT THIS MANY ISSUES IN IT AND GET THEM ALL RIGHT.

AND SO I THINK WE'LL HAVE TO SEE WHAT THE FOURTH CIRCUIT SAYS, AND I HOPE WE DON'T HAVE TO TRY THE CASE AGAIN, BUT I HAVE ALREADY PREDICTED THAT I'M GOING TO GET REVERSED.

[TRANSCRIPT OF HEARING 55]

AND I WISH I KNEW WHERE I AM GOING TO GET REVERSED SO THAT I COULD CORRECT IT.

I SUBMITTED TO THE JURY TWO ISSUES. ONE WAS THE ISSUE OF A FOURTH AMENDMENT VIOLATION BECAUSE OF THE ALLEGED ILLEGAL SEARCHES OF THESE PLAINTIFFS. AND AS I SAID EARLIER, I SAID THAT THESE SEARCHES WERE NOT CONSTITUTIONAL UNLESS THE PLAINTIFFS CONSENTED TO IT. THE JURY FOUND THAT THEY DID CONSENT TO THEM AND FOUND THE VERDICT FOR THE DEFENDANT ON THOSE CLAIMS.

I ALSO SUBMITTED THE CLAIM ASSERTED BY THE PLAINTIFF FOR A VIOLATION OF THEIR EQUAL PROTECTION RIGHTS UNDER THE

FOURTEENTH AMENDMENT. THE JURY ALSO RETURNED A VERDICT FOR
THE DEFENDANT ON - FOR THE DEFENDANTS ON THOSE CLAIMS.
THEREBY CONCLUDING THAT THE DEFENDANTS' EQUAL PROTECTION
RIGHTS WERE NOT VIOLATED, TO WIT: THAT THEY WERE NOT
DISCRIMINATED AGAINST BECAUSE OF THEIR RACE BY THE
DEFENDANTS.
THE PLAINTIFFS' HAVE MADE A MOTION FOR JUDGMENT NOV
AS TO THOSE CLAIMS. AS SOMEONE HAS POINTED OUT EARLIER, THE
LAW REQUIRES THAT IN CONSIDERING THAT MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, THAT I MUST GIVE THE DEFENDANTS
THE BENEFIT OF ALL INFERENCES REASONABLY DRAWN FROM THE
EVIDENCE AND VIEW THAT EVIDENCE IN THE LIGHT MOST FAVORABLE TO
THE NON-MOVING PARTY. AND IT IS ONLY WHEN I CONCLUDE THAT
HAVING DONE THAT, THAT A VERDICT CANNOT BE SUSTAINED FOR THE

[TRANSCRIPT OF HEARING 56]

DEFENDANTS, THAT I GRANT THE MOTION.
I HAVE DONE THAT IN THIS CASE AND I THINK THAT WHEN
I DO, I AM COMPELLED TO DENY THE PLAINTIFFS' MOTION FOR
JUDGMENT NOV. THERE IS EVIDENCE IN THE RECORD FROM WHICH THE
JURY COULD REASONABLY CONCLUDE THAT THE PLAINTIFF CONSENTED TO

THESE SEARCHES AND THAT THEY THEREFORE WERE NOT IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION. LIKEWISE I THINK THAT THERE IS EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S VERDICT THAT THE PLAINTIFFS WERE NOT DISCRIMINATED AGAINST BECAUSE OF THEIR RACE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT SO AS TO ENTITLE THEM TO RECOVER ON THAT CAUSE OF ACTION AS WELL. SO AS TO THE JUDGMENT NOV, THE SAME IS HEREBY DENIED.

WE NEXT TURN TO THE QUESTION OF INJUNCTIVE RELIEF AS TO THE CAUSES OF ACTION OTHER THAN THE TITLE 6 ACTION, BECAUSE AS I TOLD YOU EARLIER I PLAN TO RULE ON THAT CAUSE OF ACTION BY WRITTEN FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

LET'S DISCUSS THE CLAIM BY THE PLAINTIFFS' THAT THEY'RE ENTITLED TO INJUNCTIVE RELIEF ON THEIR - BECAUSE OF THE DEFENDANTS' INTERFERENCE WITH THEIR RIGHT TO PROCREATE.

I TRY TO BE STRAIGHTFORWARD AND NOT PLAY ANY GAMES WITH ANYBODY. WHEN I WAS A LAWYER I DIDN'T PARTICULARLY LIKE PEOPLE PLAYING GAMES WITH ME AND I DON'T LIKE TO PLAY THEM WITH OTHER PEOPLE. AND THEREFORE I MADE NO SECRET OF THE FACT

25 THAT I REALLY COULD NEVER SEE THE BASIS OF THE RIGHT,

[TRANSCRIPT OF HEARING 57]

1 INTERFERENCE OF THE RIGHT TO PROCREATE. I STILL DON'T SEE
2 IT. I - I JUST DON'T SEE WHERE THE FACTS IN THIS CASE
3 SUPPORT THE CONTENTION THAT THE CONDUCT OF THE DEFENDANTS'
4 IMPOSING THIS POLICY ON THE PLAINTIFFS SOMEHOW INTERFERED WITH
5 THE PLAINTIFFS' RIGHT, PLAINTIFFS' RIGHTS TO CARRY THEIR
6 PREGNANCIES TO TERM. I JUST - I DON'T SEE THAT IN THE FACTS
7 OF THE CASE.
8 THEREFORE I GUESS WHAT I'M SAYING IS I DON'T THINK
9 THAT THERE IS A SHOWING THAT THERE IS A VIOLATION OF THE
10 PLAINTIFFS' CONSTITUTIONAL RIGHTS IN THAT REGARD. AND I THINK
11 THAT'S THE FIRST STEP IN CONSIDERING INJUNCTIVE RELIEF. IF I
12 DID FIND THAT THERE WAS A CONSTITUTIONAL VIOLATION, THEN I
13 THINK THAT I WOULD HAVE TO LOOK AND SEE IF THE DEFENDANT COULD
14 MORE NARROWLY TAILOR WHAT THEY WERE DOING TO AVOID IT. AND
15 THEN I WOULD HAVE TO GO INTO THE POSSIBILITY AS TO WHETHER OR
16 NOT ANY SUCH CONSTITUTIONAL VIOLATION WOULD LIKELY BE REPEATED
17 IN THE FUTURE AND THEREFORE IT SHOULD BE ENJOINED.

BUT I THINK AS FAR AS THE RIGHT TO PROCREATE, THERE IS NO EVIDENCE OF ANY CONSTITUTIONAL VIOLATION. AS FAR AS THE CONFIDENTIALITY IN THE MEDICAL RECORDS, THAT'S A LITTLE BIT DIFFERENT. I PROBABLY DID SAY DURING THE TRIAL THAT MS. HILDEBRAND WAS GUILTY OF DOING THAT. IT WAS A SUPERFLUOUS RULING BECAUSE IT WASN'T SOMETHING THAT I WAS CALLED UPON TO DO. AND I DON'T KNOW THAT THAT IS A RULING THAT HAS A BINDING EFFECT OF LAW UNDER THOSE CIRCUMSTANCES. BUT THAT REALLY IS

[TRANSCRIPT OF HEARING 58]

NOT THE IMPORTANT ISSUE. I THINK THAT SHE DID DISSEMINATE TO OTHERS OUTSIDE OF THE MEDICAL UNIVERSITY, OUTSIDE OF THE GROUP OF PEOPLE THAT NEEDED TO HAVE THAT INFORMATION TO PERFORM THE MUSC TASK OF TREATING THE PLAINTIFF PATIENT, AND THAT SUCH INFORMATION WAS OF THE TYPE THAT IS PROTECTED BY THE CONSTITUTION.

WE DID NOT PERMIT THAT ISSUE TO GO TO THE JURY BECAUSE MS. HILDEBRAND WAS NOT A PARTY TO THE ACTION. AND OF COURSE AS WE ALL KNOW, THE DOCTRINE OF RESPONDEAT SUPERIOR DOES NOT APPLY IN CASES FOR DAMAGES UNDER SECTION 1983. AND

SHE NOT BEING A POLICYMAKER, MEANT THAT THE MEDICAL UNIVERSITY COULD NOT BE HELD LIABLE FOR ANY VIOLATION OF THE PLAINTIFFS' CONSTITUTIONAL RIGHTS BY RELIEVING CONFIDENTIAL INFORMATION. BUT THE SAME ON DAMAGE RECOVERY, THEY ARE NOT APPLICABLE IN THE CASE OF INJUNCTIVE RELIEF. HAVING CONCLUDED THAT THERE IS EVIDENCE THAT THE RELEASE OF THIS INFORMATION VIOLATES THE PLAINTIFFS' CONSTITUTIONAL RIGHTS, AND THAT THE POLICY COULD HAVE BEEN MORE NARROWLY TAILORED AND AVOIDED THAT, I THEN LOOK TO THE QUESTION OF WHETHER OR NOT THE EQUITABLE REMEDY OF INJUNCTIVE RELIEF IS AVAILABLE.

AND I'M LOOKING HERE AT A CASE THAT HAS SOME VERY GOOD LANGUAGE IN IT. IT'S A CASE OF SIMMONS AGAINST POE. IT'S A FOURTH CIRCUIT CASE, DECIDED ON MARCH THE 1ST,1995. QUOTING FROM PAGE - THESE COMPUTER PRINTOUTS IT'S HARD TO TELL WHAT PAGE YOU'RE ON. LOOKS LIKE 1382. IT'S PAGE 12 OF

[TRANSCRIPT OF HEARING 59]

THE LEXUS PRINTOUT. THE COURT SAID THE FOLLOWING: THE EQUITABLE REMEDY IS UNAVAILABLE ABSENT A SHOWING OF IRREPARABLE INJURY. A REQUIREMENT THAT CANNOT BE MET WHERE

THERE IS NO SHOWING OF ANY REAL OR IMMEDIATE THREAT THAT THE PLAINTIFF WILL BE WRONGED AGAIN. A LIKELIHOOD OF SUBSTANTIAL AND IMMEDIATE IRREPARABLE INJURY. THE SPECULATED NATURE OF LINUS'S CLAIM OF FUTURE INJURY REQUIRES A FINDING THAT THIS PREREQUISITE OF EQUITABLE RELIEF HAS NOT BEEN FULFILLED. I THINK THAT STANDARD CAUSES THE COURT TO DENY THE PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF AS IT RELATES TO THE CLAIM FOR THE RELEASE OF THE CONFIDENTIAL MEDICAL INFORMATION BY MS. HILDEBRAND.

THE NEXT AREA OF INJUNCTIVE RELIEF THAT IS ADVANCED BY THE PLAINTIFFS HAS TO DO WITH THE FOURTH AMENDMENT ILLEGAL SEARCH. THE OUTCOME OF THAT ASPECT OF THE CASE IS DEPENDENT, IN MY JUDGMENT, ON THE OUTCOME OF THE APPEAL OF THE VERDICT IN THAT CASE. THE JURY HAS FOUND, AND I HAVE HELD THAT THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THAT THE PLAINTIFFS CONSENTED TO THOSE SEARCHES AND THAT THEY THEREFORE WERE NOT ILLEGAL.

THAT BEING THE CASE, THERE IS NO CONSTITUTIONAL VIOLATION AND AN INJUNCTION WOULD NOT BE APPROPRIATE. IT MAY BE THAT IF THE FOURTH CIRCUIT CONCLUDES THAT THERE IS A

CONSTITUTIONAL VIOLATION THERE BECAUSE THERE WAS NOT CONSENT IN ONE OR MORE OF THE PLAINTIFFS' INSTANCES, THEN OBVIOUSLY

[TRANSCRIPT OF HEARING 60]

THE CASE WOULD COME BACK TO ME FOR DAMAGE HEARINGS AS FAR AS THOSE PLAINTIFFS ARE CONCERNED. AND AT THAT PARTICULAR TIME WE WOULD THEN REVISIT THE MATTER OF INJUNCTIVE RELIEF. BUT AT THE PRESENT TIME, I THINK UNDER THE FACTS IN THIS CASE, THAT THAT INJUNCTIVE RELIEF SHOULD BE DENIED, FIRST OF ALL BECAUSE THERE IS NO INDICATION THAT THERE WAS A CONSTITUTIONAL VIOLATION IN REGARD TO ANY PLAINTIFFS UNDER THE FOURTH AMENDMENT.

AND BECAUSE OF THAT RATIONAL, I REALLY DON'T THINK IT'S APPROPRIATE FOR THE COURT TO GO INTO THE MATTER OF WHETHER THE POLICY IS GOING TO BE OPENED BACK UP OR NOT. I REALLY DON'T PERCEIVE THE LIKELIHOOD OF ANY FURTHER DAMAGE BEING SUSTAINED - IF WE CAN CALL IT DAMAGE, BEING SUSTAINED BY THE PLAINTIFFS' BECAUSE OF THE POLICY AND ITS FOURTH AMENDMENT IMPLICATIONS.

BUT I DON'T THINK IT NECESSARY FOR ME TO REACH THAT POINT IN VIEW OF MY DECISION TO RELY ON THE JURY VERDICT AND

MY DENIAL OF THE MOTION FOR JUDGMENT NOV IN CONCLUDING THAT THERE IS NOT SUFFICIENT SHOWING OF THE CONSTITUTIONAL VIOLATIONTO WARRANT INJUNCTIVE RELIEF FOR THE FOURTH AMENDMENT CONDUCT.

FOR THE REASONS STATED THEREFORE, THE MOTIONS OF THE PLAINTIFFS' FOR INJUNCTIVE RELIEFS ARE AT THIS TIME DENIED.

NOW, TITLE 6. FINDINGS OF FACT AND CONCLUSIONS OF LAW. WHEN DO YOU WANT TO DO THOSE? HOW LONG DOES IT TAKE?

[TRANSCRIPT OF HEARING 61]

YOU KNOW IF IT'S GOING TO TAKE 30 DAYS OR SO I REALLY DON'T NEED THEM.

NOW, I MIGHT SAY ON TITLE 6 THAT OUR RECOLLECTION IS THAT THE PLAINTIFFS AGREED THAT MUSC WAS THE ONLY VIABLE DEFENDANT AS FAR AS TITLE 6 IS CONCERNED. NOW, IF WE FIND THAT IN THE RECORD, WE WILL FIND IT IN THE RECORD. BUT THAT'S OUR RECOLLECTION OF THE FACT. WE HAD TOTALLY NOT CONSIDERED ANYBODY BUT MUSC. WE DID NOT THINK THAT THE PLAINTIFFS' ASSERTED THAT ANYBODY BUT MUSC WAS A TARGET DEFENDANT IN THAT CLAIM. AND THE FIRST WE HEARD OF THAT IS THIS MORNING.

NOW, I DON'T KNOW WHERE IT CAME IN THE RECORD. AND I SAID WE'LL FIND IT. WE'LL FIND IT IF YOU SHOW IT TO ME, BECAUSE I DON'T THINK I'M GOING TO SIT DOWN AND GO THROUGH IT. I DON'T KNOW THAT IF THERE IS SUCH A CONSENT IN THE RECORD, THAT THAT IS THE END OF THE MATTER. I NORMALLY PREFER TO DISPOSE OF SOMETHING ON THE MERITS RATHER THAN IF SOMEBODY SAYS SOMETHING AND THEN TAKE IT AWAY LATER, AND THERE IS NO PREJUDICE TO THE OTHER PARTY, I THINK WE OUGHT TO LOOK AT IT. AND I DON'T SEE WHERE THERE IS ANY PREJUDICE TO THE

DEFENDANTS, EVEN IF YOU DID CONSENT TO THAT, BUT THERE MAY BE. AND SO I THINK THAT AT LEAST THAT ITEM NEEDS TO BE BRIEFED ON TITLE 6.

AND I WOULD BE HAPPY TO HAVE YOUR FINDINGS OF FACT AND CONCLUSIONS OF LAW IF IT'S NOT GOING TO TAKE A LONG TIME. BUT - BUT, YOU KNOW, I REALLY, I DON'T WANT TO DENY ANYBODY

[TRANSCRIPT OF HEARING 62]

THE RIGHT TO SAY ANYTHING THEY WANT TO SAY, BUT I WANT TO GET THIS CASE BEHIND ME. I GOT TWO CASES THAT I WANT TO END THIS SUMMER, AND THIS IS ONE OF THEM. AND THE OTHER ONE IS - YOU KNOW WHAT IT IS. AND SO IF I COULD GET THOSE TWO CASES BEHIND

ME, THOSE TWO CASES AND STAND UP AND BREATHE AND BE ALIVE, I FEEL LIKE I'M A LUCKY MAN.

MS. SMITH: YOUR HONOR, I WOULD PROPOSE THAT WE BRIEF JUST THIS ONE ISSUE. WE HAVE DONE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE TITLE 6 ISSUE.

THE COURT: OKAY.

MS. SMITH: WE COULD DO BRIEFINGS ON JUST THIS ONE ISSUE, AND UNLESS THE DEFENDANTS WOULD LIKE TO DO - SUPPLEMENT THEIR FINDINGS OF FACT.

THE COURT: WHAT ABOUT IF I GIVE YOU A WEEK.

MS. SMITH: THAT'S FINE.
MR. HOOD: THAT'S FINE.
THE COURT: BOTH SIDES A WEEK. AND WHEN YOU SEE YOU'VE GOT A PROBLEM, GIVE ME A RING AND I'LL SEE AND WE WILL HAVE A CONFERENCE CALL OR SOMETHING AND TALK ABOUT IT. THANK YOU VERY MUCH. WE'LL BE IN RECESS.
MS. SMITH: I'M SORRY, YOUR HONOR, THERE IS ONE OTHER MOTION PENDING, WHICH IS THE PLAINTIFFS' MOTION TO SUBSTITUTE THE ESTATE OF THERESA JOSEPH FOR HER, AND SO WE WANTED TO GET A RULING ON THAT.
THE COURT: ANY PROBLEM WITH THAT?

[TRANSCRIPT OF HEARING 63]

MR. HOOD: YOUR HONOR, WE HADN'T SEEN THEIR MEMORANDUM OF LAW FOR THEM ON THIS SUBJECT. I DON'T KNOW IF THEY HAVE A RIGHT TO UNDER THE LAW.
THE COURT: IT'S A QUESTION OF WHETHER THE CAUSE OF ACTION SURVIVES OR NOT.
MS. SMITH: YES.
THE COURT: I DON'T HAVE ANY IDEA. I THINK IT WOULD BE EASY TO DETERMINE. AND I DOUBT - I JUST DON'T KNOW. YOU KNOW.
MS. SMITH: SHALL WE DO A LITTLE BRIEF ON THAT FOR THE NEXT WEEK?

THE COURT: I THINK SO. AND IF IT SURVIVES - IF THE CAUSE OF ACTION SURVIVES AND INURES TO THE BENEFIT OF THE ESTATE, OBVIOUSLY THE SUBSTATION IS A MERE FORMALITY.

MS. SMITH: THANK YOU, YOUR HONOR.

MR. HOOD: THANK YOU, YOUR HONOR.

THE COURT: AND I DON'T - I JUST DON'T KNOW. I DON'T KNOW WHETHER IT WOULD BE STATE LAW OR FEDERAL. I JUST DON'T KNOW WHAT YOU WOULD LOOK TO. LET'S DO THAT WITHIN THE WEEK ALSO.

MS. SMITH: OKAY.

CERTIFICATE

I, NORMA JEAN CARROW, OFFICIAL COURT REPORTER, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES.

DATED IN CHARLESTON, SOUTH CAROLINA, THIS 27TH DAY OF AUGUST, 1997.

[TRANSCRIPT OF HEARING 64]

NORMA JEAN CARROW

* * *

Filed September 29, 1997
LARRY W. PROPES, CLERK
FLORENCE, S.C.

Entered September 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 2:93-2624-2

Crystal M. Ferguson, Theresa Joseph, Darlene Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and LaVerne Singleton,

Plaintiffs,

vs.

The City of Charleston, South Carolina, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This action was brought by ten women pursuant to 42 U.S.C. §1983 alleging their rights were violated by the defendants when the women were arrested for drug use while pregnant. The plaintiffs asserted ten claims: (1) violation of the right to privacy; (2) violation of the right to procreate; (3) violation of the Fourth Amendment; (4) violation of the Equal Protection clause based on gender discrimination; (5) violation of the Equal Protection clause based on racial discrimination; (6) violation of Title VI of the Civil Rights Act; (7) violation of the Federal Confidentiality Statute, 42 U.S.C. §290dd-2; (8) abuse of process; (9) violation of the

Due Process clause of the Fourteenth Amendment; and (10) violation of the right to refuse medical treatment.

The action came to trial before the court with a jury from November 20, 1996, to December 19, 1996. The court granted judgment as a matter of law for the defendants on the claims for intentional discrimination on the basis of gender, due process, right to refuse medical treatment, 42 U.S.C. §290dd-2, and abuse of process. The court charged the jury on the plaintiffs' claims for violations of the Equal Protection clause and Fourth Amendment and the jury rendered a verdict in favor of the defendants on both claims. The court then took under advisement the claims for denial of the right to privacy, right to procreate, and Title VI. On August 13, 1997, the court denied the plaintiffs' request for injunctive relief in the right to procreate and right to privacy claims and allowed to parties to submit further briefs on the Title VI claim. The court has now considered the Title VI claim. After weighing the testimony of the witnesses, examining the exhibits introduced, and studying the applicable law, the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiffs are eight black women, one white woman, and one woman who is multiracial.

2. The defendants are either agencies of the State of South Carolina or agencies of political subdivisions thereof.

3. All of the plaintiffs presented at the Medical University of South Carolina ("MUSC") in Charleston, South Carolina for gynecological services. All of

the plaintiffs either delivered children at MUSC or were treated postpartum at MUSC.

4. All of the plaintiffs except Darlene Nicholson were arrested when the defendants discovered they were using drugs while pregnant. Instead of being arrested, Darlene Nicholson was involuntarily committed to MUSC's Institute of Psychiatry for drug treatment.

5. The catalyst for targeting these individuals was a policy designed to prevent cocaine abuse in pregnant women. During the fall of 1989, the defendants formulated a policy ("policy") for treating pregnant women who tested positive for cocaine at MUSC. The policy was not implemented at any other hospital in Charleston by these defendants nor was it applied to women who were less than twenty-four weeks pregnant.

The policy identified probable drug abuse through screening all maternity patients who met certain criteria. A female patient was tested for cocaine through the use of a urine drug screen ("UDS") if she presented with one or more of the following symptoms: (1) *abruptio placentae*, or separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care; (5) incomplete prenatal care; (6) pre-term labor of no obvious cause; (7) history of cocaine use; (8) unexplained congenital anomalies; or (9) intrauterine growth retardation of no obvious cause.

6. If a patient tested positive for cocaine, an employee of MUSC would confront the patient and question her about her drug use. At some point thereafter, the positive results of the UDS were provided to the Ninth Circuit Solicitor's office or to the Charleston City Police Department. An officer of the latter then arrested the patient who had tested positive.

7. The policy was applied in all maternity departments at MUSC. Its goal was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child.

8. Prior to 1990, if a patient tested positive for cocaine, she was arrested without further ado. However, the defendants changed the policy in 1990 to give patients a choice to receive treatment for their drug use or be arrested and prosecuted under South Carolina law.

9. The large majority of MUSC's maternity patients are black. The maternity population at MUSC during the time period relevant to this action was approximately sixty-seven percent (67%) black and thirty-three percent (33%) white.

10. The racial composition of the women who tested positive for cocaine at MUSC during the period in question was approximately ninety percent (90%) black and ten percent (10%) white. Of the thirty women who were arrested under the policy, ninety-six percent (96%) were black and four percent (4%) were white.

The plaintiffs' expert witness Dr. Martin Shapiro testified that the disparity of racial composition between the MUSC maternity population and the persons who tested positive for cocaine was roughly 5.54 standard deviations from chance. Such a deviation means that the likelihood that chance is the cause is less than 1 in 100,000. Dr. Shapiro explained that some reason other than chance must be the cause of the disparity.

The defendants' expert statistician Dr. McCabe testified that there was no statistically significant difference between the racial composition of the population of women who tested positive for cocaine and women who

were arrested, and therefore no disparity exists between white and black patients in these two categories. According to Dr. McCabe there was no significant racial disparity in implementing MUSC's policy.

11. MUSC receives financial assistance from the United States Department of Health and Human Services to render health care. MUSC uses part of this financing in its OB-GYN clinic to treat indigent patients. There is no evidence in the record that any other defendant receives relevant financial assistance from the United States.

Conclusions of Law

A. This court has jurisdiction pursuant to 28 U.S.C. §1331 (1994).

B. The plaintiffs brought this action in part under Title VI of the Civil Rights Act, Title 42, section 2000d. Section 2000d provides "[no] person in the United States shall on the ground of race, color, or national origin ... be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 2000d-4a defines "program" to "mean all of the operations of ... a department, agency, ... or other instrumentality of the state ... or an entire corporation ... which is principally engaged in the business of providing ... health care ... any part of which is extended Federal financial assistance." Federal regulations provide that a state or its agency cannot "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race ...." 45 C.F. §80.3(b)(2).

C. While Title VI itself only prohibits intentional discrimination, the regulations promulgated thereto clearly prohibit a state agency from administering a

program which has a discriminatory impact on a protected person. Alexander v. Choate, 469 U.S. 287 (1985).

D. The plaintiffs bear the ultimate burden of persuading the court that the defendants' violated Title VI by establishing each of the following elements: (1) each defendant is an entity which receives funds from the federal government and is subject to the requirements of Title VI; (2) the plaintiffs are persons protected under Title VI and the regulations promulgated pursuant thereto; (3) the plaintiffs challenge a specific practice, procedure, or course of action of the defendants; and (4) the practice, procedure, or course of action of the defendants has an adverse discriminatory effect on the plaintiffs.

E. MUSC is the only defendant which has been shown to receive the requisite federal assistance. MUSC receives federal assistance from the Department of Health and Human Services and admits that it is subject to Title VI. Furthermore, the plaintiffs conceded at trial that MUSC is the only defendant subject to the requirements of Title VI.

F. Eight of the plaintiffs are black and therefore protected by the regulations promulgated under Title VI.

G. The plaintiffs challenge a specific practice, procedure, or course of action of the defendants. The plaintiffs challenge the following practices: (a) application of the policy only at MUSC; (b) application of the policy only to certain parts of MUSC; (c) application of the policy only to cocaine; and (d) application of testing criteria that would inevitably result in testing more blacks.

H. The plaintiffs must prove that the practice, procedure, or course of action caused the adverse

discriminatory effect on them. Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990); ElSton v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). For instance, the plaintiffs must show that the policy itself, as opposed to MUSC's general or maternity population, caused the disparate impact. None of the challenged practices, procedures, or courses of action of the defendants have an adverse discriminatory effect on the plaintiffs.

The plaintiffs introduced statistical evidence to prove their claim of disparity which the defendants countered with their own statistics. The evidence is conflicting, and the court concludes that the plaintiffs have not proven racial disparity through statistics. To do so, they must "offer statistical evidence of the kind and degree sufficient to show that the practice in question *caused*" the adverse impact on black patients. Elston, 997 F.2d at 1407 (emphasis added). In other words, the practice must affect black patients significantly more than white patients; if white patients are affected equally, then there is no disparate impact. Edwards v. Johnston County Health Dept., 885 F.2d 1215, 1223 (4th Cir. 1989). "The standard by which this greater adverse impact allegation must be tested is `whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied.'" Edwards, 885 F.2d at 1223 (quoting Betsey v Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984)). Dr. Shapiro pointed to a large disparity between the MUSC maternity population and those who tested positive for cocaine, but the court concludes those are the wrong numbers to compare. To determine if the policy had an adverse impact on black women, one must compare the racial composition of women who tested positive for cocaine with those actually arrested, because the true impact of the policy was *the arrest*, not the UDS testing. Dr. McCabe testified there is no statistical difference between the racial composition of those two groups, and the court agrees.

Therefore, the plaintiffs have not shown a statistically significant disparate impact on black women in this case. Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982).

Even though the plaintiffs have not proven a statistically significant disparate impact, the court has nevertheless considered each challenged practice *seriatim*. The plaintiffs first challenge the practice of employing the policy only at MUSC rather than at other hospitals in the Charleston, South Carolina metropolitan area. However, this challenge is irrelevant since MUSC is the only party subject to Title VI and MUSC cannot control or implement the policy at hospitals not controlled by MUSC. Therefore, the fact that the policy was not applied at other hospitals is not a practice that can be challenged under Title VI because it was not a practice administered by a defendant subject to Title VI.

The plaintiffs next challenge the practice of applying the policy only at certain discreet sections of MUSC. As the court found above, the policy was applied at all maternity departments throughout MUSC, and the practice challenged by the plaintiffs did not exist and cannot be used to prove disparate impact.

The plaintiffs further challenge the practice of applying the policy only to cocaine users. They argue that cocaine is a drug preferred by blacks, and thus a policy isolating it would necessarily impact blacks. This argument fails for two reasons. First, the alleged disparate use of cocaine by blacks causes the disparate impact, not the isolation of cocaine by MUSC. In this instance, the plaintiffs have not proven that the practice of the defendant causes the disparate impact. Secondly, the evidence shows that white cocaine users were treated the same as black cocaine users. If a patient had cocaine in her system, then she was given a

choice of treatment or jail. No disparity exists in that form of treatment.

Finally, the plaintiffs challenge the practice of employing subjective testing criteria. By targeting symptoms such as "no prenatal care" or "incomplete prenatal care" in deciding to test for drugs, MUSC allegedly targeted blacks because they typically have no or incomplete prenatal care. The plaintiffs have offered little evidence to support the allegation that blacks typically have incomplete or no prenatal care. In fact, they offered the testimony of Dr. Chasnoff who testified that the criteria were medically senseless and merely a proxy for selecting black women. This testimony addresses the legal justification argument and is based solely on Dr. Chasnoff's opinion, not on statistical analysis. Furthermore, the plaintiffs argue that because the number of black women tested for drugs rose after the policy was implemented, the criteria must *a fortiori* disparately impact blacks.

The court finds these arguments unpersuasive. MUSC adopted these medially valid criteria to avoid the very subjectivity in testing about which the plaintiffs complain. The evidence presented by the defendants shows that whenever a patient presented with one of the criteria, they were tested. There is no evidence that the criteria were applied subjectively. The allegation that more black maternity patients may have taken cocaine into their systems than white maternity patients does not prove that the policy disparately impacted black women. The plaintiffs have failed to prove that the MUSC policy disparately impacts black women in violation of Title VI.

I. However, assuming *arguendo* that the plaintiffs have shown a prima facie case for disparate impact under Title VI, the defendants can meet and rebut the plaintiffs prima facie case by showing the following: (a) they

had legitimate needs or goals; (b) the challenged practice, procedure, or course of action was necessary to meet those needs or goals; and (c) the practice, procedure, or course of action adopted by the defendants satisfied those needs or goals. The court concludes that the defendants have shown such.

J. MUSC officials stated that they implemented this policy to identify mothers who abused cocaine while pregnant and eliminate as far as possible the harmful effects of cocaine on fetuses. After implementing a protocol to test for illegal drugs, MUSC officials noticed an increase in the number of women who tested positive for those drugs. Furthermore, many women were not responding to MUSC requests to get help for their drug abuse. The policy at issue was then adopted and made mandatory throughout MUSC.

MUSC states that the policy isolates cocaine and is designed to get help to those who need it most: mothers abusing cocaine. The criteria were developed based on symptoms MUSC officials knew were associated with cocaine abuse, and made mandatory to supplant random or subjective application of UDS testing. These criteria limit testing to isolate potential problem patients for testing, and the UDS further narrows the field of potential patients. The court concludes that the policy was necessary to help cocaine-dependant mothers and their babies and actually achieved that goal as evidenced by the fact that a substantial majority of plaintiffs stopped abusing cocaine.

K. Since the defendants have rebutted the plaintiffs' prima facie case (if the same were in fact made out), the plaintiffs can only carry their ultimate burden of persuasion by demonstrating that other, less discriminatory practices would be as comparably effective as the challenged practice, but would result in less disproportionality. Wards

Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989); Elston v Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). The plaintiffs propose the following procedures, practices, or courses of action would result in less disproportionality: (a) focussing on all illegal drugs and alcohol, not just cocaine; or (b) testing all maternity patients.

The criteria set out in the policy were developed to minimize the costs of testing, because focussing on all illegal drugs or testing all patients would be prohibitively expensive and a waste of resources. MUSC cannot afford to implement the policy as suggested by the plaintiffs because of the sheer number of patients they treat every year. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the [defendant's] legitimate ... goals." Wards Cove, 490 U.S. at 661. The court concludes these alternatives suggested by the plaintiffs, while laudable goals, are not as comparably effective as the challenged practices of MUSC. Therefore, the plaintiffs have failed to carry their ultimate burden of persuasion as required by Title VI. Since the plaintiffs have not prevailed on this claim, the court hereby directs the clerk to enter judgment in favor of the defendants on the plaintiffs' claims brought pursuant to Title VI and the regulations promulgated thereunder and to dismiss this action with prejudice.[1]

AND IT IS SO ORDERED.

/s/
C. WESTON HOUCK
CHIEF UNITED STATES
DISTRICT JUDGE

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[1] The plaintiffs' motion to substitute parties filed on April 11, 1997 is rendered moot by this order.

Charleston, South Carolina
September 29, 1997

ORIGINAL FILED
September 30, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CA#: 2:93-2624-12

CRYSTAL FERGUSON, THERESA JOSEPH, DARLENE NICHOLSON, PAULA HALE, ELLEN KNIGHT, PATRICIA WILLIAMS, LORI GRIFFIN, PAMELA PEAR, SANDRA POWELL and LAVERNE SINGLETON,

Plaintiffs,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, ET AL.

Defendants.

JUDGMENT ENTERED 9/30/97

This action came before the Court, the Honorable C. Weston Houck, Chief United States District Judge presiding. The issues have been duly heard and a decision duly rendered.

Pursuant to the Court's September 29, 1997 Findings of Fact, Conclusions of Law and Order

IT IS ORDERED, ADJUDGED and DECREED that judgment is entered in favor of the defendants on the plaintiffs' claims brought pursuant to Title VI and the regulations promulgated thereunder.

IT IS FURTHER ORDERED that this case is hereby dismissed with prejudice.

LARRY W. PROPES, Clerk of Court

By: /s/
Shireen J. Nelson, Deputy Clerk

September 30, 1997
Charleston, South Carolina

No. 99-936

Supreme Court, U.S.
FILED
JUN 0 1 2000
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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PETITION FOR CERTIORARI FILED DECEMBER 1, 1999
CERTIORARI GRANTED FEBRUARY 28, 2000

54 pp

QUESTION PRESENTED

1. Whether the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements was properly applied to a discretionary drug testing program that targeted hospital patients and was created and implemented primarily for law enforcement purposes by police and prosecutors?

LIST OF PARTIES

The Petitioners are Crystal M. Ferguson, Theresa Joseph, Darlene M. Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and Laverne Singleton.

The Respondents are the City of Charleston, South Carolina, Dr. Harrison L. Peoples, Dr. Thomas C. Rowland, Jr., Dr. Stanley C. Baker, Jr., Dr. Charles B. Hanna, Dr. Cotesworth P. Fishburne, Dr. E. Conyers O'Bryan, Melvyn Berlinsky, Patricia T. Smith, M.J. Cooper, Herbert C. Granger, Robert C. Lake, Jr., Phillip D. Sasser, Claudia W. Peoples, and Dr. Carroll V. Bing, Jr., in their official capacities as Trustees of the Medical University of South Carolina, Reuben Greenberg, Charles Molony Condon, David Schwacke, Shirley Brown, R.N., Edgar O. Horger, III, M.D., Victor Del Bene, John Sanders, William B. Pittard, M.D., Roger Newman, M.D., Harold Bivins, M.D., and Melesia Henry, R.N., personally and in their official capacities.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 186 F.3d 469. The opinion is set forth in the Appendix to the Petition for Certiorari (App. 3). The only written opinion of the United States District Court for the District of South Carolina is unreported and is also set forth in that Appendix (App. 36).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 13, 1999. That court also denied a petition for rehearing en banc by an 8-5 vote on September 2, 1999. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Introduction

Petitioners, nine African-American women and one white woman ("Petitioners" or "the patients"), brought this action under 42 U.S.C. § 1983 against Respondents, the City of Charleston, South Carolina, and a group of law enforcement officials and hospital trustees and personnel. Petitioners

challenged Respondents' policy of warrantless and nonconsensual drug testing for criminal investigatory purposes ("the Search Policy") of a targeted group of women who sought obstetrical care at the Medical University of South Carolina ("MUSC" or "the hospital"), the public hospital located in Charleston.[1] Members of an interagency group consisting of personnel from the City of Charleston Police Department ("the police"), the Charleston County Solicitor's Office,[2] and the hospital developed and implemented the Search Policy and applied it only at the one hospital in Charleston whose patient population was predominantly African-American. An "initial and continuing focus of the policy" was on arrest and prosecution of the targeted group. *Ferguson v. City of Charleston,* 186 F.3d 469, 484 (4th Cir. 1999) (Blake, J., dissenting). Search results were routinely used to arrest women who tested positive for cocaine, and in some cases, the threat of arrest and prosecution was used as a mechanism to coerce women into Respondents' chosen drug treatment programs.

II. Respondents Designed and Implemented the Search Policy to Gather Evidence to Arrest the Patients.

The record establishes that the Search Policy's purpose, from inception to completion, was to further the needs of South Carolina law enforcement by identifying and gathering evidence of alleged criminal activity by pregnant women. The initial communications about the Search Policy occurred after Respondent Shirley Brown, R.N. ("Nurse Brown"), a case manager in the Obstetrics Department at the hospital, learned that the Solicitor in Greenville, South Carolina was using the state child abuse statute to prosecute pregnant women for drug use during pregnancy. On the same day, Nurse Brown mentioned the report to the hospital's General

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[1] Jurisdiction over this action was proper in the district court under 28 U.S.C. §§ 1331 and 1343(a).

[2] In South Carolina, the Solicitor is the local prosecuting attorney. *See* S.C. Code Ann. §§ 1-7-310; 1-7-320.

Counsel Joe Good. Brown Tr. 11/21/96 4:10-5:17 (JA 73-75).[3] As a result of this conversation, on August 23, 1989, Mr. Good wrote to Respondent Charles Conden, who was then the Charleston County Solicitor to inquire as follows:

> I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs. . . .
>
> Please advise us if your office is anticipating future *criminal action* and what if *anything our Medical Center needs to do to assist you in this matter.*

PX 2 (emphasis added) (App. 67).[4] On August 31, 1989, Solicitor Condon wrote to Charleston Police Chief Reuben Greenberg to ask him to consider co-chairing with Solicitor Condon a task force consisting of representatives from the police, the Solicitor's Office, and the hospital. The purpose of the task force was "to consider possible prosecution of the mothers of drug affected babies." PX 6 at 1 (App. 69).

As a result, a joint interagency task force was formed, and representatives from the Solicitor's Office, the police, and the hospital held an initial meeting in mid-September 1989. Brown Tr. 11/21/96 4:18-6:10 (JA 74-76); Condon Tr. 5:1-16 (JA 336-37); Cornely Tr. 321:25-322:8 (JA 399-400); PX 6 (App. 69-71). At the meeting, law enforcement personnel informed hospital staff that women using drugs

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[3] Citations to witness testimony are to the witness's name, page and line number of the trial transcript, and, when applicable, to the page of the Joint Appendix ("JA") or Appendix to the Petition for Certiorari ("App.") on which the cited transcript appears.

[4] Plaintiffs' Exhibits are cited as "PX -"; Joint Exhibits as "JX -." When included in the Joint Appendix, citations also indicate the page of the Joint Appendix on which the Exhibit appears as "JA -." When included in the Appendix to the Petition for Certiorari, citations indicate the page of that Appendix on which the Exhibit appears as "App. -."

during pregnancy had violated South Carolina's criminal child abuse and neglect laws. Brown Tr. 11/21/96 5, 7:22-8:12 (JA 74-75, 77-78); Greenberg Tr. 148 (JA 540-41). Thus, as Mr. Good explained, the Policy was instituted "*[a]t the suggestion of law enforcement and the solicitor's office.*" PX 28 at 1 (emphasis added) (App. 72).

In accordance with the Search Policy's purpose of uncovering alleged criminal activity, law enforcement personnel, not hospital officials, first memorialized the Policy in a series of separate internal memoranda. These memoranda set forth the guidelines by which: women would be selected for testing; drug testing would be conducted; a formal "chain of custody" for the urine samples would be maintained; and positive drug tests would be reported to the police. *See, e.g.,* Roberts Tr. 17:11-18:15 (stating that he brought the director of the police crime lab to the hospital to discuss proper collection of urine samples) (JA 1052-53); JX 1 (10/12/89 operational guidelines written by Captain Roberts discussing when hospital personnel would notify the police) (App. 49); JX 15 (10/17/89 memo written by Solicitor listing criminal charges that could apply to women coming under the Search Policy) (App. 64); PX 14 (10/24/89 letter from Assistant Solicitor Cornely to Nurse Brown enclosing "drafts" of "our policies") (JA 1285). The October 12, 1989, operational guidelines issued by the police after consultation with the Solicitor's office refer to the positive drug tests as "probable cause" for arrest of the mother. JX 1 at 2 (App. 49); Roberts Tr. 12:17-23 (JA 1046-47).

Each aspect of the Search Policy was designed to assist law enforcement personnel in performing their duties. For instance, in order to simplify the arrest process, the hospital notified the police when a patient was ready for discharge after her delivery so that a detective could arrest her at the hospital before she had the opportunity to leave. Roberts Tr. 24:12-19 (JA 1058); Brown Tr. 11/21/96 92:18-22; PX 258 (JA 1308). At the time of arrest, hospital personnel also provided the arresting officer with the patient's address, date of birth, social security number, and aliases, if any. Brown

Tr. 11/21/96 103:19-105:15 (JA 144-46). The officer then received, according to the operational guidelines drafted by the police, a copy of the drug screen report and the discharge summary, which provided all the information necessary for arrest. JX 1 (instructing detectives to obtain copies of all medical records at time of arrest) (App. 49); Good Tr. 216:14-218:6 (JA 521-23); Waring Tr. 200:19-23 (JA 1185).

Based on these aspects of the Search Policy, at trial the district court instructed the jury:

> But what makes this case unusual and what brings it within the coverage of the Fourth Amendment is the fact that you have law enforcement and medical service people acting together.
>
> It is the fact that the so-called search, the taking of the urine sample and the testing of it for cocaine, was to be used not only for medical diagnosis, but if it was positive it was also going to be used for police and prosecutorial purposes.

Transcript of Jury Charge at 17:22-18:4 ("Jury Charge") (JA 1314). As the dissent below wrote:

> Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using crack cocaine was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use.

Ferguson, 186 F.3d at 484 (footnote omitted) (Blake, J., dissenting); *id.* ("The prosecutorial purpose of the Search Policy and the substantial involvement of law enforcement

officials from the very beginning of its implementation" were clear.).[5]

III. The Search Policy Operated Within the Criminal Justice System.

A. The Search Policy in Practice

The Policy as initially implemented and applied to four of the Petitioners required the immediate arrest of any patient when a search of her or her newborn resulted in evidence of cocaine. *See* Opposition to Petition for Certiorari at 7 n.4 ("Opp. Cert.") (conceding that from the policy's inception until early 1990 women were arrested based on a single positive drug test); Horger Tr. 28:10-14 (JA 653). Petitioners Griffin, Singleton, Knight, and Powell were all arrested at the hospital and transported to jail after they or their child had a single positive urine screen. Griffin Tr. 6:4-25, 8:1-19 (JA 546-48); Singleton Tr. 52:8-53:7, 60:1-62:5 (JA 1132-36); Knight Tr. 121-125 (JA 773-78); Powell Tr. 149-152 (JA 1011-15). As Solicitor Condon testified, these patients were treated according to the "normal criminal [] process." Condon Tr. 10:25-11:19, 78:1-15 (JA 342-43, 382-83).

The patients arrested during the Policy's initial months received no referral for drug treatment and no opportunity to obtain treatment as an "alternative" to arrest. *See* Opp. Cert. at 7 n.4; Brown Tr. 11/21/96 37:5-39:9 (JA 104-07). Even after these women were arrested, no one associated with the

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[5]In rejecting the dissent's conclusion that the Search Policy was implemented to uncover and gather evidence of alleged criminal activity, the Fourth Circuit majority overlooked not only Respondents' voluminous testimony regarding the impetus for the Search Policy's creation, but also the overwhelming contemporaneous documentary evidence. *See Ferguson v. City of Charleston,* 186 F.3d 469, 475 n.3 (4th Cir. 1999). Respondents' post-hoc self-serving characterizations of the Search Policy's goals are simply not as reliable as contemporaneous documentary evidence. *See United States v. United States Gypsum*, 333 U.S. 364, 396 (1948) ("Where such testimony is in conflict with contemporaneous documents we can give it little weight. . . .").

Search Policy provided them with any information about drug treatment services.[6]

For instance, Petitioner Lori Griffin was searched under the Policy without her knowledge or consent in early October 1989, when she came to the hospital for prenatal care during her eighth month of pregnancy. Griffin Tr. 6, 8:1-19, 27:6-28:6 (JA 546-48, 567-68). On October 10, 1989, Nurse Brown informed Ms. Griffin that she was being released to go home; instead, police entered her hospital room, informed her that she was under arrest for distribution of cocaine to a minor, and removed her in handcuffs and shackles to a waiting police car. Griffin Tr. 8-9; 43:16-20 (JA 547-49, 581-82). Nurse Brown never presented Ms. Griffin with the option of avoiding arrest by entering a treatment program. Griffin Tr. 6:4-11, 25:5-20, 29:13-17 (JA 546, 565-66, 570). Nor had Ms. Griffin been aware that the results of her medical tests could be turned over to the police and used as the basis for her arrest. Griffin Tr. 27:9-21 (JA 567-68).

After her arrest at the hospital and until she gave birth on October 26, 1989, Ms. Griffin spent three weeks in jail in an unsanitary cell with only a metal table and cushion to serve as a bed. Griffin Tr. 12-19, 4:2-3 (JA 551-60, 544). During that time, she was transported back and forth from the hospital for further care, which she received in handcuffs and shackles. Griffin Tr. 19-22 (JA 559-63). As she stated, physicians at the hospital "would lift -- let one leg be free and the next leg they would attach to the bed." Griffin Tr. 20:15-16 (JA 560). Medical staff did not provide Ms. Griffin with substance abuse counseling or treatment during these visits, nor did they refer her to any other source of help. Griffin Tr. 22:2-13 (JA 562).

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[6] Although Respondent Condon insisted at trial that the Search Policy was always intended to provide "amnesty," *see, e.g.*, Condon Tr. 21:18-20 (JA 355), in August 1989 he described the policy as regarding "the prosecution of the mothers." PX 6 at 1 (App. 69); *see also* Horger Tr. 28:1-3 (JA 653) (confirming that "amnesty is a term that was never used in any of the initial meetings concerning the policy").

Similarly, Respondents searched Petitioner Sandra Powell after she arrived at the hospital in labor on October 13, 1989. Powell Tr. 150:13-151:25 (JA 1013-14). The following morning, Nurse Brown informed her that her urine had tested positive for cocaine and that she would be arrested immediately for unlawful neglect of a child. Powell Tr. 151:21-25 (JA 1014); PX 281 at SOL-IC 1847. Although Ms. Powell requested assistance, stating "please, what could I do to stop this or could you help me," Nurse Brown responded simply that she would "be locked up."[7] Powell Tr. 152:1-5 (JA 1014). Ms. Powell was arrested while she was still in pain and bleeding from childbirth. Handcuffed and wearing only a hospital gown, she was transported to the city jail. Powell Tr. 152:8-17, 153:7-20, 154:2-6 (JA 1015-17); PX 281 at 01-M-12, 01-M-13.

In early 1990, Respondent Solicitor Condon altered the Policy so that women coming under its terms were threatened with arrest and prosecution if they did not enroll in a "treatment program." Condon Tr. 10:25-11:11, 12:21-13:1 (JA 342-43, 345); Brown Tr. 11/21/96 37:5-39:9 (JA 104-07). After a search revealed evidence of cocaine, Nurse Brown presented the patient with a "Solicitor's Letter," which informed her of the search results and stated: "If you fail to attend Substance Abuse and Pre-Natal Care you *will* be arrested by Charleston City Police and prosecuted by the Office of Solicitor." JX 7 (given to those patients testing positive for drugs during a prenatal visit) (emphasis in original) (JA 1265); *see also* JX 6 (substantively identical Solicitor's Letter given to women testing positive at delivery) (JA 1263). Threatening arrest in order to mandate certain behavior was a strategy the Solicitor "used routinely in the criminal justice system." Condon Tr. 14:4-7 (JA 347).

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[7] Medical records indicate that Ms. Powell repeatedly requested help in obtaining drug treatment. *See* PX 281 at 01-M-13 (patient "re-emphasizes her desire for drug treatment"); *id.* at 01-M-32 (patient "desires to be free of addiction to cocaine" and "was accepting of information").

Both the Solicitor's Office and Nurse Brown tracked the treatment of those patients who received Solicitor's Letters, and those who failed to comply with the terms of the designated drug treatment program or again tested positive when they returned for obstetrical treatment at the hospital were immediately arrested. Brown Tr. 11/21/96 85:13-20, 11/22/96 206:15-20 (JA 134, 178); Condon Tr. 20:16-24, 97:7-17 (JA 354, 391); JX 1 (police operational guidelines stating that if "the patient has tested positive a second time for drug use . . . the subject will be taken into custody *immediately* upon her medical release") (emphasis added) (App. 49); JX 10 (JA 1269-70). Petitioners Ferguson, Pear, Joseph, Hale, and Williams were all arrested because they were unable to satisfy the terms set by the Solicitor's Office. PX 276 at CCPD 399-400 (Hale); Ferguson Tr. 187:4-189:12 (JA 462-64); PX 274 at CCPD 343-44 (Ferguson); PX 277 at CCPD 199-200 (Joseph); P. Williams Tr. 212:15-213:5, 220:14-224:4 (JA 1204-05, 1210-15); PX 283 at WIL-PD-13 (Williams); Pear Tr. 254:18-24, 256:3-257:2 (JA 956-58); PX 280 at MUSC 4666 (Pear).

For instance, after Respondents searched Petitioner Crystal Ferguson when she sought prenatal care at the hospital in the summer of 1991, she was shown the Solicitor's Letter and threatened with arrest unless she enrolled in an inpatient treatment program. Ferguson Tr. 197:3-198:10, 182:24-183:13 (JA 473-74, 457); PX 274 at SOL-IC-3530. Although Ms. Ferguson was willing to obtain treatment, she was unable to enter an inpatient program because of her child care responsibilities. Ferguson Tr. 183:22-25 (JA 458); PX 274 at 00-133. Nurse Brown reported this information to the police, who planned to arrest Ms. Ferguson on the day of her release from the hospital. Ferguson Tr. 188:3-12 (JA 463). Because Ms. Ferguson was still weak from giving birth by cesarean section, however, and her mother had died shortly after the delivery, hospital personnel agreed to permit her to return home, and the police later arranged that she would turn herself in for arrest in three weeks. Ferguson Tr. 187:4-189:12 (JA 462-64); PX 274 at

CONDN-2059. Only after she gave birth did the hospital refer Ms. Ferguson to an outpatient program; she was scheduled to begin the program on the day she turned herself in to the police. Ferguson Tr. 186:23-187:1 (JA 461).

Darlene Nicholson is the only Petitioner who avoided arrest under the Search Policy. On December 17, 1993, Nurse Brown confronted her about her cocaine use after Ms. Nicholson's urine was searched under the guise of treating her for dehydration:

> [T]hey said I was dehydrated and I needed to be hooked up to glucose. . . . [T]hey told me to drink lots of water. . . . I asked them if I was to be hooked up to the glucose machine. . . . [T]hey just told me to keep drinking water . . . and told me to use the bathroom in a cup. . . . And I asked what for and they said to see if I had enough fluid in my system so they could send me home.

Nicholson Tr. 278:8-24, 280:6-16 (JA 899-900, 902). Following this surreptitious search, Nurse Brown informed her that she could either immediately enter inpatient treatment at the hospital or face arrest. Nicholson Tr. 278:24-280:5 (JA 900-02). Although Ms. Nicholson requested that she be permitted to return home and make arrangements for her son's care before entering treatment, Nurse Brown refused and insisted that she begin treatment at the hospital immediately. Nicholson Tr. 278:24-281:1 (JA 900-02). Ms. Nicholson remained in inpatient treatment for thirty days, until her insurance expired. Nicholson Tr. 281:2-282:13 (JA 902-04). After she was released, she stopped seeking prenatal care for a period of time because of her fear of the Search Policy. Nicholson Tr. 283:6-25 (JA 905-06).

B. Discretionary Decisions in Creating and Implementing the Search Policy

Although the jurisdiction of the Solicitor and the police extended to several hospitals in the Charleston area, Respondents applied the Search Policy only at MUSC. Roberts Tr. 16:24-17:10 (JA 1051-52); Schwake Tr. 12/9/96 137:13-16, 141:1-5 (JA 1118, 1122-23); Condon Tr. 50:19-25 (JA 370-71); Durban Tr. 92:3-25 (JA 428-29); Greenberg Tr. 137:12-18, 143:13-19 (JA 538, 539).[8] Respondents also designed the Policy to focus on cocaine to the exclusion of other illegal or legal drugs that could harm the fetus. Patrick Tr. 33:21-34:6 (JA 946); Brown Tr. 11/21/96 159:8-14 (JA 153); Newman 268:2-269:17 (JA 879-81); Good Tr. 198:11-199:4; Roberts Tr. 15:22-16:7 (JA 1050-51). As hospital physicians testified, although ingestion of heroin or alcohol poses serious risks of fetal harm, the nine criteria established by the task force members for searching pregnant women were drafted specifically to uncover cocaine use. Newman Tr. 268:2-269:17 (JA 879-81); Pittard 219:21-220:14 (JA 985-86); Horger Tr. 11:16-24, 13:19-25, 16:1-12 (JA 633, 635-36, 638-39); PX 1 (JA 1282).

The nine criteria for identifying which obstetrical patients to search for cocaine allowed physicians to exercise virtually unbridled discretion because the criteria included such vague and malleable factors as pre-term labor "of no obvious cause" and "incomplete prenatal care." JX 2 at 1 (App. 53-54). For instance, despite the incomplete prenatal care category, the evidence shows that a woman described by

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[8] The court of appeals incorrectly asserted that the Solicitor and the police had no authority to require other area hospitals to implement the Search Policy and that they tried but failed to persuade other hospitals to do so. *See Ferguson*, 186 F.3d at 480-81 & n.11. In fact, the record reveals that neither Solicitor Condon nor any member of the police department ever attempted to implement the Policy at the other hospitals in Charleston even though their jurisdiction clearly included these hospitals. Roberts Tr. 16:21-17:10 (JA 1051-52); Condon Tr. 50:19-25 (JA 370-71); Durban Tr. 72:6-11, 92:3-25 (JA 412, 428-29); Greenberg Tr. 137:12-18, 143:13-19 (JA 538, 539).

Respondent Dr. Roger Newman as having had "very limited prenatal care" was not searched. PX 19 at 2 (JA 1289).

Eventually, neonatologists were required to test infants under the Search Policy as well. Patrick Tr. 41:2-17 (JA 948). As the Medical Director of the Neonatal Intensive Care Unit testified, testing was not being done for medical reasons, but solely for purposes of the Search Policy. *Id.*; *see also* Chasnoff Tr. 15-17, 42 (discretionary criteria did not "make medical sense") (JA 284-88, 313-14). However, despite the Policy's mandate to test all infants within the criteria, hospital physicians once again exercised discretion and decided not to apply the Search Policy to newborns in the intensive care unit who came to MUSC from other area hospitals. Patrick Tr. 46:9-23, 50:22-51:2 (JA 949-50, 952-53).

Hospital personnel also exercised discretion in enforcing compliance with the Search Policy. Although the Policy officially applied throughout the hospital, the record suggests that it was enforced only at the high-risk clinic in the obstetrics/gynecology department and not in the family practice department or at other clinics within the hospital. Clair Tr. 8:3-14, 13:17-15:10 (JA 328, 331-33); Pols Tr. 321:3-331:9, 326:9-327:8 (JA 997, 1003-05); Sanders Tr. 98:15-100:4 (JA 1100-02); PX 127 (JA 1301). Additionally, Nurse Brown admitted that she called the Solicitor's office and requested another "chance" on behalf of a white patient who should have been arrested under the Policy's terms. Brown Tr. 12/10/96 81:17-82:5 (JA 265-66).

The discretion accorded the Respondents by the Search Policy resulted in a protocol that disproportionately targeted indigent, African-American women for search and then arrest. As the record demonstrates and as the court below found, the disparity between the percentage of hospital maternity patients recorded as positive for any drug who were African-American (68%) and the percentage testing positive for cocaine who were African-American (90%) was sufficient to establish a prima facie case of disparate impact discrimination. *See Ferguson*, 186 F.3d at 481; Shapiro Tr.

126:22-128:2 (App. 110-11). Ultimately, of the thirty women arrested under the Policy, twenty-nine were African-American.[9] Shapiro Tr. 187:15-17.[10]

C. Lack of Search Warrants or Consent to Search

No search warrants or court orders were obtained before women's urine was collected and searched. Jury Charge at 18:15 (JA 1315). Patients did not provide specific consent for searching their urine, nor did the hospital give any indication that its confidentiality policy, according to which "medical records and all communication pertaining to [patient] care are . . . treated as confidential," *see* PX 105 (App. 75), did not apply to these pregnant women. *See, e.g.,* Griffin Tr. 27 (JA 567-68); Powell Tr. 149 (JA 1011-12); Knight Tr. 121-22, 139 (JA 773-75, 783); Singleton Tr. 71 (JA 1145-46).

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[9] The trial court instructed Petitioners' statistical expert to treat only 28 of the 30 women arrested as African-American for purposes of his statistical analysis because it ruled that Petitioner Joseph, who was 25 percent African-American, should be considered white. Shapiro Tr. 178:1-14, 183:14-15. However, Nurse Brown considered Ms. Joseph to be African-American. PX 277 at CCPD-199. Additionally, even the trial court itself was inconsistent in its references to Ms. Joseph's race. *See* Findings of Fact, Conclusions of Law, and Order (describing plaintiffs as "eight black women, one white woman, and one woman who is multiracial") (JA 1408).

[10] The record demonstrates that Nurse Brown, who helped establish the Search Policy and was integral to its everyday implementation, held racist views. Good Tr. 206:1-6 (JA 514); Brown Tr. 11/21/96 14-15 (JA 84-86). Nurse Brown admitted at trial that she believed that interracial relationships were "against God's way" and noted in the charts of pregnant white women if their partners were black. Brown Tr. 12/10/96 5:18-21, 64:4-66:25, 71:6-74:9 (JA 209, 250-57); M. Williams Tr. 132:7-133:1 (JA 1195-96); PX 119 (Nurse Brown notation stating that "patient live[s] with her boyfriend who is a Negro"); *see also* PX 120-123. She also raised the option of sterilization for black women testing positive for cocaine, but not for white women. M. Williams Tr. 128:9-129:5 (JA 1192-93).

As the district court correctly found, the hospital's two general consent forms were "not sufficient consent to warrant a search where the search information is furnished to law enforcement officers." Jury Charge at 21 (JA 1318-19). Even the hospital's General Counsel admitted that he was concerned that the consent forms were inadequate. Good Tr. 202:6-9 (JA 513).

All other forms related to the Search Policy were given to the woman only *after* she had already been tested for cocaine. These other forms did not seek either the patient's consent or authorization. For example, hospital staff showed the "Solicitor's Letters" to patients only after their urine was tested for drugs, i.e., after the search was conducted. *See, e.g.,* Brown Tr. 11/21/96 50:7-14 (JA 114-15); Newman Tr. 279:24-280:7 (JA 886); *see also* JX 5-7 (letters stating "[d]uring your recent examination you tested positive for drugs") (JA 1261-66). Similarly, Respondents' claim that all patients receiving prenatal care at the hospital were shown the "To Our Patients" letter, JX 10 (JA 1269-70), before they were tested for cocaine, Brown Tr. 11/22/96 199-202 (JA 171-76); Newman Tr. 243:1-7 (JA 867), is belied by the letter itself. JX 10 (stating if "we *continue* to detect evidence of drug abuse") (emphasis added) (JA 1269-70). Nursing notes for the only Petitioner whose medical record indicates that she was shown this document at all confirm this. PX 280 at BRO-WN-1415 (noting that Petitioner Pamela Pear was "given letter from the Dept. of [ob/gyn]" *after* testing positive).

D. Unauthorized Disclosure of Medical Information

Reports by hospital personnel constituted the sole means by which the Solicitor's Office and the police obtained the results of the searches of Petitioners' urine. Roberts Tr. 21:23-22:2 (JA 1055); Greenberg Tr. 132:15-16 (JA 534). Positive results for cocaine were recorded in the patient's medical chart, as well as on Rolodex cards that Nurse Brown kept in her own office. Brown Tr. 11/21/96 59:6-15 (JA

122). Nurse Brown then provided this information to law enforcement officials; Solicitor's Office employees actually had access to her office where they could review her Rolodex and other medical files. Brown Tr. 11/21/96 60:7-61:18, 109:4-13, 11/22/96 251:1-22 (JA 123-24, 147, 194-95); Good Tr. 216:19-217:5 (JA 522); JX 1 at 2 (App. 50-51).

Neither the Solicitor's Office nor the police had a search warrant, subpoena, or court order for medical information they obtained. Condon Tr. 86:8-13 (JA 388). They also lacked court authorization to receive a copy of the patient's discharge summary, containing confidential medical information such as the patient's medical history, information on sexually transmitted diseases, sterilization procedures and HIV status. Nevertheless, the hospital provided this document to the police officer who came to arrest the patient. Good Tr. 217:6-218:6 (JA 522-23).

Patients testing positive were also tracked as part of the Suspected Child Abuse and Neglect ("SCAN") meetings at which personnel from the Solicitor's Office, the police, the hospital, and the Department of Social Services discussed suspected child abuse.[11] The hospital sent confidential medical information on the patients to be discussed, such as HIV status and information on tubal ligations, to all members of the SCAN team, including personnel from the Solicitor's Office and the police. Hildebrand Tr. 126:3-20 (JA 609-10); Legare Tr. 312:1-313:18 (JA 794-97); PX 228-E; PX 178. Information on each of the patients was disclosed without their consent and without a warrant. Hildebrand Tr. 136:11-16 (JA 613); Legare Tr. 313:16-24 (JA 796-97).

The patients testified that their experience in being arrested based on searches conducted by the hospital according to the Search Policy has caused them permanently to distrust medical providers. *See, e.g.*, Griffin Tr. 10:10-12

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[11] The SCAN meetings held at the hospital pre-dated the Search Policy and were designed to coordinate the care of all children treated at MUSC who medical staff suspected were abused or neglected. Hildebrand Tr. 124:9-125:20 (JA 607-09).

(JA 550); Singleton Tr. 73:2-13 (JA 1146-47); Ferguson Tr. 194:13-20 (JA 470). In fact, Petitioner Nicholson stated that her fear of hospitals is so pronounced that she becomes "sick to [her] stomach" when she seeks routine medical care and must request others to accompany her on her medical visits. Nicholson Tr. 298:22-299:22 (JA 912-13).

E. Grounds for Arrest

Under the Search Policy, women who tested positive for cocaine could be arrested or threatened with arrest for the crimes of possession of drugs, child neglect, or distribution of drugs to a person under eighteen, depending upon the point in pregnancy at which their cocaine use was discovered.[12] JX 2 at 11 (App. 62-63). The police had never before applied these statutes to address a pregnant woman's drug use, Roberts Tr. 13:19-25 (JA 1048), nor was any male patient ever arrested by the police and charged with drug possession based solely on a positive urine drug search. *Id.* at 50:6-13 (JA 1068). The Search Policy applied at all stages of pregnancy, both before and after fetal viability. *See, e.g.*, JX 2 at 9-12 (App. 60-63). Indeed, Petitioner Joseph was confronted by Nurse Brown and threatened under the Search Policy when she was only thirteen weeks pregnant. PX 277 at 00-255, 00-256.

F. Arrests

As Captain Roberts testified, the hospital and the police coordinated at every step of the process that led to a pregnant woman's arrest. Roberts Tr. 17:11-15 (JA 1052). Nurse Brown would call the police, file a complaint, inform them when a patient who had tested positive was about to leave the hospital, and help coordinate the woman's in-hospital arrest. Brown Tr. 11/21/96 91:3-20 (JA 141-42); Roberts Tr. 23:12-

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[12] *See* S.C. Code Ann. § 44-53-370 (possession of cocaine misdemeanor carries a maximum sentence of two years for first offense); *id.* § 20-7-510 (criminal child neglect felony carries maximum penalty of 10 years); *id.* § 44-53-440 (distribution of drugs to persons under 18 carries maximum sentence of 20 years).

24:19 (JA 1057-58); Waring Tr. 132:3-16 (JA 1161-62). Indeed, at least one Petitioner was detained in the hospital after she was medically ready to leave in order to facilitate her arrest by the police. P. Williams Tr. 223:11-224:4 (JA 1214-15); *see also* Henry Tr. 120:10-123:18.

Women subject to arrest were, in some instances, denied the opportunity to change out of their hospital gowns or to make a phone call to family members to make arrangements for care of their children. *E.g.*, Singleton Tr. 61:11-14, 68:22-24, 69:5-8 (JA 1135-36, 1143); Powell Tr. 152:2-11; 157:4 (JA 1014-15, 1020); Knight Tr. 124:20-125:17 (JA 777-78); Griffin Tr. 11:9-12:4 (JA 551-52). Some women were arrested while still bleeding, weak and in pain from having just given birth. *E.g.*, Singleton Tr. 68:1-69:8 (JA 1142-43); Powell Tr. 153:7-20, 155:8-16 ("I pretty much couldn't move on my own") (JA 1016, 1018); Knight Tr. 125, 136:10-13 (arrested while bleeding heavily from her first vaginal childbirth and still vomiting) (JA 777-78, 782). Some women were put in handcuffs that were attached to a chain that circled their abdomens. *E.g.*, Griffin Tr. 9:12-25 (JA 549). Some were also placed in leg shackles when they were taken into custody. *E.g.*, Singleton Tr. 62:1-11 (JA 1136); Griffin Tr. 8:11-9:21 (JA 547-49); Ferguson Tr. 190:2-6 (JA 465). A blanket or sheet would be placed over the woman, and she would be wheeled out of the hospital to a waiting police car and transported to jail. *E.g.*, Singleton Tr. 62-64 (JA 1136-39); Powell Tr. 154:2-156:24 (JA 1017-19); Griffin Tr. 10 (JA 549-50); Knight Tr. 126 (JA 778-79).

IV. The Search Policy Was Not Effective in Improving Fetal Health.

The Search Policy did not reduce cocaine use, improve pregnancy outcomes, or increase the number of women successfully completing drug treatment. Indeed, if the Search Policy were responsible for a decrease in cocaine-exposed infants, one would expect to see an increase in cocaine-exposed infants after the Search Policy was

terminated, but no such increase took place. Patrick Tr. 49:22-50:21 (JA 951-52).

The Search Policy's failure to promote fetal health stemmed from its faulty design. As Dr. Ira Chasnoff, a nationally recognized expert on substance abuse and pregnancy, and Respondents' own neonatologists testified, focusing on cocaine use alone is unlikely to improve a pregnancy's outcome because of the multitude of factors contributing to a baby's health. Chasnoff Tr. 12:9-24 (JA 281-82); Horger 45:13-24 (JA 673). Moreover, numerous studies have shown that punitive programs drive women away from prenatal care and treatment programs and thus do not improve pregnancy outcomes for either mother or child.[13] Chasnoff Tr. 23:22-24:11 (JA 293); Jessup Tr. 89:11-97:2, 115:12-118:7 (JA 711-21, 722-26). In fact, because of Dr. Chasnoff's expertise, Respondents consulted him about the Search Policy's creation but then ignored his warning that such a punitive program could never improve fetal health. Chasnoff Tr. 29-31 (JA 297-301).

Indeed, the Search Policy's focus on cocaine to the exclusion of other drugs, legal or illegal, is medically senseless. As numerous witnesses for both Petitioners and Respondents testified, heroin, alcohol, and amphetamines also pose risks of harm to the fetus. Chasnoff Tr. 12-15 (JA

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[13] Respondents suggest that the Search Policy was necessary because prior to its inception pregnant women were not attending substance abuse treatment voluntarily. *See* Opp. to Pet. for Cert. at 4. However, as Respondent Horger admitted, this belief was based solely on Nurse Brown's perceptions. Horger Tr. 18:16-19:17 (JA 641-42). In fact, prior to adopting the Search Policy, the hospital had no formal tracking system to document whether women attended substance abuse treatment and no employee in the obstetrics/gynecology department who was trained in making substance abuse referrals. Horger Tr. 20:17-21:17 (JA 644-45). Respondents' own expert testified that the information he reviewed from the hospital about women's willingness to attend treatment before implementation of the Search Policy would not be the kind reasonably relied upon by experts in his field because it included no systematic accounting of patients. Kebler Tr. 847:3-848:5 (JA 766-68).

281-85); Frank Tr. 952:12-23 (JA 486); Horger Tr. 44-47 (JA 671-75); Newman Tr. 202-203, 267-272 (JA 841-43, 878-85); Pittard Tr. 219:21-220:14 (JA 985-86). From a medical standpoint, if Respondents had wished to target the one drug that is most harmful to fetal health, they should have focused on tobacco, not cocaine. Chasnoff Tr. 13:6-19 (JA 282).

V. Procedural Background

Petitioners filed suit in 1993 for damages and injunctive relief claiming *inter alia* that urine drug tests performed pursuant to the Search Policy constituted warrantless searches in violation of the Fourth Amendment. After a six week trial, the trial court submitted Petitioners' Fourth Amendment claim to the jury which found against Petitioners. After inviting Petitioners to file a Rule 50(b) motion on the Fourth Amendment claim, the court then denied that motion. Petitioners appealed this claim, as well as three others,[14] to the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the trial court by a 2-1 vote. Petitioners' petition for rehearing *en banc* was denied by the court below by an 8-5 vote. This Court granted certiorari on February 28, 2000.

SUMMARY OF ARGUMENT

The searches at issue in this case were conducted without warrants or individualized suspicion and thus violated the Constitution unless Respondents established that Petitioners provided valid consent. But rather than examining whether the Petitioners had provided valid consent to the searches, the court below held that the warrant and probable cause requirements of the Fourth Amendment are not applicable where the government can articulate a non-law enforcement rationale for the program or policy, even where the policy implements the state's criminal law by traditional means of

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[14] Petitioners did not seek certiorari on these three claims.

searches, arrests and prosecutions. *See Ferguson v. City of Charleston*, 186 F.3d 469, 476 (4th Cir. 1999). The "special needs" balancing test, applied by the Fourth Circuit, has never before been applied to a search primarily serving the normal needs of law enforcement and has never been applied to searches of citizens, such as the Petitioners, whose reasonable expectation of privacy is undiminished.

The court of appeals' reliance on this Court's line of cases authorizing checkpoint seizures, *see Ferguson*, 186 F.3d at 477 n.7 (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451-55 (1990)), is misplaced. The searches here -- discretionary searches of the patients' urine in the context of a supposedly confidential medical visit --bear no relationship to and were much more invasive than the brief stops for questioning and observation conducted pursuant to a nondiscretionary checkpoint program. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("There are few activities in our society more personal or private than the passing of urine.") (internal citiation omitted).

Moreover, application of the "special needs" exception to such searches is not only unprecedented, but would swallow whole the Fourth Amendment's requirements of a warrant and probable cause. Because nearly every application of the criminal law serves some other vital public health or safety purpose, "'[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation'" on the special needs exception under the Fourth Circuit's reasoning. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Chimel v. California*, 395 U.S. 752, 766 (1969)). Under such a broad interpretation of the special needs exception, Fourth Amendment protection "would approach the evaporation point." *See Chimel*, 395 U.S. at 765.

This Court has rejected numerous similar attempts to do away with the warrant requirement in the service of the

"public interest." For example, this Court held that the "vital public interest in the prompt investigation of" serious crimes, even the crime of murder, does not justify disregard of the Fourth Amendment. *Mincey*, 437 U.S. at 394 ("the seriousness of the offense under investigation" cannot justify warrantless searches); *see also Flippo v. West Virginia*, 120 S. Ct. 7, 8 (1999). Nor is disregard of the Fourth Amendment justified by the "mere fact that law enforcement may be made more efficient." *Mincey,* 437 U.S. at 393. Similarly here, the state's interest in the health of viable fetuses, even if those interests were served by this Search Policy, which they were not, *see supra* pp. 17-18, does not justify the Fourth Circuit's decision to scrap the warrant requirement in toto.

Finally, the Fourth Circuit's approach would reduce the Fourth Amendment to a balancing test, in which the extent of the invasion of privacy is weighed against the state interests served by the search. In such an equation, the rights of the individual will almost always bend to the interests of the State, leaving citizens with no assurance of privacy in their homes or persons.[15] Ironically, Fourth Amendment protections would disappear in all cases *except* where the public interest is negligible, such as, perhaps, in investigation of very minor offenses. But as Justice Brandeis noted, protections of the Fourth Amendment are the most important where the stakes are highest:

> [I]t is [] immaterial that the intrusion was in aid of law enforcement. Experience should

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[15] As this Court has noted, the warrant requirement "provides the detached scrutiny of a neutral magistrate," ensures an "objective determination whether an intrusion is justified," and thus serves to protect citizens from arbitrary and discriminatory searches. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989); *see also Katz v. United States*, 389 U.S. 347, 358 (1967); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

> teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

ARGUMENT

I. The Searches of the Patients' Urine for Evidence of Crime Violated the Fourth Amendment.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. It is well-settled that "government ordered 'collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable,'" and thus effects a search of the person subject to the demands of the Fourth Amendment. *Chandler v. Miller,* 520 U.S. 305, 313 (1997) (quoting *Skinner,* 489 U.S. at 617). Because the urine drug screens ordered in this case are searches under the Fourth Amendment, the question is whether the searches were reasonable.

"Over and again," this Court has emphasized that a search conducted without a warrant issued upon probable cause, like the urine drug screens at issue in this case, is *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (internal quotations omitted); *see also Flippo,* 120 S. Ct. at 8; *Chandler*, 520 U.S. at 313; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

The only exception to the warrant requirement asserted by Respondents in this case was consent.[16]

Although the court below recognized the proposition that the Fourth Amendment generally requires a warrant and probable cause as prerequisites to a reasonable search in the process of law enforcement and recognized the integral involvement of law enforcement in developing and implementing the Search Policy here, *see Ferguson*, 186 F.3d at 477 n.7; *see also id.* at 484 (Blake, J., dissenting), it held that a search that was "motivated" by a desire to protect health falls outside the Fourth Amendment's protections. *See id.* at 475 n.3. Instead of examining whether the patients provided valid consent to the searches, the court of appeals held that these searches were "reasonable" under the "special needs" exception to the Fourth Amendment's requirement of warrants and probable cause.

But this Court has repeatedly refused to dispense with the warrant and probable cause requirements to uphold the constitutionality of suspicionless searches of free citizens as a part of law enforcement, even where there is a strong health or safety governmental interest. For example, this Court has held that neither the vital public interest in the prompt investigation of serious crime nor the laudable goal of increasing the efficiency of law enforcement can justify dispensing with the requirements of individualized suspicion. *Flippo,* 120 S. Ct. at 8 (rejecting "murder scene exception" to warrant requirement); *Mincey*, 437 U.S. at 393-94. Similarly, the Court has rejected application of the "special needs" exception to the warrantless search of a person's home in the aftermath of the fire, even where the search

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[16] Although the jury found that Petitioners had consented to the searches of their urine, no fair analysis of the evidence can support such a conclusion, as this brief's recitation of the facts demonstrates. *See supra* pp. 13-14. By applying the "special needs" exception, the court of appeals avoided deciding the issue of consent entirely.

serves the important public interest of determining the cause of the fire. *Michigan v. Clifford*, 464 U.S. 287, 292 (1984).

Thus, the court of appeals' application of the "special needs" exception to searches serving normal law enforcement needs -- searches for evidence of crime -- contradicts this Court's Fourth Amendment jurisprudence and would render the Warrant Clause a "dead letter." *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 673 (1995) (O'Connor, J., dissenting).

A. The Searches Here Do Not Fall Within the "Closely Guarded" Exceptions to the Fourth Amendment's Requirements of Warrants and Probable Cause.

This Court has held that "'in certain limited circumstances,'" *Chandler*, 520 U.S. at 308 (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989)), the warrant and probable cause requirements may be disregarded and the "reasonableness" of a search or seizure may be determined using a balancing test. However, the Court has limited the cases in which such a balancing test replaces the requirements of warrants and probable cause to "closely guarded" categories. These limited exceptions include searches serving "special needs" beyond the normal need for law enforcement where the subject searched has a reduced expectation of privacy; and limited "seizures" made at highway checkpoints. *See id.* at 308, 311.[17]

The searches here fit into none of these categories and thus violate the Fourth Amendment. First, since *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), this Court has applied the "special needs" exception only to searches that have met all

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[17] *See also Michigan v. Clifford*, 464 U.S. 287, 291-92 & 292 n.2 (1984) (administrative search of a private home to investigate the cause and origin of a fire did not fall within one of "carefully defined classes of cases" in which exceptions to the warrant requirement applied).

four factors identified by Justice Blackmun[18] and that have been conducted in situations in which there is a reduced expectation of privacy. Neither is true here. Second, the seizures at issue in the checkpoint cases are completely distinguishable from the searches of the patients' bodies at issue in this case.

1. The Special Needs Exception Is Inapplicable Where, as Here, the Law Enforcement Purpose Is Integral to the Searches.

This Court has held that "particularized exceptions to the main rule are sometimes warranted based on 'special needs, *beyond the normal need for law enforcement.*'" *Chandler*, 520 U.S. at 313 (emphasis added) (quoting *Skinner*, 489 U.S. at 619); *see also Acton*, 515 U.S. at 653; *id.* at 673 (O'Connor, J.,dissenting); *Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 619; *T.L.O.*, 469 U.S. at 356 (Brennan, J., concurring in relevant part). This Court has given some significant content to the requirement that the search program serve needs "beyond the normal need for law enforcement." Properly interpreted, "beyond the normal need for law enforcement" excludes cases in which an integral purpose of the search is arrest and prosecution; law enforcement involvement is tolerated only if it is incidental in nature and not pervasive or built into the design and implementation of the program.[19] For example, this Court has upheld as reasonable searches of public school children that led to school disciplinary action, *T.L.O.*, 469 U.S. at 343; *Acton*,

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[18] The four factors are: 1) that the need is "special," *see Chandler v. Miller*, 520 U.S. 305, 322 (1997); 2) that the need is "beyond the normal need for law enforcement," *see, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); 3) that the warrant requirement is impracticable, *see, e.g., Skinner*, 489 U.S. at 624; and 4) that the probable cause requirement is impracticable, *see, e.g., id.* at 631.

[19] Respondents do not contend otherwise. Instead, they argue that the claimed non-law enforcement purpose here was the "primary focus" of the policy, and not a pretext. Opp. Cert. at 26-27, 21.

515 U.S. at 664-65, searches of employees for employment purposes or where the employees participate in an industry that is "regulated pervasively to ensure safety," *Skinner*, 489 U.S. at 627; *see also Von Raab,* 489 U.S. at 677, searches of probationers for supervisory purposes, *Griffin v. Wisconsin,* 483 U.S. 868, 880 (1987), and administrative inspections of businesses in "closely regulated" industries, *New York v. Burger*, 482 U.S. 691, 703-04 (1987); *United States v. Biswell*, 406 U.S. 311, 316 (1972). In such cases, the reasonableness of a search is evaluated using a balancing test rather than by determining whether a warrant based on probable cause was obtained. *See Von Raab*, 489 U.S. at 665-66; *see also Chandler*, 520 U.S. at 314 ("context-specific inquiry, examining closely the competing private and public interests advanced by the parties" appropriate in "special needs" case); *Acton*, 515 U.S. at 652-53 (reasonableness of search in special needs case "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests") (internal citations omitted).

In *Von Raab, Skinner,* and *Acton,* this Court applied the special needs exception only after noting that the searches at issue were not part of a law enforcement program and that the results of the searches could not be disclosed to law enforcement. *See Acton*, 515 U.S. at 651 ("[o]nly the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year"); *Von Raab*, 489 U.S. at 666 (applying special needs exception to program of drug testing of certain employees in sensitive positions by United States Customs Service where "test results may not be used in a criminal prosecution of the employee without the employee's consent"); *Skinner*, 489 U.S. at 621 n.5, 626 n.7 (where the respondents had claimed that the test results might be used by the police, Court noted that nothing in the record indicated that government would use test results for other than employment purposes).

Where law enforcement did become involved in searches, the "special needs" exception has only been applied where that involvement was incidental to the primary purpose of the search, and most often where law enforcement involvement occurred only after the search. The law enforcement *purpose* for the search was either non-existent or clearly secondary to the non-law enforcement purpose of the search. For example, in *T.L.O.*, where the contents of a student's purse which had been searched by a school principal because of evidence of a violation of the school's no-smoking policy were turned over to the police, this Court stressed:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.

T.L.O., 469 U.S. at 342 n.7. Similarly, in *Burger,* this Court applied the special needs balancing test to uphold an administrative inspection of a commercial property employed in a "'closely regulated' industr[y]." 482 U.S. at 700. Although this Court acknowledged that the search to enforce an administrative scheme might also uncover evidence of a crime, this Court stressed that the search was reasonable only where the administrative scheme in question was not being used as a "'pretext' to enable law enforcement authorities to gather evidence of penal law violations." *Id.* at 716 n.27.[20] In contrast here, the search by hospital personnel was indeed

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[20] *See also Whren v. United States*, 517 U.S. 806, 811-12 (1996) ("exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes").

conducted "in conjunction with" and "at the behest of" law enforcement agencies. *Cf. T.L.O.*, 469 U.S. at 342 n.7.[21]

This Court's rulings on the legality of administrative searches with overlapping law-enforcement and non-law-enforcement purposes are instructive here as well. In those cases, even where the search is for non-law enforcement purposes, a warrant is still required, although the warrant requirements differ depending on the purpose of the search. For example, in *Clifford*, the Court evaluated a search of a home in the aftermath of a fire, distinguishing between the search to determine the cause of the fire and a second separate search to gather evidence of criminal arson. 464 U.S. at 294.[22] Noting that "the object of the search determine[d] the type of warrant required," the Court stated:

> If the *primary* object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. . . . If the *primary* object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

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[21] *New York v. Burger* is further distinguishable from this case because of the "'unique' problem" it addressed, the "long tradition of close government supervision" of such industries, and the significantly reduced expectation of privacy that results therefrom. 482 U.S. 691, 700 (1987); *see also infra* pp. 33-36. Indeed, the doctrine allowing such searches was first articulated in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), predating the "special needs" cases.

[22] The Court held that unless a search was justified by exigent circumstances or consent even a search to determine the cause of the fire required a warrant, albeit an administrative one. *See Clifford*, 464 U.S. at 294.

Id. (emphasis added). Here, the record demonstrates that the primary object of the search was to obtain evidence of criminal activity.

In the only "special needs" case that allowed some level of law enforcement involvement, *Griffin*, this Court allowed a warrantless search by a probation officer pursuant to probation regulations allowing a search of a probationer's home for firearms. 483 U.S. at 870-71. Importantly, the search for firearms in *Griffin* served the "special need" of ensuring compliance with those regulations and not the "normal" law enforcement need of finding evidence of violation of a separate crime. Thus, as this Court noted, *Griffin*'s holding was limited to a search of a probationer pursuant to a "valid regulation" and did not address whether "*any* search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present." *Id.* at 880. In this case, by contrast, the searches were specifically formulated and implemented for the purpose of "obtaining evidence for use in criminal . . . enforcement proceedings." *See O'Connor v. Ortega*, 480 U.S. 709, 721 (1987) (plurality opinion).[23]

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[23] Moreover, *Griffin* is also distinguished from this case because the previous finding of guilt and the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." *Griffin*, 483 U.S. at 875; *see also Pennsylvania Bd. of Parole v. Scott*, 524 U.S. 357 (1998) (exclusionary rule inapplicable in parole revocation proceedings); *Ferguson,* 186 F.3d at 486 (Blake, J., dissenting). Indeed, this Court suggested, without deciding, that the constitutional rights of probationers might be as limited as those of prisoners. *Griffin*, 483 U.S. at 874 n.2 (noting that probation regulations might be subject to the same "reasonably related to legitimate penological interests'" test as are prison regulations). Unlike probationers, the patients here had, if anything, a heightened expectation of privacy in their medical information. *See infra* pp. 33-36.

2. Because Law Enforcement Played an Integral Role in the Searches at Issue Here, the Special Needs Exception Cannot Be Applied to Excuse the Lack of Warrants or Individualized Suspicion.

In this case, a central purpose of the Search Policy was to "search for evidence qua evidence," *see United States v. Colyer*, 878 F.2d 469, 478 (D.C. Cir. 1989), in furtherance of arrests for crimes. *See supra* pp. 2-6. The searches served the normal needs of law enforcement: detection of crime and preservation of evidence to facilitate arrest and prosecution. *Id.*

The court of appeals attempted to counter the overwhelming evidence that the Search Policy served the normal needs of law enforcement by pointing to the Respondents' testimony indicating that some women were "diverted" into treatment under the Policy. *See Ferguson*, 186 F.3d at 474 n.3. Rather than serving non-law enforcement needs, diversion from prosecution into treatment programs is a normal part of the law enforcement process in South Carolina and thus actually serves law enforcement goals. As Respondent Condon testified, this "carrot and stick" approach, diverting people into treatment by threatening jail, was part of the "norms and standards of the solicitor's office" for first-time nonviolent offenders and was used for "general drug cases, simple possession cases, small property offenses." Condon Tr. 23:4-24:4 (JA 357-58).

The court below clearly struggled with its application of a balancing test to the searches here, because it recognized that law enforcement was involved from the Policy's inception. *Ferguson*, 186 F.3d at 477 n.7 ("law enforcement officers were involved in the fomulation of the policy"). In an attempt to resolve this conflict, the court first characterized the policy as "motivated by a desire to protect the health of

the children born at MUSC," as if the existence of some benevolent purpose could render irrelevant the significant law enforcement purpose. *Ferguson*, 186 F.3d at 473 n.3 (denying that the policy was "animated by a vindictive purpose to prosecute women who used cocaine during pregnancy"). Of course, just as malevolent "ulterior motives" cannot invalidate an otherwise objectively justifiable search, neither can benevolent motives justify an objectively unreasonable one. *Cf. Whren v. United States*, 517 U.S. 806, 811-13 (1996). Moreover, perhaps reflecting its discomfort with this analysis and its recognition of the lack of any similar law enforcement involvement in the other "special needs" cases, the court was forced to reach outside the special needs context and to rely on this Court's decision in *Sitz* to justify dispensing with the warrant requirement. *Ferguson*, 186 F.3d at 477 n.7 (citing *Sitz*, 496 U.S. at 451-55).[24]

Thus, the court below side-stepped the overwhelming evidence of law enforcement involvement, *see discussion supra* pp. 2-6, examining neither whether the primary object of the searches was to gather evidence of criminal activity, nor whether the drug testing scheme was a "pretext" to enable authorities to gather evidence of penal law violations. Instead, the court held blithely that "the involvement of law enforcement officers does not make a special needs analysis inappropriate." *Ferguson*, 186 F.3d at 477 n.7.

If the Fourth Circuit's reliance on the Respondents' claimed benevolent motivation as a means of avoiding the settled requirements of a warrant and individualized suspicion for law enforcement searches is upheld, the Warrant Clause would be a "dead letter." *Acton*, 515 U.S. at 673 (O'Connor, J., concurring). There is virtually no criminal law that is administered exclusively to achieve

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[24] *Sitz* is inapplicable to this case for the reasons outlined below. *See infra* pp. 36-40.

punishment for its own sake. Drug prosecutions seek to suppress social evils, but so do laws against gambling, robbery, and embezzlement. Prosecutions for violations of income tax laws protect the public fisc, laws which punish polluters or protect wetlands guard the environment, and criminal sanctions against securities fraud guard investor confidence. Yet it cannot be the case that a motive to protect the public welfare removes the protections of the Fourth Amendment. *See Mincey*, 437 U.S. at 393. As Justice O'Connor wrote in *Acton*:

> [I]t remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime. And this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods. Nor could it be otherwise, for if being evenhanded were enough to justify evaluating a search regime under an open-ended balancing test, the Warrant Clause, which presupposes that there is *some* category of searches for which individualized suspicion is nonnegotiable, . . . would be a dead letter.

Acton, 515 U.S. at 673 (O'Connor, dissenting) (emphasis added) (internal citations omitted).

Two other factors bring this case outside the special needs exception. First, as with the drug testing program at issue in *Chandler*, the Search Policy serves a "symbolic" rather than "special" need. *See* 520 U.S. at 322; *see also Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting). The program here demonstrates "symbolic opposition to drug use," but because of its faulty design, *see supra* pp. 17-18, it "lacked a real capacity" to protect the health of fetuses or improve

pregnancy outcomes. Accordingly, Respondents were unable to establish any "real evidence of a real problem that will be solved" by the Search Policy. *Cf. Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

Second, Respondents have not shown that the "warrant and probable cause requirement [was] impracticable." *See Acton*, 515 U.S. at 653 (quoting *Griffin*, 483 U.S. at 873). The Fourth Circuit ignored this important inquiry. The reasons this Court has given for dispensing with the warrant or individualized suspicion requirements – *e.g.*, immediacy of the need in *Skinner*, 489 U.S. at 623-34, and *T.L.O.*, 469 U.S. at 340, and frustrating the routine conduct of business in *O'Connor*, 480 U.S. at 722 – are absent here, where there was ample opportunity to present evidence of probable cause to a judicial officer.

3. The Special Needs Exception Is Inapplicable Because the Patients' Expectation of Privacy Was Undiminished.

The Petitioners entered the care of the hospital as free citizens. They were assured by the hospital that their medical records would be "treated as confidential," PX 105 (hospital's patient handbook guaranteeing confidentiality) (App. 75), and were treated by physicians who by generations of practice regarded their patients' confidences as a sacred trust. *See, e.g.*, Hippocratic Oath (quoted in Albert R. Jonsen et al., *Clinical Ethics* 166 (4th ed. 1998)) ("[A]nd whatsoever I shall see or hear in the course of my profession, . . . if it be what should not be published abroad, I will never divulge, holding such things to be holy secret."). Yet the court below held that "special needs" justified testing them for evidence of cocaine use without their consent and conveying the results of those tests to law enforcement officials. This holding is entirely at odds with the "special needs" doctrine established by this Court.

Even in cases involving searches with *no* law enforcement involvement whatsoever, this Court only applies the "special needs" exception to uphold suspicionless searches when the citizens searched have a diminished expectation of privacy. As this Court wrote in *T.L.O.*:

> [e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

469 U.S. at 342 n.8 (citation omitted). Similarly, in *Skinner*, when applying the "special needs" exception, this Court emphasized that "[m]ore importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S. at 627; *see also Burger*, 482 U.S. at 700 (noting that "[a]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. . . . This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries.") (internal citation omitted). Indeed, in *Burger*, this Court noted that "[c]ertain industries have such a history of government oversight that *no* reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Id.* (emphasis added); *see also T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) ("[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally.").

Moreover, that warrants *are* required for administrative searches, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (administrative search warrant required for administrative search); *Camara v. Municipal Court,* 387 U.S. 523 (1967) (same); *See v. City of Seattle*, 387 U.S. 541 (1967) (same), shows the importance of the searched population's expectation of privacy. The only difference between those administrative search cases and non-law enforcement special needs cases is the reduced expectation of privacy of the citizens searched in the latter. As this Court noted in holding that the "special needs" exception did not apply to the administrative search of a private home to investigate a fire, "[i]f reasonable privacy interests remain in the fire-damaged property, the warrant requirement applies. . . ." *Clifford,* 464 U.S. at 292-93.[25]

Women seeking medical care at public hospitals do not have a *reduced* expectation of privacy; instead, they have, if anything, a *heightened* expectation of privacy with respect to their medical care and records. *See Whalen v. Roe,* 429 U.S. 589, 599 (1977) (constitutional right to privacy "in avoiding disclosure of personal matters" well-established). Given this heightened expectation of privacy, dispensing with the Fourth Amendment's warrant and probable cause

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[25] Where such a reduced expectation of privacy does exist, this Court has reasoned that "the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, . . . have lessened application . . ." *Burger,* 482 U.S. at 702; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("the warrant requirement, in particular, is unsuited to the school environment" and would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) ("[T]he warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'") (quoting *T.L.O.*, 469 U.S. at 340, 341).

requirements by expanding the "special needs" exception to cover pregnant women seeking medical care is especially pernicious. And the perniciousness of the approach of the court below is magnified because of the highly invasive nature of the searches at issue here, namely searches of the patients' urine. *See Bond v. United States*, 120 S. Ct. 1462, 1464 (2000) ("[p]hysically invasive inspection is simply more intrusive than purely visual inspection"); *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (discussing "the unique, significantly heightened protection afforded against searches of one's person"); *Skinner*, 489 U.S. at 617 ("there are few activities in our society more personal or private than the passing of urine") (citations omitted). The Fourth Circuit relegates pregnant women in their doctors' offices to a status comparable to that occupied by convicted criminals on probation, leaving them with less protection under the Fourth Amendment than motorists in their cars.[26]

4. This Court's Jurisprudence Authorizing Checkpoint Seizures Is Inapplicable to the Searches Conducted in This Case.

The court below relied on *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), to justify application of the

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[26] The era is past in which pregnant women were regarded as peculiarly subject to the authority of the state because of their status as child-bearers. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 896-98 (1992); *id.* at 896 ("The effect of state regulation [with respect to a woman's pregnancy] on a woman's protected liberty is doubly deserving of scrutiny . . . , as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman."); *id.* at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. . . . [I]f the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.").

special needs exception to this case, pointing to the law enforcement involvement in the *Sitz* checkpoint. *See Ferguson*, 186 F.3d at 477 n.7. This Court has approved brief stops, or "seizures," for questioning or observation at fixed checkpoints, such as border patrol checkpoints, *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-50, 566-67 (1976), or sobriety checkpoints, *Sitz*, 496 U.S. at 447, 455, despite the absence of a warrant or individualized suspicion. But the court below misapplies checkpoint seizure cases to a case involving searches of persons.

First, although the Fourth Circuit referred to *Martinez-Fuerte* and its progeny as "special needs" cases, in *Sitz*, this Court carefully distinguished the two and did so specifically on the grounds that the heavy involvement of law enforcement precluded any potential finding that the program served needs "beyond the normal need" for law enforcement. In that case, this Court excused the government's failure to demonstrate a "special governmental need 'beyond the normal need' for criminal law enforcement," distinguishing between the checkpoint cases, which predated the Court's articulation of the "special needs" exception, and the special needs cases. The Court held that *Martinez-Fuerte* and the other checkpoint cases, and not *Von Raab*, "are the relevant authorities here." *Sitz*, 496 U.S. at 450. This is a further indication that the heavy involvement of law enforcement that was tolerated in the *Sitz* checkpoint should not be tolerated in a *Von Raab* special needs case, contrary to the decision of the court below. As the Solicitor General of the United States wrote recently in distinguishing between the drug testing cases and checkpoint seizure cases,

> [t]he drug testing cases involve both a search and seizure of an individual and one that implicates a uniquely personal activity. If such personal intrusions were permitted for routine crime detection, it would do much to

> undermine the general principle of the Fourth Amendment that intrusions on the person require some individualized suspicion.

Brief for United States as *Amicus Curiae* Supporting Petitioners at 21-22, *City of Indianapolis v. Edmond*, No. 99-1030 ("United States' *Edmond* Br.").

Second, this Court has stressed that the checkpoint cases involved no more than an "initial stop . . . and the associated preliminary questioning and observation by checkpoint officers." *Sitz*, 496 U.S. at 450-51. As this Court cautioned in distinguishing between such checkpoint "seizures" in which drivers are observed by officers who stand outside the stopped car, and situations, such as those at issue here, where the personal property or body of an individual itself is searched: "[D]etention of particular motorists for more extensive . . . testing may require satisfaction of an individualized suspicion standard." *Id.* at 451 (citation omitted). Unlike a checkpoint "seizure," the searches here were highly particularized and discretionary and much more extensive than an "observation" – they were targeted searches of the bodily fluids of certain women at a specific hospital. Accordingly, as the Solicitor General notes:

> "[W]arrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not" . . . because of the "obviously public nature of automobile travel" . . . [and the fact that] automobiles, unlike homes or offices, are subject to a "web of pervasive regulation."

United States' *Edmond* Br. at 8-9 (internal citations omitted).

Third, at least since *United States v. Ortiz*, 422 U.S. 891 (1975), it has been clear that the limited exception to the warrant and individualized suspicion requirements that

justifies temporary seizures of motorists at properly operated checkpoints does not serve also to allow searches of one's person or even one's effects. As the Court held in *Ortiz*, at "checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." 422 U.S. at 896-97; *see also Houghton*, 526 U.S. at 303 (cases involving searches of one's person do not govern searches during automobile stops). Under the Fourth Circuit's ruling, though, the body of a pregnant woman can be searched for law enforcement purposes in the privacy of her doctor's office without consent, a warrant, or probable cause.

Finally, the Search Policy's allowance for discretion takes it completely outside the bounds of *Sitz* – and outside the bounds of the "special needs" exception. The randomness and universality of the checkpoints in *Sitz* rendered the traffic stops constitutional by preventing any abuse of discretion. Similarly, the "special needs" exception only applies to policies authorizing non-discretionary searches. *See Ferguson*, 186 F.3d at 479 ("'cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches.'") (quoting *Turner v. Dammon*, 848 F.2d 440, 446-47 (4th Cir. 1988)). As this Court noted in *Sitz*, "standardless and unconstrained discretion is the evil the Court has discerned. . . ." 496 U.S. at 454 (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)); *see also T.L.O.*, 469 U.S. at 342 n.8; *Prouse*, 440 U.S. at 654-55.

The court of appeals acknowledged this rule but erred in asserting that the Search Policy at issue here involved such neutrality. *See Ferguson*, 186 F.3d at 479. First, Respondents exercised significant discretion in choosing to enforce the Search Policy only at MUSC and only as to cocaine, even though the Solicitor's jurisdiction over child abuse and drug violations extended to other hospitals in Charleston and to other drugs. *See supra* p. 11. Second, although as the court below notes, "the urine drug screens [on pregnant women] were conducted whenever one of the

criteria for testing was met," *Ferguson*, 186 F.3d at 479, physicians exercised their discretion in determining when a patient in fact satisfied the criteria.[27] For example, Dr. Newman described a patient with "very limited pre-natal care" who was not searched under the Search Policy despite the fact that one of the criteria for testing was "inadequate prenatal care." PX 19 at 2 (JA 1289). Similarly, the hospital's physicians did not apply the criteria for testing newborns even-handedly. Instead, they chose not to enforce the Search Policy as to any newborn in their intensive care unit who came from a hospital other than MUSC. *See supra* p. 12 (Policy did not apply to "outborn babies"). The flexibility inherent in the Policy even permitted Nurse Brown to contact the Solicitor's Office and request another "chance" for a white patient who should have been arrested under its terms. Brown Tr. 12/10/96 81:17-82:5 (JA 265-66). The result of the discretion exercised by Respondents in forming and enforcing the Search Policy was a protocol that disproportionately targeted indigent, African-American women for search and then arrest. *See supra* pp. 12-13. Indeed, the Fourth Circuit held that the evidence presented by the patients at trial was sufficient to establish a prima facie case of disparate impact discrimination. *See Ferguson*, 186 F.3d at 481.

B. Assuming, *Arguendo*, That Application of the "Special Needs" Balancing Test Is Appropriate Here, the Balance Weighs Against the State.

Even in applying the balancing test the court below erred in three additional ways.[28] First, for the reasons outlined

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[27] By contrast, a checkpoint seizure involves a seizure of every vehicle passing a given point. Even such a seizure would, however, raise significant constitutional issues if the placement of the checkpoint itself indicated an abuse of discretion. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 559-62 & n.15 (1976) (reviewing reasonableness of choice of location); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

[28] In *Acton*, 515 U.S. at 653, this Court balanced "the nature and immediacy of the governmental need at issue here, and the efficacy of

above, there was not sufficient evidence that the Search Policy was "effective." *See supra* pp. 17-18. Importantly, as applied by Respondents to five Petitioners, the Search Policy simply could not improve fetal health. Four Petitioners were arrested based on a single positive drug screen and were given no substance abuse referrals or education, *see supra* pp. 6-8 (Griffin, Singleton, Knight and Powell); , another Petitioner was searched for the first time at delivery, when the Policy could no longer affect her child's health. PX 276 at 1543-44, CCPD 399-400 (Hale, searched in December 1990 when she came to the hospital in active labor). Thus, the searches conducted on these Petitioners in particular were effective in identifying women to arrest, but not in insuring a drug-free pregnancy.[29]

In addition, the Search Policy's focus on cocaine to the exclusion of other drugs is medically senseless given the voluminous testimony at trial that other drugs are equally harmful to the fetus. *See supra* pp. 18 (heroin, amphetamines, alcohol and tobacco equally harmful). Lastly, Respondents failed to present any empirical data on the effectiveness of the targeted testing program in achieving its goal. *Cf. Sitz*, 496 U.S. at 454-55 (noting importance of the empirical data on effectiveness present in that case). Indeed, the Respondents could not even document the Search

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this means for meeting it," *id.* at 660, "the character of the intrusion that is complained of," *id.* at 658, and "the nature of the privacy interest upon which the search here at issue intrudes," *id.* at 654.

[29] The court below contends that the urine drug screens were effective in "determin[ing] whether a woman had used cocaine during her pregnancy and thus whether her child required treatment for prenatal exposure to cocaine." *Ferguson*, 186 F.3d at 478 n.8. However, unlike in *Skinner* where the effectiveness of the drug tests was increased because employees who were tested when accidents occurred could not anticipate testing, *Chandler*, 520 U.S. at 315 (citing *Skinner*, 489 U.S. at 628), some patients who were aware of the Search Policy could avoid detection by avoiding drug use prior to a doctor's appointment. Moreover, there is no evidence that any child was given any special treatment for "prenatal exposure to cocaine."

Policy's "hit rate," the percentage of all women tested who tested positive for cocaine, because the hospital kept no records regarding the total number of women searched. McCabe Tr. 165:15-20; 177:6-17.

Second, contrary to the finding of the court below, *see Ferguson*, 186 F.3d at 479, nothing about the intrusiveness of the searches here was "minimal." The court below relies on the analysis in *Sitz* to evaluate the intrusiveness of the urine drug tests here, using the "'duration of the seizure and the intensity of the investigation'" to measure "the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained." *Id.* (quoting *Sitz*, 496 U.S. at 452). But this case does not involve such a "minimal" intrusion as does a quick glance into a car at a checkpoint on a highway. *See Sitz*, 496 U.S. at 452-53 (where signs warning of checkpoint stops allow person to avoid the stop, result is "appreciably less" "subjective intrusion" than even "roving patrols"). Rather, the patients' *bodies* were searched and confidential medical information was disclosed to law enforcement. Such a nonconsensual search of a person's body for evidence of crime is among the most intrusive searches imaginable. *See Union Pacific R.R.. v. Botsford*, 141 U.S. 250, 251 (1891); *cf. Chandler*, 520 U.S. at 313 (search relatively noninvasive where person search "control[led] further dissemination of the report").

Third, this Court has established that drug testing invades personal privacy in a fashion that brings the requirements of the Fourth Amendment to bear in full force. *See Chandler*, 520 U.S. at 313; *T.L.O.*, 469 U.S. at 337. As a result, it has approved suspicionless drug testing as "reasonable" only in a narrowly circumscribed set of circumstances. In *Skinner* and *Von Raab*, for example, the Court upheld carefully constrained programs that applied only to a limited number of government employees. By contrast, the program at issue here – if upheld – puts at risk the privacy of every pregnant woman in South Carolina. The broad holding of *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) (criminalizing

behavior by pregnant women -- whether otherwise legal or illegal -- which could potentially harm viable fetus), *cert. denied*, 528 U.S. 1145 (1998), coupled with the expansion of the special needs exception as interpreted by the court below, would authorize "special needs" searches of all pregnant women, or at least those seen smoking or drinking alcohol. In effect, it decrees that women, by becoming pregnant and seeking medical attention, place themselves in the same category as minor students in the custody of the public schools: a "custodial and tutelary" relationship "permitting a degree of supervision and control that could not be exercised over free adults." *Acton*, 515 U.S. at 655.

This result is radically at odds with the assumptions that have historically attended medical treatment of adults, in which the obligation of the medical profession is to guard the confidences of patients as a "sacred trust." Hippocratic Oath, quoted in Albert R. Jonsen, et al., *Clinical Ethics* 166 (4th ed. 1998). And it is irreconcilable with the teaching of this Court in *Planned Parenthood v. Casey*, 509 U.S. 833 (1992), that it is unconstitutional to treat pregnant women as dependents requiring the tutelage of the state. *Id.* at 895 (contrasting the "quite reasonable assumption that minors will benefit from consultation with their parents" with the constitutional impermissibility of adopting "parallel assumption about adult women").

Nor does the fact that the urine drug tests took place as part of a medical examination minimize the intrusiveness of the search.[30] The fact that the patients had no idea that their physicians were revealing what the patients believed to be

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[30] Both cases cited by the court of appeals, *see Ferguson*, 186 F.3d at 479, involved searches for purposes of employment and not for criminal investigation. *See Yin v. California*, 95 F.3d 864, 869 (9th Cir. 1996); *Dimeo v. Griffin*, 943 F.2d 679, 682 (7th Cir. 1991) (tests for noncriminal purposes); *id.* (distinguishing person who has frequent medical exams because of illness from person who has them because of a job).

confidential information[31] to law enforcement officers rather than simply using the information for medical purposes only increases the intrusive aspect of the search, *Chandler*, 520 U.S. at 318 (relative intrusiveness of a urine drug search is dependent on whether the individual has control over the results of the search), and, indeed, has had a permanent effect on the patients' relationships with medical providers. *See, e.g.*, Griffin Tr. 10:10-12 (JA 550); Singleton Tr. 73:2-13 (JA 1146-47); Ferguson Tr. 194:13-20 (JA 470); Nicholson Tr. 298:22-299:22 (JA 912-13). The mere fact that one does not know that one is being searched for criminal purposes does not lessen the impact of the invasion. For example, a search of one's home even when one was not there would not be considered minimal, even though searching the home when the occupants are not inside would drastically minimize "fear and surprise" on the part of those searched. *Cf. Ferguson*, 186 F.3d at 479; *see also id.* at 488 (Blake, J., dissenting).

CONCLUSION

For all the foregoing reasons, and in order to insure the continued vitality of the protections of the Fourth Amendment, the judgment of the court of appeals should be reversed.

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[31] MUSC's Patient Handbook, given to all patients, stated "medical records and all communication pertaining to your care are also treated as confidential." PX 105 (App. 75).

(13)

No. 99-936

Supreme Court, U.S.
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In the
Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the urine drug tests performed by the MUSC Medical Center for medical purposes in the course of treatment of their maternity patients were reasonable searches under the Fourth Amendment?

I. Whether the urine drug tests were reasonable under the special needs doctrine?

II. Whether the urine drug tests were consensual?

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STATEMENT OF THE CASE

I. Introduction

This case presents a Fourth Amendment challenge to urine drug screens performed on pregnant patients by the medical staff of the Medical University of South Carolina ["MUSC Medical Center"] pursuant to its policy for "Management of Drug Abuse During Pregnancy," ["the Policy"].

The Petitioners are ten women who sought treatment at the MUSC Medical Center during their pregnancies. As part of their medical treatment, they voluntarily provided urine samples for testing. Because these patients exhibited certain medical symptoms and criteria delineated in the Policy as indicative of cocaine use, their urine samples were tested for cocaine as well as other routine readings. When the tests established that these women had, in fact, been using cocaine during their pregnancies, the MUSC Medical Center referred each patient to substance abuse counseling due to the potential catastrophic medical complications to the fetus associated with maternal cocaine use. And, as required by state law, MUSC also reported the positive test results to law enforcement. Nine of the ten Petitioners were arrested, but none were prosecuted to trial. Rather, each of the women completed substance abuse treatment and the charges were dismissed.

In this Section 1983 claim, the Petitioners allege that the urine tests performed for medical purposes were warrantless searches which violated their Fourth Amendment rights. However, their claims have been rejected at the trial and appellate levels.

At trial, the jury found that the Petitioners consented to the tests. On appeal, the court held that the searches were reasonable under the special needs doctrine as enunciated by this Court, without reaching the question of the sufficiency of the evidence to support the jury's factual finding of consent. 186 F.3d 469 (4th Cir. 1999).

The law and the evidence fully support the findings of both the jury and the Court of Appeals that the urine drug screens were reasonable and thus not violative of the Fourth Amendment. Accordingly, judgment for the Respondents should be affirmed.

First, the Court of Appeals correctly found no Fourth Amendment violation under the special needs analysis based on evidence that the drug screen effectively met special needs beyond normal law enforcement goals and only minimally intruded on the Petitioners' privacy rights. More specifically, the medical expert testimony establishes that the urine drug screens were medically necessary for management of pregnant patients and their newborns. In addition, the documented evidence establishes a broader special need, namely -- an epidemic of cocaine use among its maternity patient base and the serious consequent public health problems and associated fiscal costs.

The clinical necessity for the drug screens, the health problems associated with maternal cocaine use, and the astronomical economic costs of caring for infants suffering from the effects of cocaine use by their mothers all created special needs beyond normal law enforcement goals. On the other hand, the urine testing policy was a minor intrusion on the Petitioners' privacy expectations inasmuch as their urine

was collected and tested in the regular course of medical treatment to which they had consented.

In balancing these factors, the Court of Appeals properly concluded that the MUSC Medical Center's special interest in protecting the health of its pregnant patients and their children significantly outweighed the minimal intrusion suffered by the Petitioners. In addition, the record contains sufficient evidence to sustain the jury's finding that the Petitioners consented to testing. Ultimately, under either analysis, the searches conducted were reasonable and did not violate the Fourth Amendment.

II. The Special Needs Beyond Normal Law Enforcement Goals

In this case, the MUSC Medical Center had not one, but two, special needs for identifying cocaine use among its maternity patients, both of which were beyond normal drug interdiction law enforcement goals. First and foremost, the medical staff had a direct clinical need to know if the women were using cocaine so that they could safely manage the pregnancy and provide necessary treatment. Beyond that clinical need, there was a broader medical and social need to stem the tide of an epidemic of maternal drug use with potentially devastating medical consequences and staggering social costs. Separately or collectively, these needs were important enough, if not absolutely compelling, to justify conducting drug tests on the urine samples voluntarily provided by the maternity patients.

A. The Clinical Need for Urine Drug Tests

The Respondents presented expert medical testimony that the use of cocaine can have serious consequences for both maternal and infant health. Effects on the mothers include: creased risk of premature delivery, premature separation of the placenta (abruptio placentae), spontaneous abortion, and death. [Opp. App.[1] 76] Cocaine use during pregnancy can affect infants in a number of ways, including an increased risk of sudden death syndrome, low birth weight, seizures, strokes, heart attacks, lack of bonding, emotional disorders, behavioral problems, and learning disabilities. [Opp. App. 75] Other medical problems suffered by these infants include: brain damage, prune belly syndrome, limb reduction defects, kidney damage, and damage to the genitourinary and reproductive systems. [J.A. 35-43; see also J.A. 303-312] In some cases, even a single dose of cocaine can kill the baby and the mother too. [J.A. 43]

The potential complications with the pregnancy and delivery make it clinically necessary for the obstetrical staff to know whether the mother has used cocaine. [J.A. 846, 847-48] The pediatric staff also need to know if a newborn has tested positive for drug use because their management of newborns can be affected by possible withdrawal or other manifestations of prenatal drug abuse. [J.A. 28-29, 847]

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[1] Transcript excerpts and exhibits can be found in three appendices filed with this Court – the Appendix ["App."] submitted by the Petitioners with their Petition for a Writ of Certiorari, the Appendix ["Opp. App."] submitted by the Respondents with their Brief in Opposition, and the Joint Appendix ["J.A."].

B. The Epidemic of Cocaine Use by Pregnant Women

In the late 1980s and early 1990s, research studies and medical literature were published documenting a national epidemic of prenatal illegal drug use and the staggering associated social and economic costs. [See J.A. 46, 488] One study indicated that each year in South Carolina, alone, approximately 15,000 babies suffered from prenatal exposure to illegal drugs. [Opp. App. 73] Of those, as many as 3,221 pregnant women, were using cocaine. [Opp. App. 74] In addition to the literature, the medical staff at the MUSC Medical Center began observing the local effect of that epidemic in their maternity patients. [J.A. 624-25, 847]

As noted above, the cocaine use by pregnant women seriously impacts the health of both mother and child. Prenatal cocaine use also produces staggering societal costs – increased need for neonatal intensive care at birth, increased needs for social services, foster care, and special education services, lower levels of achievement of educational and occupational goals, increased family stress, and reduced maternal bonding. [Opp. App. 76] The national costs to care for infants exposed to cocaine were estimated to rise as high as $3 billion annually. [J.A. 320] The medical costs for each infant can exceed $50,000 for the first year alone. Severe exposure can result in lifetime economic costs in excess of $ 1 million per infant. [Opp. App. 77]

III. Development of the Policy

A. The Initial Protocol

When the MUSC medical staff observed that the national epidemic had reached Charleston, they established a protocol in April 1989 to routinely evaluate their maternity patients

for possible cocaine use. Because of concerns about the degree of discretion in allowing individual physicians to order urine drug tests without any parameters, they established six criteria to control the discretion.

Any MUSC maternity patient presenting one or more of these criteria was automatically tested. If a patient tested positive, she was referred to the county substance abuse commission for counseling and treatment. However, this protocol proved to be ineffective when virtually none of the patients referred followed through with treatment. [J.A. 635-36, 641; Opp. App. 67]

B. The Search for an Effective Policy – The Multidisciplinary Task Force

Faced with a crisis and lack of success with the voluntary referral protocol, the Medical Center was still in need of an effective policy. During this time, Shirley Brown, the case manager for the obstetrics department learned that under state law, prenatal cocaine use constituted child abuse and neglect which the Medical Center was required to report to law enforcement. [J.A. 73]

Ms. Brown mentioned it to the Medical Center's General Counsel who in turn contacted the Charleston County Solicitor regarding the hospital's obligation under the state mandatory reporting statute. [J.A. 74, 337]

In an effort to address the complicated, multidimensional problem of maternal drug abuse, a multidisciplinary task force was formed in the fall of 1989, consisting of representatives from different agencies with varied interests in formulating a solution: [J.A. 338-39]

- The MUSC Medical Center obstetrical and neonatology staff had a vital interest in maternal and infant health;

- The Charleston County Solicitor's Office and the City of Charleston Police Department had an interest in protecting the infants and enforcing the laws governing illegal drug use and child abuse and neglect.[2]

- The Department of Social Services was charged with safeguarding the health and welfare for the infants; and

- The Charleston County Substance Abuse Commission was responsible for providing services for treatment of drug abuse.

Every person involved in that task force had one overriding objective – to develop an effective policy that would maximize maternal-fetal health and protect the children: "This was not supposed to be a punitive policy where we went out and punished people for doing something, even though we knew the activity was illegal. What we were trying to do is give those babies a chance to be born normal." [J.A. 506, lines 19-22]

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[2] Under South Carolina law, a viable fetus is a "child" under the abuse statutes and ingestion of cocaine during the third trimester of pregnancy constitutes criminal child neglect. *Whitner v. State of South Carolina*, 328 S.C. 1, 492 S.E.2d 777 (1995), *cert. denied*, 523 U.S. 1145 (1998). In addition, both agencies are designated to receive reports of suspected child abuse or neglect. S.C. Code Ann. § 20-5-510 (Law. Co-op. 1976 & Supp.) ("Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.")

Since the voluntary referral protocol had proven ineffective, the substance abuse representative on the task force proposed the "carrot and stick" method of coercive treatment as a last resort in dealing with the problem. He explained that most addicts are in such a state of denial that they will not voluntarily seek help unless there is some leverage to get their attention. [J.A. 738-40]

The Policy ultimately established provided a three-step process for identifying and dealing with pregnant patients that were using cocaine. The first two steps paralleled the prior protocol, but the addition of a third step – threat of law enforcement intervention – provided the necessary "leverage" to make the Policy effective.

IV. The Policy for Management of Drug Abuse During Pregnancy

The first step in the implementation of the Policy was the identification of pregnant patients suspected of drug abuse. The Policy contained a list of medical symptoms and indicia of drug abuse to identify which patients were to be screened by urine testing, to wit: 1. No prenatal care; 2. Late prenatal care after 24 weeks gestation; 3. Incomplete prenatal care; 4. Abruptio placentae; 5. Intrauterine fetal death; 6. Preterm labor of "no obvious cause"; 7. IUGR of "no obvious cause"; 8. Previously known drug or alcohol abuse; or 9. Unexplained congenital anomalies.[3] [App. 53-54.]

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[3] This list was not "medically senseless" as the Petitioners contend. Rather, the list was compiled by the Medical Center physicians from the medical literature available at the time, including articles written by one of the Petitioners' own expert witnesses, Dr. Ira Chasnoff. [J.A. 155, 286, 302, 313] Nor was the list targeted to discriminate against African-American pregnant women, to the contrary, the list was developed to remove any discretion for testing. [J.A. 847]

Like all MUSC patients, the maternity patients signed consent forms permitting the medical staff to conduct necessary testing – including urine tests.[4] In addition, all maternity patients were provided with educational information about the harmful effects of prenatal drug abuse and each patient also signed a statement acknowledging that she had received counseling.

If a patient tested positive, the second step included providing the patient with the same educational information and referring her to substance abuse counseling. If the patient failed to follow-up with substance abuse treatment or prenatal medical visits, or if she tested positive a second time, the Solicitor's office was notified and arrests were made.[5] This new third step proved to be the pivotal factor in making this an effective policy.

V. The Effectiveness of the Policy

Contrary to the Petitioners' broad assertions, the record establishes that the Policy was highly effective in educating women of the dangers and in discouraging cocaine use during their pregnancies.[6] After implementation of the

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[4] See forms, Opp. App. 60-65. The Petitioners claim that they did not give consent for their urine to be tested for drugs. The jury, however, found that they did consent. See discussion, infra.

[5] During a short period of time when the Policy was first initiated, a positive test was immediately reported and the patient was arrested. In early 1990, the Policy was amended to provide the patients a chance to obtain substance abuse treatment and avoid arrest. Even after arrest, the patient could avoid prosecution by completing a drug treatment program.

[6] The Policy has been discontinued since this litigation was initiated.

Policy, the medical staff experienced a decline in the number of positive drug screens and fewer medical complications previously attributed to cocaine abuse. [J.A. 681; Opp. App. 67-68] The substance abuse counselors reported that many of the patients referred by MUSC benefited from and successfully completed the treatment. [J.A. 64] Even many of the Petitioners themselves admitted that the Policy helped them successfully complete treatment and fight their addictions.

Of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested. Of those thirty, most were processed through pretrial intervention upon voluntary completion of substance abuse treatment. Only two – neither of whom is a Petitioner – failed to complete treatment and were prosecuted, but even they were ordered to complete treatment as a condition of probation rather than sentenced to an active jail term. [J.A. 1125-26]

Contrary to the Petitioners' supposition, there was no evidence that the Policy discouraged pregnant women from seeking treatment at the Medical Center. The MUSC data did not demonstrate any change in the utilization patterns of their prenatal clinics nor did they identify any increase in unbooked deliveries at other regional hospitals. [Opp. App. 67]

VI. Procedural History

The District Court submitted the Fourth Amendment claim to the jury on the question of whether the Petitioners consented to the urine drug tests, and judgment was entered for the Respondents on the jury's finding that the Petitioners

had consented to the searches. On appeal, the Court of Appeals found that the searches were reasonable under the special needs doctrine and affirmed the judgment for the Respondents on that ground without reaching the issue of the sufficiency of the evidence to support the jury's finding of consent to the urine tests.

In addition to the Fourth Amendment claim, the Petitioners asserted a number of federal and state law claims, each of which was properly rejected by the District Court, the trial jury, and the Court of Appeals. None of these additional claims have been preserved in this appeal.

The Petitioners asserted a constitutional challenge to the disclosure of medical information to law enforcement personnel as a violation of their Fourteenth Amendment right to privacy and a statutory claim for racial discrimination in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d - 2000d-6. The Petitioners also asserted a state-law tort claim against the MUSC medical staff for abuse of process.

The District Court granted judgment as a matter to law to the Respondents on the claims of abuse of process and right to privacy, and the Court of Appeals affirmed those rulings.

The jury found that the Respondents had not intentionally discriminated against the Petitioners based on their race, and the District Court ruled for the Respondents on the Title VI disparate impact claim. The Petitioners did not appeal the jury's finding of no intentional racial discrimination, and the Court of Appeals affirmed the disparate impact ruling.

VII. Clarification of the Question Presented

In light of the extraneous arguments and issues raised by the Petitioners and the petitioning *Amici Curiae*, Respondents feel it necessary at the outset to clarify what is and is not involved in this case.

The question presented is whether the urine drug screens conducted by the MUSC Medical Center were reasonable searches in compliance with Fourth Amendment jurisprudence. The Petitioners specifically challenge the Court of Appeals' ruling that the urine drug screens were reasonable under the special needs doctrine.

The Respondents maintain that the urine drug screens are clearly sustainable under the special needs doctrine as enunciated in this Court's precedent. However, Respondents also insist that the urine drug screens were reasonable searches because -- as the jury found -- the Petitioners voluntarily provided the urine samples and consented to the testing.

At this stage, there is no issue regarding the alleged "Unauthorized Disclosure of Medical Information" or breach of confidentiality by the medical staff. In the first instance, the Petitioners never asserted state common law claims for breach of physician-patient confidentiality.

While South Carolina courts have recognized an ethical duty of confidentiality and a correspondingly tort action for its breach, that duty is not absolute and disclosures compelled by law, such as those made by the MUSC Medical Staff are not actionable:

> [A]n actionable tort lies for a physician's breach of the duty to maintain the confidences of his or her patient **in the absence of a compelling public interest or other justification for the disclosure**." (Emphasis added).
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> ****
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> Patients have the right to be candid in their disclosures of private information to their physicians without fearing this information will be disseminated throughout the community. **However, this right is not absolute and must give way when disclosure is compelled by law or is in the best interest of the patient or others.** (Emphasis added.)

McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 439 (Ct. App. 1997); *see also S.C. State Board of Medical Examiners v. Hedgepath*, 325 S.C. 166, 480 S.E.2d 724, 726 (1997) ("A physician acts ethically when she maintains patient confidences, and when she provides confidential information to others as required by law or as authorized by the patient."); *see also* S.C. Code Ann. § 20-5-510 (Law. Co-op. 1976 & Supp.) (mandatory reporting of suspected child abuse and neglect).

Secondly, the District Court rejected the Petitioners' Fourteenth Amendment claim of violation of their right to privacy by unauthorized disclosure of medical information. On appeal, that ruling was affirmed by the Court of Appeals, citing *Whalen v. Roe*, 429 U.S. 589, 602 (1977), wherein this Court recognized that such statutes requiring disclosure of otherwise confidential medical information to state officials does not automatically amount to an impermissible invasion of privacy. The Petitioners did not seek review of that

ruling in its Petition for a Writ of Certiorari and the issue is not before the Court.

Likewise, the Petitioners did not appeal the jury's finding that the Respondents did not intentionally discriminate against them based on their race. Nor did the Petitioners seek review of the Court of Appeals' affirmance of the District Court's rejection of their disparate impact claims. Yet, the Petitioners' brief contains numerous affecting references to racial animus. Under these circumstances, their continued insinuations of racial discrimination are a blatant attempt to invoke the Court's ire or appeal to its sympathy.

The Petitioners also attempt to influence the Court by painting a grim picture of the Petitioners' arrests and conditions of pretrial detention. However, there is no issue on appeal regarding the circumstances of their arrests or of their confinements. And, the evidence presented at trial rebutted the Petitioners' allegations and demonstrated that the arrests were properly conducted under standard protocol and the conditions of confinement were not inhumane nor were their jailers deliberately indifferent to their medical needs. The Petitioners also complain about the grounds for arrest, but this case does not present any question regarding the constitutionality of the statutes under which they were arrested.[7]

The sole question is whether the urine drug screens were reasonable. And, based on the facts and law, the answer is

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[7] In this same vein, several of the *Amici Curiae* attack the imposition of criminal sanctions for maternal drug abuse. However, this case is not the appropriate venue for these groups to lobby their political and social policy agenda against criminalization of drug abuse by pregnant women.

yes. They were reasonable both under the special needs doctrine and as consensual searches.

SUMMARY OF ARGUMENT

The Basic Tenet of the Fourth Amendment -- Reasonableness

The Fourth Amendment prohibits ***unreasonable*** searches, but it does not require that all government searches be conducted pursuant to a warrant supported by probable cause.[8] In *New Jersey v. T.L.O,* this Court declared that the

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[8] The Fourth Amendment only imposes strictures on government action. The Respondents have maintained throughout the litigation that the Medical Center and its staff were not state actors in conducting clinically necessary drug screens. No case has extended the application of the Fourth Amendment to medical personnel in a public hospital based solely on their status as government employees. However, to the contrary, the Court of Appeals for the Ninth Circuit has ruled that not all healthcare providers in public hospitals are acting as agents of the police subject to the Fourth Amendment in obtaining and testing bodily fluids in every case. *United States v. Attson*, 900 F.2d 1427, 1434 (9th Cir.), *cert. denied*, 498 U.S. 961 (1990).

The Fourth Amendment only applies if law enforcement instigated, encouraged or participated in the "search" and the healthcare provider engaged in the search with the intent of assisting the police in their investigative efforts. If there is a "dual purpose" – both medical and investigative – the search retains its private character, and if the search is "private" at the inception, subsequent voluntary disclosure to the police does not implicate the Fourth Amendment.

Here, the medical purpose was undeniably a legitimate, independent motivation for performing the urine drug screens. Thus, at worst, there was arguably a "dual purpose." In this situation, the Fourth Amendment simply does not apply to the conduct of the MUSC Medical Center and its staff.

"[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search ... in certain limited circumstances neither is required.'" 469 U.S. 325, 340 (1985) (quoting *Almeida Sanchez v. United States*, 413 U.S. 266, 277 (1973)).

The Court stressed that the touchstone[9] of Fourth Amendment analysis is reasonableness and "what is reasonable depends on the context within which a search takes place:"

> The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

Id. at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967)).

The special needs doctrine comprises one such category of governmental searches which are reasonable notwithstanding the lack of a warrant or probable cause. Likewise, a search is reasonable if conducted pursuant to consent.

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[9] *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("the touchstone of the Fourth Amendment is reasonableness"; *see also Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.")

The Special Needs Doctrine

This Court has recognized that in certain cases, the government may have "special needs," beyond normal law enforcement goals, which make the usual warrant and probable-cause requirement impracticable

The special needs doctrine applies where there is an important or compelling special need founded on a concrete danger. Ultimately, the reasonableness of the search must be evaluated by balancing the public interest and the effectiveness of the search in advancing that interest against the individual privacy expectations and the degree of intrusion suffered by the individuals.

In upholding the MUSC Policy, the Court of Appeals correctly applied the principles and adhered to the parameters set by this Court. The evidence demonstrates that the drug screens were medically necessary for the treatment of the maternity patients and their children and that the epidemic of cocaine use by pregnant women and the attendant public health problems created important special needs beyond normal law enforcement goals. The evidence also establishes that the MUSC urine testing policy was effective in addressing these special needs and that the intrusion on the Petitioners' privacy expectations was minimal. Therefore, the Court of Appeals properly found that the searches were reasonable and judgment should be affirmed on that ground alone.

Consensual Searches

It is well settled that "a search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). A valid consent is one freely and voluntarily given. *Id.* This is a question of fact to be determined from the totality of all the circumstances. *Id.* at 227. There is ample evidence to support the jury's finding that the Petitioners freely and voluntarily provided the urine samples and consented to the drug screens. Therefore, the judgment should be affirmed on this alternate ground.

ARGUMENT

I. The urine drug screens were reasonable under the special needs doctrine.

A. The Special Needs Doctrine as Defined and Applied by the Supreme Court

The genesis of the special needs doctrine is found in the decision of *New Jersey v. T.L.O.*, in which the Court addressed the proper standard for assessing the legality of searches conducted by public school officials. In that case, a school principal discovered marijuana and other paraphernalia while searching a student's purse for cigarettes. When the principal turned the evidence over to the police and the state brought delinquency proceedings, the student moved to suppress the evidence, contending that the principal had violated her Fourth Amendment rights.

In upholding the search, the Court found that the warrant requirement was unsuited to the school environment and

concluded that the school officials did not need to obtain a warrant before searching students under their authority. The Court also concluded that the school officials did not need probable cause to believe a violation of law has occurred; but rather, that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. 469 U.S. at 341.

Justice Blackman concurred in the judgment of the Court, but wrote separately to emphasize the predicate justification for a warrantless search without probable cause: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351.

The Court adopted Justice Blackman's special needs analysis in *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), in holding that a state's operation of a probation system constitutes "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." [10] Pertinent to the Court's analysis was the fact that the probation officer who conducted the search was not a law enforcement officer; but rather, a government employee charged with supervising his client with the goal of assuring that the probation served as a period of genuine rehabilitation.

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[10] The Petitioners attempt to categorize this case and the other probation/parole cases separately from "special needs" cases on the grounds that probationers/parolees have lesser liberty rights. However, a fair reading of the Court's opinion shows that the decision was based squarely on the special needs doctrine.

The Court further refined the special needs doctrine in the companion cases of *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), which presented two different drug test policies for review under the special needs doctrine.

At issue in *Skinner* were railroad company policies that required blood, breath and urine testing of its employees under certain circumstances as mandated or permitted by regulations of the Federal Railroad Administration.[11] The Court found that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, ... 'likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. at 873-74).

In *Von Raab*, the Court upheld a policy of the United States Customs Service requiring a urinalysis test from all employee applicants for transfer or promotions to certain positions. In so holding, the Court succinctly articulated the following two-step analysis for application of the special needs doctrine: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U.S. at 665-66.

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[11] The regulations had been promulgated after the FRA gathered and evaluated evidence that on-the-job intoxication was a significant problem in the railroad industry and that alcohol and drug abuse by railroad employees posed a serious threat to safety.

In applying the special needs test, the Court found that the warrant requirement is as unsuited to the employment situation as it is to the school environment at issue in the *New Jersey v. T.L.O.* case and that imposing a warrant requirement "would only serve to divert valuable agency resources from the Service's primary mission." *Von Raab*, 489 U.S. at 666-67. The Court further found that "a warrant would provide little or nothing in the way of additional protection of personal privacy," *id.* at 667, because the circumstances under which the testing would be conducted and the permissible limits of the search were narrowly defined and the employees were well aware of the policy and its procedures. The Court also found that the compelling governmental interests justified the urine testing even in the absence of probable cause or any individualized suspicions of drug use.

In evaluating the public interest component of the balancing test, the Court noted that the smuggling of illicit narcotics has created a national crisis, and that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668. In light of such, the Court found that the Government has "a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. On the other side of the balancing scale, the Court found that the Customs employees "have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test." *Id.* at 672.

The Court ultimately held that the warrantless and suspicionless testing policy was reasonable because the Government's "compelling interest in safeguarding our

borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm." *Id.* at 677.

The Court revisited the application of the special needs doctrine to a drug testing policy in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). After observing a sharp increase in drug use among the student population and that athletes were the leaders of the school drug culture, the school district adopted a Student Athlete Drug Policy that authorized random drug testing of students who participated in school athletic programs. The express purpose of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650.

Relying on its previous decision in *New Jersey v. T.L.O.*, the Court again found that special needs exist in the public school context which make the warrant and probable-cause requirement impracticable. *Id.* at 653. Turning then to the evaluation of the privacy interests, the Court found that the students' legitimate expectations of privacy were diminished because of the supervisory role of the school and the voluntary participation in extracurricular athletic activities. On the other side of the equation, the Court found that, with the clear evidence of an immediate crisis of great proportions,[12] deterring drug use by schoolchildren is an important governmental concern and it was "self-evident"

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[12] The District Court had found that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion;" "[d]isciplinary actions had reached epidemic proportions;" and "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F.Supp. 1354, 1357 (Ore. 1992).

the problem was effectively addressed by preventing drug use by student athletes. Taking all these factors into consideration, the Court concluded that the policy was reasonable.

The only case in which the Supreme Court has struck down a drug testing policy under the special needs analysis is *Chandler v. Miller*, 520 U.S. 305 (1997). At issue there was a Georgia statute which required that all candidates for certain state offices submit to a urinalysis for illegal drug use and test negative as a precondition to qualifying for a place on the ballot.

In addressing the espoused justification of the statute under the special needs doctrine, the Court reviewed and summarized its decisions in *Skinner*, *Von Raab*, and *Vernonia*: "Our precedents establish that the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[13] *Id.* at 318. The Court found that the State of Georgia had failed to demonstrate any such special need. The key to the Court's decision appears to be a lack of evidence of a concrete danger that state officeholders in

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[13] All of the special needs cases involved warrantless searches, but they also involved a range of levels of suspicion. The policies in *Von Raab, Vernonia,* and *Chandler* all called for drug testing without any level of individualized suspicion. In contrast, the policy is *Skinner* was based on specific factors that provided the basis for some level of individualized suspicion. Likewise, in *New Jersey v. T.L.O.*, the search was predicated on individualized suspicion. The searches in this case were not suspicionless. The criteria for performing the test was medically-based, and provided ample suspicion to believe that the patients had been using cocaine.

Georgia have drug problems; rather, Georgia merely presented a "symbolic" need to project its commitment to the fight against drugs.

The urine drug screens conducted under the MUSC Policy meet the guiding principles and parameters of the special needs doctrine as enunciated by the Court in these cases. The important – if not compelling – special needs to treat and protect the maternity patients and their children were well documented. The Respondents also presented evidence that the Policy was effective and only minimally intrusive. Accordingly, judgment for the Respondents should be affirmed.

B. There were well-documented special needs to treat and protect pregnant patients and their children.

The first step in the special needs analysis is the determination of whether the search serves a special governmental need beyond normal law enforcement needs. Contrary to the Petitioners' assertions, the Policy was not merely a symbolic opposition to drug use as in *Chandler*. Rather, the MUSC Medical Center demonstrated well-documented special needs in treating and preventing cocaine use by pregnant women.

The incontrovertible evidence is that both the obstetrical and neonatal medical staff had a clinically-based need for the information in order to manage the pregnancy and treat the newborns.[14] The evidence also demonstrated that medical

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[14] See also Brief of *Amici Curiae* American Public Health Association, et al., pages 19-20, acknowledging clinical need to know of cocaine use for safe administration of anesthesia.

communities in the City of Charleston, other areas of the State of South Carolina, and across this Nation were experiencing serious maternal and neonatal health problems as a result of the epidemic of prenatal drug abuse.

The Petitioners, and several *Amici Curiae*, attempt to deny the existence of the problem and/or minimize its impact. However, the Petitioners' own expert, Dr. Ira Chasnoff,[15] testified before Congress in 1989 that there had been a rapid rise in reported instances of cocaine use during pregnancy and something needed to be done immediately about the problem. [J.A. 313-14]

Since the "special need" was uniquely medical in nature, it was appropriately addressed on the frontline by medical personnel that could best identify the at-risk patients and most effectively implement a policy to prevent or treat prenatal drug abuse. Notably, Dr. Chasnoff testified that it was "essential for medical professionals to develop protocols and criteria to test pregnant women for cocaine use during pregnancy." [J.A. 314, lines 5-8]

The words of Justice Powell in his concurrence in *New Jersey v. T.L.O.*, illustrate how special relationships -- such as that between healthcare providers and their patients -- can establish a basis for recognizing special needs exceptions to the warrant/probable cause requirement:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and

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[15] Despite his status as a witness in the case, Dr. Chasnoff has sought leave to appear as *amicus curiae* along with the American Public Health Association.

> arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

469 U.S. at 349. The Court in *Griffin v. Wisconsin* also found it pertinent that the primary role of a probation officer was not to investigate criminal activity, but to supervise his client with the goal of assuring that the probation served as a period of genuine rehabilitation.

By the same token, healthcare providers and patients do not stand in an adversarial relationship to each other. Instead, there is a commonality of interests between medical personnel and their patients. In maternity cases, the medical personnel and the patients share common interests in the health of both the mother and her child.

The medical staff did not conduct the drug screens for the purpose of investigating criminal activity. The purpose was to provide proper medical treatment to their patients. During pregnancy, so many factors effect the health of the mother, the course of the labor and delivery, and the health of the child, that the medical staff cannot adequately treat the pregnant patient or manage the pregnancy without such critical information as the patient's use of illegal drugs.

The opinion of the Court of Appeals cannot fairly be read, as the Petitioners assert, to establish any dangerous precedent that would permit law enforcement to engage in warrantless searches for just any and every health or safety reason. The

Court of Appeals adhered to this Court's decisions in *Vernonia* and *Chandler*, in stressing that the governmental need must be "compelling" and that "the hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one." 186 F.3d at 477. The Court of Appeals correctly found that: "In light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women." 186 F.3d at 478.

The Court has recognized in *Von Raab* that "drug abuse is one of the most serious problems confronting our society today." 489 U.S. at 674. However, the Court has drawn parameters for how far that problem will justify warrantless searches. In *Vernonia,* the special need for the school's random drug testing policy was justified by documented evidence of a sharp rise in drug use by student athletes and attendant injuries and disciplinary problems. On the other hand, in *Chandler v. Miller*, the State of Georgia could not produce any evidence of drug problems among state officeholders to establish a special need sufficient to justify its mandatory drug testing for political candidates.

The Court of Appeals decision is not a radical departure from the parameters set by the Court. To the contrary, it squarely fits within those parameters as a clear case of "special needs" sufficient to sustain the MUSC Policy. In comparing the range of documentation and substantiation of the special needs, this case clearly aligns most closely with *Vernonia* where the school district presented solid evidence to document the existence and extent of the problem of drug abuse by its students and the harmful consequences to school discipline and the students' health. Unlike in *Chandler*, the special need to protect pregnant women and their children

from prenatal cocaine abuse is not merely symbolic, but fully demonstrated by the evidence of an epidemic causing serious public health problems.

The Petitioners complain about the collaboration with law enforcement and argue that any special needs search must be totally divorced from any law enforcement activity. However, this argument directly conflicts with the Court's repeated references to "'special needs' **beyond normal law enforcement**." *Griffin v. Wisconsin*, 483 U.S. at 873-74 (emphasis added.)

Notwithstanding that the references to the restricted use of the drug test results in *Von Rabb, Skinner,* and *Acton*, the Court has never said that the results of a special needs search cannot be turned over to law enforcement. Notably, in the case of *New Jersey v. T.L.O.* which came before the Court on appeal of the juvenile criminal case, the Court found no reason to invalidate the search because the fruits were ultimately turned over to the police.

Here, the MUSC Medical Center had a primary, clinical need to identify cocaine use which was wholly beyond normal law enforcement goals. However, under state law, prenatal illegal drug use constitutes child abuse. Thus, once in possession of evidence of cocaine use, state law mandated that the MUSC medical staff report such cases to law enforcement or the Department of Social Services. Nothing in the prior decisions of this Court intimates that disclosure of such information under mandatory reporting statutes would invalidate an otherwise legitimate special needs search.

Further, this case does not present any evidence, direct or inferential, that the MUSC Medical Center's goal of

protecting the health of its maternity patients and their children was merely a pretext to prosecute cocaine addicts. The record establishes that there was a very real medical epidemic and the Medical Center's only goal was to manage the pregnancies of its maternity patients and prevent maternal and infant injuries arising from prenatal cocaine abuse.[16] The Medical Center had already attempted a protocol that proved ineffective and it was the substance abuse counselors that proposed the coercive element necessary to make the Policy work. The purpose of the urine drug tests was not to prosecute the drug laws; rather, the threat of prosecution was but a tool in implementing a Policy that would prove to be effective in discouraging their patients from prenatal cocaine abuse.

C. The Policy was Effective.

The second step is an assessment of the effectiveness of the policy in meeting the identified, important special needs. As the Court of Appeals found, the urine drug screens were effective in identifying cocaine use which met the clinical needs.[17] In addition, a decline in the number of positive drug screens and fewer associated medical complications demonstrated that the Policy effectively met the broader need to discourage prenatal cocaine use.

Evidence established that the Policy had a ninety percent success rate: 223 of the 253 pregnant women who tested positive the first time, completed substance abuse treatment

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[16] See J.A. 34, 68, 71, 452, 598, 929, 974, 1084.

[17] The Court of Appeals found "little doubt that testing the urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use...." 186 F.3d at 478.

and did not test positive a second time. Of the thirty who did test positive a second time and were arrested, twenty-eight successfully completed substance abuse treatment through the pretrial intervention program. Most telling is the testimony of many of these Petitioners that they had finally beaten their cocaine habits. [J.A. 582 Griffin, 787 Knight, 1037 Powell, 479 Ferguson, 595 Hale, 745-46 Joseph, 971 Pear].

Despite this evidence, the Petitioners claim that the Policy was ineffective in promoting fetal health because of what they allege as its "faulty design" in focusing only on cocaine use and by employing a punitive approach to treatment.

The Petitioners assert that the Policy was "medically senseless" because it did not address other drugs that also pose risks of harm to the infant. Such assertion is disingenuous in light of the fact that their own expert testified that at the time, cocaine use had been identified as a particularly critical problem – both in terms of its epidemic scope and devastating consequences.[18] Similarly, their contention that the punitive approach drives women away from prenatal care and treatment program disregards the record evidence to the contrary.

Further, the Respondents' decision to focus on cocaine use was a rational discretionary policy decision not subject to second-guessing. This Court has recognized that policy-makers are not constitutionally obligated to tackle complex

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[18] The record evidence stands in stark contrast to the assertions of certain *Amici Curiae* that subsequent studies contain no empirical data of a unique danger associated with prenatal cocaine use. [Brief of American Public Health Association, p. 27.] Further, the MUSC medical staff's decisions must be evaluated in light of the then available evidence, including the expert opinions of those such as Dr. Chasnoff.

problems with full-scope, comprehensive programs. *Bowen v. Owens*, 476 U.S. 340, 347 (1986). Rather, they may take a step-by-step approach and address that phase of the problem which they adjudge most acute at the time. *Id.*; *see also Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies .... [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.")

Likewise, the decision to employ a punitive – "carrot and stick" -- approach to discouraging cocaine use was rationally based on consultation with substance abuse counselors. And, although the evidence rebuts the claim that this discouraged some pregnant women from seeking treatment, any such indirect impact does not invalidate the policy. *See Whalen v. Roe*, 429 U.S. 589, 602-603 (1977) (finding that while patients may avoid or postpone medical attention because of concerns about disclosure of information that might be ascertained during treatment, it did not render the policy unconstitutional).

There is rarely, if ever, a single perfect solution to a complex problem such as prenatal drug abuse. This Court has "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. at 597. This Court has also stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma*, 348 U.S. at 487.

It is for the policymakers to balance the benefits and risks of proposed solutions, and their decisions are reviewable by the courts only for arbitrariness and capriciousness or invidious discrimination. Experts in a given field[19] may disagree over techniques to be employed to deal with a serious danger, but "for purposes of the Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials" – not the courts. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990).

The Policy was the product of an orderly and studied attempt to deal with a specific problem of epidemic proportions. There was nothing unreasonable or discriminatory in their identification of cocaine as a particularly critical problem or their decision to focus on that illegal drug to the exclusion of other illegal (or legal) substances which pose risks to maternal and fetal health.

D. The Intrusion was Minimal.

The next step in the special needs analysis is consideration of the nature of the Petitioners' privacy expectations and the level of intrusion. The Court of Appeals correctly held that

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[19] Accordingly, the prominence or number of those public interest groups, such as listed in the Brief of *Amicus* Curiae American Public Health Association, which are opposed to the use of the punitive approach does not conclusively establish that the Policy was ineffective. Here, the punitive approach was proffered by the local substance abuse counselors after voluntary treatment options proved ineffective and it did, in fact, prove to be effective at MUSC – regardless of what studies might have proven elsewhere.

testing the Petitioners' urine for cocaine was a minimal intrusion on their reduced privacy expectations.

First, the Petitioners voluntarily sought treatment at the MUSC Medical Center and they consented to the collection and testing of the urine.[20] Further, as this Court has noted, privacy concerns are minimal when the urine samples for testing are collected in a medical environment.

In *Skinner v. Railway Labor,* the Court noted that urine testing does not invade the body and when collected in a medical environment, the procedure is not a significant invasion of personal privacy. 489 U.S. at 626. Likewise, in *Chandler v. Miller,* the Court noted the minimal intrusion when the tests are conducted in physicians' offices. *Cf. Schmerber v. California*, 384 U.S. 757, 771 (1966) (holding that the intrusion occasioned by a blood test is not significant since such tests are routine medical procedures).

The Petitioners claim that they had a ***heightened*** expectation of privacy with respect to disclosure of their confidential medical information[21], citing the Hippocratic Oath and *Whalen v. Roe*, 429 U.S. 589, 599 (1977). However, as discussed above,[22] physician-patient confidentiality does not preclude disclosures compelled by law. Moreover, in *Whalen v. Roe*, the Court discussed the limitations on a patient's expectations of privacy of medical

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[20] See discussion of consent, infra.

[21] Notably, the Petitioners voluntarily consented to the disclosure of their medical information to other sources, thereby reducing their expectations of absolute confidentiality.

[22] See discussion of Clarification of Issues, supra.

information and specifically noted statutory reporting requirements relating to child abuse. 429 U.S. at 602 n.29.

E. The Special Needs Outweighed the Minimal Intrusion.

The final step is balancing all these factors. In *Skinner*, the Court balanced the limited discretion exercised by the employers in determining which employees could be tested under the railroad policies, the "surpassing" interests in train safety, and the diminished expectation of privacy held by railway employees that participate in such a heavy regulated industry. Similarly, in *Von Raab*, the Court balanced the government's compelling interest in preventing the promotion of drug users that might endanger the border security or public safety with the diminished expectation of privacy interests of the applicants for such security-sensitive positions. In *Vernonia*, the Court took into account the reduced expectation of privacy of school children, the relative insignificance of the intrusion, the important nature of the school's responsibilities and quasi-guardian relationship with its students, the documented immediacy of the drug problems; and the effectiveness of the policy.

Here, there is ample evidence of the clinical need to identify cocaine use and of the existence and magnitude of the epidemic of prenatal use of cocaine at that time. There is also sufficient evidence of the effectiveness of the urine testing in identifying and treating maternal cocaine use.

Finally, the degree of intrusion was minimal in light of the fact that the collection and testing of urine was a normal, routine and expected part of the medical treatment to which the Petitioners had consented and the urine tests were

performed based on a non-discretionary application of the criteria delineated in the Policy.[23]

The Court of Appeals properly evaluated these factors and correctly concluded that the special needs outweighed the minimal intrusion. That decision comports with this Court's precedent and is consistent with a number of the circuit court decisions upholding random and mandatory drug testing policies in a number of industries ranging from schools to nuclear power plants to horse racing. Those few decisions where the circuits have struck down drug testing policies are also consistent with this Court's precedent and distinguishable from the case here.[24]

The appropriate application of the special needs doctrine in this case perhaps is best illustrated by comparison of decisions arising out of child abuse and neglect investigations. *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993); and *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993).

In *Franz*, a police officer investigating a case of possible sexual abuse conducted a warrantless inspection of the child's vaginal area and forcibly removed the child for medical examination. The police officer argued that the "societal imperative to protect children" justified his actions under the special needs doctrine. While expressing a "deep concern for the safety and well-being of young children," the

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[23] The Petitioners argue that the Fourth Circuit improperly applied the balancing test enunciated in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). However, the Court itself relied upon *Sitz* in its opinion in *Vernonia School District v. Acton*, 515 U.S. at 654.

[24] See discussion in Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, pages 23-25.

court rejected the special needs argument because the primary focus of the police officer's investigation was the potential criminal culpability of the parents:

> What the district court perceived, and what cannot be overlooked, is that defendant's focus was not so much on the child as it was on the potential criminal culpability of her parents. That focus is the hallmark of a criminal investigation. In contrast, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not part of the social worker's cachet.

997 F.2d at 791; *see also Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (possibility of criminal prosecution was contingency of only secondary importance to social worker).

In contrast, the Court of Appeals for the Fourth Circuit upheld a medical examination by a public health nurse that accompanied a social worker in the course of a child neglect investigation, finding that the state's interest in examining the neglected children outweighed any attenuated privacy interest.

These two cases illustrate two important distinguishing factors: (1) the official role of the person or entity conducting the search; and (2) the primary focus of the search. The urine drug screens in this case were conducted by medical personnel, not law enforcement officers, and the primary focus of the search was to manage the pregnancy and protect the health of both the mother and the infant. Similarly, a social worker's principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker's activity, that prospect is not part of the

social worker's cachet. Likewise, here, the principal focus of the MUSC medical staff was the welfare of the pregnant patient and her child, and while a criminal prosecution might emanate from the activity, that prospect is not part of the medical staff's "cachet."

One final consideration to be factored in the balancing is the impracticability of imposing, under such circumstances, a warrant requirement. Contrary to the Petitioners' contentions, it would be impracticable, if not impossible, to require the MUSC medical staff to seek a warrant for a urine drug test every time that a maternity patient presents with symptoms and indicia of cocaine use. As this Court recognized in *Skinner*, drugs are eliminated from the body at a constant rate, and samples must be obtained as soon as possible and the delay to procure a warrant might result in the destruction of valuable evidence. 489 U.S. at 623.

To paraphrase the Court's ultimate conclusion in *Skinner* -- in light of the limited discretion exercised by the medical staff under the Policy, the surpassing clinical needs and broader public health interest served by the urine drug tests for prenatal cocaine use, and the diminished expectation of privacy that attaches to urine samples voluntarily provided for routine medical treatment and the information gathered therefrom pertaining to illegal drug use and consequent child abuse, it is reasonable to conduct such tests in the absence of a warrant.

II. The Petitioners consented to the searches.

A valid consent does not have to be "knowing" and "intelligent" in the same sense as a valid confession.[25] *Schneckloth v. Bustamonte*, 412 U.S. at 241 ("Nothing either in the purposes behind the requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.") Rather, it only has to be freely and voluntarily given. Here, the drug screens were constitutionally valid because, as the jury found, the Petitioners freely and voluntarily consented to the urine testing.

First, unlike other special needs cases, the Petitioners were not compelled to provide urine samples. They freely and voluntarily sought medical treatment at MUSC and provided the urine samples as a routine part of that treatment.[26]

Second, each of the Petitioners signed a consent to treatment form which authorized the MUSC medical staff to conduct all necessary tests of those urine samples – including drug tests: "I further consent to the testing for drugs if deemed advisable by or necessary in the professional judgment of the physician or surgeon, or physician or

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[25] The District Court did, however, charge the jury that "before there can be consent, there must be knowledge. The person giving the consent must have knowledge of what she is doing." [J.A. 1318, lines 16-19]

[26] It is notable that apart from the positive urine drug screens, several of the Petitioners actually admitted to the medical staff that they were using cocaine during their pregnancies. [J.A. 456 (Ferguson), 591 (Hale), 753 (Joseph); 1212 (Williams)]

surgeon acting under their instructions." [App. 64; Joint Exhibit No. 13 – Consent for Treatment.[27] See also App. 62, Joint Exhibit No. 12 – "I further consent to the testing of drugs if deemed advisable by my physician."]

The District Court charged the jury that those written consents were "sufficient to cover the taking of the a urine sample and the testing thereof ..." [J.A. 1318, lines 1-2.] However, the District Court also charged the jury that the written consents were not sufficient to cover the sharing of that information with law enforcement officials. [J.A. 1318, 5-7.] Instead, the District Court charged, the Respondents were required to show that the Petitioners consented to MUSC disclosing the information to law enforcement.[28] [J.A. 1319, lines 16-22.]

There is no precedent in this Court's Fourth Amendment search and seizure jurisprudence which imposes any such requirement that the searching agency inform the consenting party that the results of the search will be turned over to law enforcement. In fact, this Court's opinions would indicate the contrary.

In *Schneckloth v. Bustamonte,* the Court held that a valid consent does not depend on knowledge of the right to refuse consent, although it may be one of the factors to be considered along with all the other circumstances. 412 U.S. at 222, 248-49 ("Voluntariness is a question of fact to be determined from all the circumstances, and while the

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[27] See Defendants' Exhibits 1 – Williams, 1A – Ferguson, 13A – Griffin, 51A – Knight, 67A – Nicholson, 81B – Pear, 95A – Powell, 155 – Singleton, 174 – Hale, and 175 – Joseph.

[28] The Petitioners also consented to disclosure of their medical information to certain sources.

subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."). And, more recently, in *Ohio v. Robinette*, 519 U.S. 33, 40 (1996), the Court rejected a per se rule that would "require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."

Notwithstanding the District Court's questionable charge, the evidence presented to the jury supports the finding that these Petitioners did freely and voluntarily consent to the urine drug screens with sufficient knowledge that any positive results of those tests could be turned over to law enforcement officials.

Under the Policy all patients were given a letter at the time of their initial visit which explained the urine drug testing policy and which would clearly put them on notice that law enforcement would be contacted if they tested positive and did not get treatment. [App. 54, 56-57; J.A. 165, 174, 1269]

Some of the Petitioners admitted seeing or hearing the public service announcements about the Policy which would have put them on notice that their urine would be tested for cocaine and positive test results would be disclosed to law enforcement. [J.A. 345, 477-78, 753] And, in fact, several of the Petitioners admitted that they were aware of the Policy at the time they sought treatment at MUSC and provided urine specimens for testing. [J.A. 478, 754-5, 969-70]

The jury's factual finding that the Petitioners consented to the drug testing is fully supported by the evidence adduced during the six-week trial and stands as an independent

ground for sustaining the judgment that there was no Fourth Amendment violation.

CONCLUSION

For all the foregoing reasons, the urine drug tests were not unreasonable searches violative of the Fourth Amendment. The Fourth Amendment does not apply to urine drug tests conducted for medical reasons, but, in any event, they were reasonable under either the special needs analysis applied by the Court of Appeals or the jury's factual finding that the Petitioners consented to the tests. Accordingly, judgment for the Respondents should be affirmed.

Respectfully submitted,

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CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents' attempt to bring the Search Policy within the scope of the limited special needs exception to the Fourth Amendment fails for three reasons. First, their claim that the Policy served needs beyond the normal needs of law enforcement is belied by their own admissions about the essential role law enforcement played. Second, Respondents understate the limits placed on law enforcement involvement in special needs cases and mischaracterize the evidence concerning the impact of the Policy. Finally, Respondents attempt to evade entirely the issue on which this Court granted certiorari by raising the argument that the searches here were consensual even though no evidence suggests that the Petitioners ("patients") granted consent to an investigatory search.

I. Respondents' Own Characterization of the Search Policy Highlights That Law Enforcement Was its Primary Purpose.

Respondents describe the Search Policy as "provid[ing] a three-step process for identifying and dealing with" pregnant women who use cocaine: testing; referral to drug treatment; and the use of the threat of arrest and criminal prosecution to "leverage" women into treatment. Brief of Respondents at 8 ("Resp. Br.").[1] Because, as Respondents note, "the first two steps paralleled the prior protocol," it was "the addition of [the] third step," the law enforcement component, that turned the "prior protocol" into the Search Policy. *Id.*

In fact, the threat of law enforcement intervention was not only what transformed the medical protocol into the Policy, but, as Respondents admit, it was the essential and indispensable step in the Policy; it was the step that, in Respondents' words, "ma[d]e the Policy effective." *Id.*

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[1] Of course, as Respondents now admit, at the beginning of the Policy, there were only two steps: testing and arrest. Resp. Br. at 9 n.5. Women who tested positive, including four Petitioners, were not referred for treatment or given any opportunity to obtain treatment before their arrest. *See* Brief for Petitioners at 6 ("Pet. Br.").

Despite this admission, Respondents also suggest that reporting to the police was but an unintended consequence of the physicians' actions. *See* Resp. Br. at 28. Surely, law enforcement involvement cannot both be the key to the Policy and simply an unintended byproduct of it.[2]

Regardless of Respondents' contradictory assertions, the level of law enforcement involvement demonstrates that the intended purpose of the Policy was to fulfill the traditional functions of the police. Law enforcement helped create the Policy, drafted the central documents regarding how it would operate, and coordinated regularly with the hospital in order to arrest Petitioners. *See* Pet. Br. at 2-5. The operational guidelines written on Police Department letterhead in early October 1989, described in detail how patients with positive search results would be arrested by the police. *See* JX 1 (App. 49-52).[3] The guidelines instructed hospital personnel when to file a criminal complaint; described a positive drug search as "probable cause to arrest"; advised detectives to obtain "copies of all medical records pertinent to the criminal charges"; listed the criminal charges to be filed against the

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[2] Respondents go so far as to claim that substance abuse counselors initially "proposed" using the "leverage" of arrest to force women into treatment. Resp. Br. at 8. This is simply untrue. The idea to involve law enforcement came from Nurse Brown, the Solicitor and the police department. Pet. Br. at 2-4 (citing Brown Tr. 11/21/96 4:10-5:17 (JA 73-75); PX 28 at 1 (App. 72)). Respondents provide no citation for their assertion. *See* Resp. Br. at 8, 29. Their only citation referring to the substance abuse counselors is to testimony from the administrator of the county drug treatment program, stating that addicts rarely seek treatment voluntarily. *See* Resp. Br. at 8 (citing JA 738-40). A full reading of the administrator's testimony reveals that the Policy was proposed to him, and he merely indicated that he would cooperate. Johnson Tr. at 719-20 (JA 738).

[3] Citations to exhibits are to the Plaintiff Exhibit ("PX -"), Defendant Exhibit ("DX –"), or Joint Exhibit number ("JX -"); citations to testimony are to the witness's name and page of the trial transcript. When applicable, citations also indicate the page of the Joint Appendix ("JA") or Appendix to the Petition for Certiorari ("App.") on which the cited transcript or exhibit appears.

patients; and referred to the patients as "suspects." *See id.* at 50-51.

Perhaps the most telling indication of the Policy's law enforcement purpose is the attention paid by hospital staff and law enforcement personnel to treating the urine collected from the patients as evidence of a crime. Thus, documents instructed hospital personnel to maintain a "chain of custody" in obtaining urine samples. *See* JX 2 at 2 (App. 54). The police department sent the director of the police crime lab to the hospital to provide training regarding the proper collection of urine. *See* Roberts Tr. 17:16-18:15 (JA 1052-53). As a police representative explained, "I invited our lab director because I was cognizant of the fact that any arrests could ultimately end up in a trial. And I was concerned that we at least consider that as a factor when we went through this process." Roberts Tr. 18:5-9 (JA 1053). These quintessentially law enforcement aspects of the Policy served law enforcement needs only.

Moreover, as initially implemented and applied to four Petitioners, the policy served no purpose other than to arrest alleged law-breakers. *See* Pet. Br. at 6. Petitioners Griffin, Singleton, Knight and Powell were all arrested without any offer of treatment after a single positive drug search under the Policy.[4] *See* Griffin Tr. 6:4-25, 8:1-19 (JA 546-48); Singleton Tr. 52:8-53:7, 60:1-62:5 (JA 1132-36); Knight Tr. 121-125 (JA 773-78); Powell Tr. 149-152 (JA 1011-15). Indeed, Solicitor Condon himself acknowledged that these Petitioners were subjected to the "normal criminal [] process." Condon Tr. 10:25-11:19, 78:1-15 (JA 342-43, 382-83). After Respondents altered the Policy in the winter of 1990 to use threatened arrest to "leverage" patients into mandatory treatment, they relied on a standard criminal justice model in an attempt to change the patients' behavior

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[4] Thus, Respondents' repeated assertions that all women who were arrested had "failed to complete treatment or tested positive a second time," Resp. Br. at 10, 30, are incorrect.

and therefore still were serving regular law enforcement needs.[5] *See infra* at 5.

Respondents attempt to downplay the Policy's dominant law enforcement purpose by arguing that the Policy served two other needs -- the "clinical need for urine drug tests" and the need to stop what they describe as an "epidemic" of drug use by pregnant women. *See* Resp. Br. at 4-5. Neither of these asserted needs was served by the Policy, and the second claimed "need," stopping drug use, is not "special," but rather is a normal law enforcement need.

First, the Policy was not created to help physicians manage individual patients' pregnancies. Simple drug tests, without any law enforcement involvement or chain of custody procedures, accomplish that goal. Further, the Policy's testing component duplicated efforts already undertaken before the Policy began. *See, e.g.*, Horger Tr. 9:5-10:4 (JA 630-31); Newman Tr. 211:17-212:8 (JA 846-47); PX 1 (JA 1282). Even worse, the Policy actually compromised the care pregnant women and their newborns received. As established at trial, and discussed extensively by *amici*, law enforcement involvement undermines the goal of safely managing the treatment of pregnant patients and their newborns. *See, e.g.*, Chasnoff Tr. 23:22-24:11 (JA 293-94); Jessup Tr. 39:15-21 (JA 700-01); *Brief Amicus Curiae of the American Medical Association* at 6-10. Thus, the need to manage patients' pregnancies appropriately cannot justify the detailed protocols created by Respondents for arresting women with positive search results.[6]

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[5] In fact, women referred for treatment were tracked by law enforcement authorities to determine whether they were complying with treatment requirements. Brown Tr. 11/21/96 85:13-20, 11/22/96 206:15-20 (JA 134, 178); Condon Tr. 20:16-24, 97:7-17 (JA 354, 391).

[6] Respondents' claim that the Policy was necessary to manage women's pregnancies rings particularly false given that several of the patients were searched *after* they gave birth, when management of their pregnancies could no longer be a reason for the search. *See, e.g.*, PX 278, CCP-D-

Second, putting aside the issue of whether there was any evidence, other than anecdotal, of an increase in cocaine use at the hospital,[7] the need to stop drug use is a normal law enforcement need that was served here with normal law enforcement tools. *See* White House, Office of National Drug Control Policy, *National Drug Control Strategy Report* 1-3 (1992) (summarizing 1989 report's finding that "user accountability" through law enforcement was the best approach for addressing drug use). Arguing that the need to stop cocaine use by pregnant women is not a law enforcement need because of the public health problems caused by such use, as do Respondents, Resp. Br. at 5, is like arguing that the need to stop the sale of drugs on the street is not a law enforcement need because of the public health problems caused by the drug trade. Neither argument holds water.[8] *See Mincey v. Arizona*, 434 U.S. 385, 394 (1978).

Moreover, as explained in Petitioners' initial brief, *see* Pet. Br. at 30, using threatened arrest and prosecution to "leverage" individuals into treatment is a normal tool of law enforcement. Solicitor Condon testified that his office routinely used the "carrot and stick" approach, arrest followed by diversion into mandatory treatment, in an

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451, CCP-D-452 (Knight); PX 281, CCP-D-417, CCP-D-418 (Powell); PX 282, CCP-D-704, CCP-D-705 (Singleton).

[7] Respondents repeatedly refer to an "epidemic" of cocaine use at MUSC. *See, e.g.*, Resp. Br. at 5, 29. But the record provides no support for the conclusion that the hospital was experiencing an "epidemic." Instead, it demonstrates that Respondents possessed only anecdotal evidence that the number of pregnant hospital patients using cocaine was increasing. *See* Horger Tr. 4-8 (JA 624-25); Brown Tr. 79:24-80:7 (JA 263-64) (the only information on the number of women testing positive prior to Policy was an informal count maintained by Nurse Brown on an index card). Also, the South Carolina study repeatedly cited by Respondents as providing the impetus for the Policy was completed only in 1991 and thus could not have been relied upon when the Policy was drafted in 1989. DX 133 (Op. App. 73). Notably, the study showed that alcohol, not cocaine, was the drug whose use reached epidemic proportions. *Id.*

[8] Also, as described *infra* at 11-12, the Policy failed to serve this claimed need of stopping drug use.

attempt to rehabilitate non-violent first-time offenders. *See* Condon Tr. 23:4-24:4 (JA 357-58) (stating that the "carrot and stick" approach was part of the "norms and standards of the Solicitor's office" and was used for "general drug cases, simple possession, small property offenses"); *id.* at 14:4-7 (JA 347). Because Respondents relied on arrest and its threat as a "stick" to stop crime, the Policy they created operated within the traditional confines of the criminal justice system.

II. Respondents Understate the Limitations of the Special Needs Exception.

A. Respondents' Attempt to Hide Behind *New Jersey v. T.L.O.*'s Tolerance of Incidental Law Enforcement Involvement Fails.

Respondents seek to avoid the weight of this Court's precedent limiting the application of the special needs exception to a non-law enforcement context. Instead, they argue that the searches in this case are reasonable under this Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Resp. Br. at 24, 28. This argument fails for three reasons.

First, the law enforcement involvement in *T.L.O.*, unlike here, was merely incidental to the search at issue. In *T.L.O.*, this Court upheld a warrantless search of a student's purse by a school official. *See T.L.O.*, 469 U.S. at 347-48. The search was conducted because the school official suspected that the student had been smoking in the lavatory and had therefore violated a school rule. *See id.* at 328. When the official found marijuana in the student's purse, he turned over the results of the search to the police. Respondents argue that the facts of this case resemble those of *T.L.O.* and that, once the physicians had evidence of child abuse, it was appropriate for them to report the information to the police under the state reporting statute.[9] Resp. Br. at 28.

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[9] Respondents go so far as to characterize the Search Policy as a protocol required by South Carolina's mandatory child abuse reporting statute,

But the school official who searched the student's purse in *T.L.O.*, in contrast to the hospital personnel who searched the patients' urine, was not involved in a scheme concocted in conjunction with law enforcement authorities to enforce the criminal law. *See T.L.O.*, 469 U.S. at 341 n.7. In fact, this Court stressed that its decision in *T.L.O.* addressed "only searches carried out by school authorities acting alone and on their own authority" rather than "in conjunction with or at the behest of law enforcement agencies." *Id.* The Search Policy

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S.C. Code § 20-7-510. *See* Resp. Br. at 28. This is wrong for two reasons. First, implementation of the child abuse reporting statute must nonetheless be conducted pursuant to the warrant and probable cause requirements of the Fourth and Fourteenth Amendments. *See, e.g.*, *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (removal of child from school under New York's child abuse emergency removal statute violated Fourth Amendment); *see also* U.S. Const. art. VI, clause 2. Thus, Respondents' obligations under the child abuse reporting statute do not change the analysis under the special needs exception.

Second, Respondents can fully comply with the reporting statute without violating their patients' Fourth Amendment rights. The reporting statute does not require medical personnel to conduct investigatory searches of patients suspected of child abuse and to turn over incriminating confidential medical records to police without warrant or subpoena. Instead, the statute requires, and the Constitution allows, a reportof suspicion of child abuse to be made "orally" to either DSS or the police. S.C. Code Ann. § 20-7-510(D). Where such oral reports are made, the state is still put to the test of substantiating the accusation by conducting an investigation that may require it to obtain a search warrant. Here, though, Respondents circumvented the need for law enforcement to prove its case. Instead, hospital physicians gathered the evidence necessary for arrest, maintained it through a chain of custody, and furnished it directly to the police in the form of the patient's medical records.

Moreover, the hospital could have decided to report the patients to DSS, as the statute allows and as they were doing for all other drugs that posed risk of harm to the fetus. *See, e.g.*, Brown Tr. 159:8-14 (JA 152-53); Patrick Tr. 33:21-34:6 (JA 946-47); *see also* Roberts Tr. 15:22-16:7 (JA 1050-51). Their decision to report to the police instead reveals that the Policy's purpose was not simply to comply with the reporting statute but to join the Solicitor and the police in investigating illegal cocaine use and using the threat of arrest to "leverage" women into treatment.

here was designed by and with law enforcement authorities in order to target women who were allegedly violating the child abuse laws. The law enforcement purpose was integral, not incidental, to the Policy.[10]

The involvement of law enforcement authorities in the Policy was particularly pernicious given that Respondents conducted bodily searches of Petitioners. This Court has *never* upheld a warrantless and suspicionless[11] search *of an*

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[10] The level of law enforcement involvement in a search is critical to the Fourth Amendment analysis because law enforcement officials are in an "adversarial" relationship with citizens. Because the Search Policy was designed to use the threat of arrest as "leverage," the traditional "adversarial" relationship between law enforcement and citizens, *see T.L.O.*, 469 U.S. at 349 (Powell, J., concurring), existed here between the hospital and the patients.

[11] Citing the search criteria established by hospital personnel, Respondents claim that the searches conducted on Petitioners were based on suspicion of wrongdoing, Resp. Br. at 23 n.13, and appear to argue that this level of individualized suspicion excuses the Respondents' actions. This argument is wrong for two reasons.

First, search criteria such as "inadequate prenatal care," "late prenatal care," or "no prenatal care," *see* JX 2 (App. 53), could not have provided physicians with reasonable suspicion that a patient was using cocaine, such that the warrant requirement can be overlooked. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (defining reasonable suspicion in stop and frisk context as "whether a reasonably prudent man in the same circumstances would be warranted in the belief that his safety or that of others was in danger."). As a nationally recognized expert on prenatal care and drug use testified, poor women as a group have very little access to prenatal care. Chasnoff Tr. 16:19-20 (JA 286). Thus, a woman who satisfied these criteria was more likely to be poor than she was to be using cocaine.

Even the "medical" criteria in the Policy were more likely to indicate the existence of a health problem other than cocaine addiction. For example, placental abruption and premature labor can be evidence of "a wide range of problems, including tobacco use." Chasnoff Tr. 15:21-16:9 (JA 285-86); *see also Williams Obstetrics* at 748-49 (F. Gary Cunningham et al. eds., 20th ed. 1997) (while primary cause is unknown, other conditions associated with placental abruption include pregnancy-induced or chronic hypertension (the most commonly associated condition), prematurely ruptured membranes, and cigarette smoking);

individual's urine under the special needs exception where the search results were used as the basis for the individual's arrest or prosecution. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (upholding searches of students' urine for drugs where only school officials had access to test results); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (upholding searches of customs employees for drugs where only employer had access to search results); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 n.5, 626 n.7 (1989) (upholding searches of railroad employees' urine and blood for drugs where nothing in the record indicated that government would use test results for other than employment purposes); *see also Chandler v. Miller*, 520 U.S. 305, 318 (1997) (noting that statute at issue allowed the candidate to control dissemination of the urine search results); *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting) ("[u]ntil today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates"); *Acton*, 515 U.S. at 676 (O'Connor, J., dissenting) (intrusive bodily searches such as searches of urine must be based on individualized suspicion).

Second, Respondents completely fail to address Petitioners' argument that, as patients seeking medical care, they were entitled to the full force of the Fourth

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Obstetrics: Normal and Problem Pregnancies at 505-06 (Steven G. Gabbe et al. eds., 3d ed. 1996) (while primary etiology of placental abruption is unknown, maternal hypertension is most consistently identified factor; other causes include blunt trauma caused by battery or motor vehicle collision).

Second, even if the searches here were based on some quantum of individualized suspicion, Respondents nevertheless violated the Fourth Amendment in failing to obtain a warrant based upon probable cause. This Court has approved warrantless law enforcement searches based solely on reasonable suspicion in very limited circumstances that are inapplicable here. *See, e.g., Terry*, 392 U.S. at 30 (stop and frisk); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (roving border patrol).

Amendment's privacy protections, and point to no case in which the special needs exception was applied to citizens with undiminished expectations of privacy. Instead, Respondents claim that the searches here were minimally intrusive merely because the urine was obtained during a doctor's visit.[12] Resp. Br. at 32-35. Yet the measure of a search's intrusiveness depends not simply on the method of the search, but also on the nature of the privacy interest that the search compromises, *see, e.g.*, *Acton*, 515 U.S. at 654, *Von Raab*, 489 U.S. at 671, and the extent of the disclosure of search results, *see Chandler*, 520 U.S. at 318 (extent of disclosure is factor in determining intrusiveness). Because pregnant women have undiminished privacy expectations, and because hospital personnel disclosed their private medical information to the police, the searches conducted by Respondents were highly intrusive.

Third, Respondents have failed to demonstrate why the Fourth Amendment's usual requirements of warrant and probable cause were impracticable in this case. *See* Pet. Br. at 33. Law enforcement could have quickly obtained a search warrant when a child abuse or police investigation indicated that a particular patient may have been using drugs. *See Steagold v. United States*, 451 U.S. 204, 222 (1981) (noting "short time required to obtain a search warrant"); *Ramsey v. County of McCormick*, 412 S.E.2d 408 (S.C. 1991) (noting that magistrate is always on call). Hospital physicians would, of course, have remained free to perform warrantless urine tests that were necessary to manage the patients' pregnancies as long as they were not working with law enforcement authorities to arrest patients based on the results of such tests. If the hospital already had obtained a urine sample in the course of medical care, time would not be

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[12] Respondents make much of the fact that the searches in this case were conducted in a doctor's office. *See* Resp. Br. at 34. But the fact that Petitioners were searched in a hospital and not in a police station does not negate or mitigate the involvement of law enforcement authorities in designing and implementing the Search Policy. It is this involvement that takes the searches here outside the scope of the special needs exception.

of the essence because the target of the warrant would be the already-obtained urine.[13]

B. Respondents' Claims of Effectiveness Are Contradicted by the Record.

Playing fast and loose with the record, Respondents claim that the Search Policy was "successful." But the record contradicts their assertions and instead reveals that the Policy was ineffective in deterring cocaine use. Because of its ineffectiveness, the Search Policy is unreasonable even if the special needs balancing test is applied. *See, e.g., Chandler*, 520 U.S. at 319-20 (discussing ineffectiveness of drug-testing scheme).

First, Respondents repeatedly assert, without citation, that "of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested." Resp. Br. at 10, 29-30.[14] In fact, there is no evidence in the record regarding what happened to the vast majority of patients who were subject to the Policy because the district court severely limited the introduction of evidence regarding non-plaintiffs. Thus, the record does not reveal how many times the non-plaintiff patients tested positive for cocaine, or whether they completed the mandatory treatment program or simply left the jurisdiction. What the record does reveal is that even if a patient had violated the Policy's requirements, Nurse Brown had great discretion in deciding whether the patient would be arrested. *See* Brown Tr. 81:17-82:5 (JA 265-66) (admitting that her request to the Solicitor's Office

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[13] Likewise, establishing some quantum of individualized suspicion was also practicable here. *Cf. Acton*, 515 U.S. at 675-76 (O'Connor, J., dissenting) (noting that "individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people").

[14] As noted above, the implication that all the women who were arrested failed treatment or tested positive a second time is incorrect. *See supra* at 3 & n.4.

for another chance for a white patient who was non-compliant with treatment was approved). The claim that the Policy had a ninety percent "success" rate is therefore complete speculation and not based on the facts of this case.

Second, contrary to Respondents' assertions, none of the Petitioners testified that the policy helped them "beat" their cocaine addiction. Resp. Br. at 10, 30. Instead, all Petitioners stated that the Policy harmed them psychologically, and some specifically indicated that their experiences with the policy have left them with a distrust of medical providers. Griffin Tr. 10:10-12 (JA 550); Knight 138:8-17; Powell Tr. 168:7-18 (JA 1028); Ferguson Tr. 194:8-20 (JA 470); Hale Tr. 40:19-23 (JA 588); Joseph Tr. 79:10-21; Pear Tr. 263:5-9, 260:8-261:4 (JA 962, 959-60); Singleton Tr. 73:10-13 (JA 1147); Nicholson Tr. 299:3-25 (JA 913-14); P. Williams Tr. 213:22-214:7 (JA 1206). Although several Petitioners stated that the substance abuse treatment they received was helpful, they viewed the Policy's law enforcement component as damaging, and there is no indication that these Petitioners would not have benefited from treatment that was not linked to arrest or its threat. Additionally, five Petitioners testified that they experienced a relapse in their addiction even after they received substance abuse treatment. Griffin Tr. 46 (JA 582-83); Ferguson Tr. 191:16-192:11 (JA 467-68); Singleton Tr. 111:11-19 (JA 1152-53); Nicholson Tr. 281-83 (JA 902-06); P. Williams Tr. 230:5-17, 246:20-22 (JA 1220-21, 1235). These results do not demonstrate effectiveness.

III. Respondents Have Not Established that the Patients Consented to the Searches At Issue Here.

Respondents have asked this Court to consider whether the patients provided a valid consent to the searches at issue in this case, Resp. Br. at i, a question which the court of appeals did not address[15] and which falls outside the scope of

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[15] In dissent, Judge Blake noted that " [i]f the special needs exception had been held not to apply, a more thorough analysis of this issue would have

the question presented in the Petition for Certiorari and accepted for review by this Court.[16] "While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *see also West v. Gibson*, 527 U.S. 212, 223 (1999) (refusing Respondents' request to affirm decision below on alternative grounds outside the scope of the question presented and remanding issue for determination by Court of Appeals); *Ponte v. Real*, 471 U.S. 491, 500 & n.3 (1985) (declining to entertain argument on alternate grounds because "[i]t is a question best left to [the lower] court."). These considerations are particularly strong where the arguments were not fully briefed before the Court. *Cf. Bennett v. Spear*, 520 U.S. 154, 166-67 (1997) (appropriate to consider alternative ground because, *inter alia,* it was fully briefed and argued before the Court). Should the Court reach the alternative ground raised by Respondents, the record plainly shows that the patients did not consent to the searches to which they were subjected because the drug searches exceeded the scope of the patients' consent for medical treatment and the consent was not voluntary under Fourth Amendment standards.

The drug searches here went beyond the scope of the consent to medical treatment the patients executed. *See*

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been necessary." *Ferguson v. City of Charleston*, 186 F.3d 469, 489 (4th Cir. 1999) (Blake, J., dissenting) (App. 31).

[16] The court below noted that Respondents had "agreed throughout this litigation that MUSC is a state hospital and that MUSC employees are therefore government actors." *Ferguson*, 186 F.3d at 477. Despite this concession, Respondents now claim that MUSC and its staff are not state actors and therefore cannot be liable under the Fourth Amendment. Resp. Br. at 15 n.8. In support of their position, Respondents cite *United States v. Attson*, 900 F.2d 1427 (9th Cir.), *cert. denied*, 498 U.S. 961 (1990). Yet *Attson* did not concern the question of state action but rather whether a state actor's conduct constituted a search. The Respondents appear to have confused these two concepts.

Florida v. Jimeno, 500 U.S. 248, 251 (1991) (search based on consent cannot be broader than the express authorized scope of the consent); *id.* at 252 ("suspect may of course delimit as he chooses the scope of the search to which he consents."). Not only did the patients give their consent only to tests conducted for purposes of medical treatment, but their consent was conditioned on the express[17] and implied[18] promise of confidentiality in their physician-patient relationship. The "typical reasonable person," *see id.* at 251, would never have understood that in the context of a doctor's appointment, the confidentiality of which was explicitly and implicitly promised, her consent for medical treatment would constitute consent for a search by the police. Such is not the "kind of risk we necessarily assume" when we seek medical treatment. *Cf. Hoffa v. United States*, 385 U.S. 293, 303 (stating that accused assumed risk that person he was talking to would talk to police). Simply put, a written consent permitting hospital personnel to test urine for medical purposes does not constitute consent to use the urine for police investigations. *See Jimeno*, 500 U.S. at 251; *cf. Von Raab*, 489 U.S. at 666 ("Test results may not be used in a criminal prosecution of the employee without the employee's consent.").

In fact, none of the evidence proffered by Respondents to establish consent -- the hospital consent to medical treatment

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[17] Defendant Shirley Brown testified that MUSC's Patient Handbook, stating "medical records and all communication pertaining to your care are also treated as confidential," *see* PX 105 (App. 75), was shown to all patients who came to MUSC. Brown Tr. 11/21/96 at 20:16-21:3; 27:10-14 (JA 91-94).

[18] The explicit limitation on the scope of the patients' consent is informed by the promise of confidentiality implicit in the physician-patient relationship. *See* Hippocratic Oath (quoted in Albert R. Jonsen et al., *Clinical Ethics* 166 (4th ed. 1998)); *McCormick v. England*, 494 S.E.2d 431, 435 (S.C. 1997) (because disclosures for purposes of medical treatment are "not totally voluntary," in exchange "it is expected that the physician will keep such information confidential.").

forms,[19] the Solicitor's letters,[20] the "To Our Patients" letter,[21] and a public service announcement[22] which aired

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[19] Most of the plaintiffs signed one of the general hospital consent forms. However, even MUSC's General Counsel Joe Good admitted that he was concerned that the consent forms were inadequate. Good Tr. 202:6-9 (JA 513); *see also* PX 28 (App. 72-74) (Letter from MUSC General Counsel Joseph Good to Pat Hudson, Senior Assistant Attorney General (Dec. 19, 1989)) ("I would prefer to have the mother sign an informed consent for drug screen and for the same procedure to be used on her children."). Furthermore, Sandra Powell did not sign a consent form after the Policy was initiated, and so it cannot be claimed that she consented to having her drug test results disclosed to the police on that basis. Powell Tr. 174:21 - 175:4 (JA 1034); DX 95-B.

[20] The Solicitor's Letter was given to patients *after* testing positive for drugs, so it had no bearing on the already-given consent. *See* PX 231(b) (Hale); PX 274, 00-88 (Ferguson); Ferguson Tr. 182 (JA 456) (same); DX 175 (Joseph); PX 283, 00-2830 (JA 1887) (Williams); PX 230(b) (Pear); Pear Tr. 254 (JA 956-57) (same); PX 279, MUSC 3581 (JA 1726) (Nicholson). Furthermore, the Solicitor's Letter does not inform patients that they will be arrested if they test positive for drugs, only that they will be required to attend substance abuse and prenatal appointments. *Id.* Finally, Patients Griffin, Powell, Knight and Singleton were never shown the Solicitor's Letter, probably because it was not yet in use. PX 14 (JA 1285) (Letter from Francis J. Cornely Asst. Solicitor to Nurse Brown indicating that letter not available as of October 24, 1989).

[21] Like the Solicitor's Letter, the "To Our Patients" letter was given *after* a positive drug test. Moreover, not only is there no evidence of when this document came into use, Brown Tr. 35:13-18 (JA 102) (Policy in Plaintiffs' Exhibit 25 not applied "in its fullest extent because all of the letters and videotapes, etc., were not available at that time"), the document itself failed to disclose that urine drug screens were being conducted for law enforcement purposes or that confidential medical information would be revealed to the police. *See* JX 10 (JA 1269) (stating that MUSC will "take action" and "ask for help" if patients continue to use drugs or fail to follow treatment, and describing policy as one of "providing warning, counseling and treatment for pregnant women using illegal drugs," not one of reporting and arresting the women).

[22] The Public Service Announcement ("PSA"), created by the Solicitor's Office and aired on local television stations sometime after March 1990, Condon Tr. 27:19-24, encouraged women to call and speak to counselors at the hospital, and ensured them that if they did so, and stayed with a

after the Policy was instituted -- told the patients that the hospital would turn their medical records over to law enforcement agents if they revealed evidence of drug use. *See, e.g.,* Griffin Tr. 27-29 (JA 567-70); Powell Tr. 149, 151-52 (JA 1011-12, 1013-15); Knight Tr. 121-22, 139 (JA 773-75, 783); Singleton Tr. 52, 71 (JA 1132-33, 1145-46); P. Williams Tr. 238 (JA 1226). Indeed, Respondents deliberately deceived and misled at least one patient by telling her that her urine was being tested to determine if she was dehydrated. Nicholson Tr. 278:8-24, 280:6-16 (JA 899-900, 902).

Thus, the patients' consent was limited to consent to medical treatment, information about which they were told would be kept confidential. The searches of the patients for evidence of a crime cannot be excused based on such explicitly limited consent. Where consent is obtained "by stealth, or through social acquaintance, or in the guise of a business call," the search must be limited to the scope of the consent; otherwise it is no longer consensual but is "against [the] will" of the person searched and therefore violates the Fourth Amendment. *Gouled v. United States*, 255 U.S. 298, 305-06 (1921) (search went beyond scope of consent when man obtained entry into a suspect's home by falsely representing that he intended only to pay a social visit, then proceeded to ransack the suspect's private papers and seize some of them); *id.* at 304-05.[23] This Court's jurisprudence

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drug treatment program they would be *protected* from arrest. DX 148. It neither mentioned the urine drug screens at all nor informed the public that *medical providers* were involved in the criminal process. *Id.*; Tr. Vol. 7 at 1318 (admission by defendants' counsel). Furthermore, only two patients, Petitioners Ferguson and Joseph, reported seeing the PSA. Ferguson Tr. 201 (JA 477-78). Ms. Ferguson testified that she thought she would be *helped* if she went to the hospital, not *arrested*, and neither plaintiff knew that their medical providers would disclose information about their drug use to the police. Ferguson Tr. 207:6-19 (JA 481); Joseph Tr. at 124-25 (JA 753-55).

[23] As the Ninth Circuit held in *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990), "access gained by a government agent . . . violates the fourth amendment's bar against unreasonable searches and seizures if

discussing disclosure of information to informants bolsters Petitioners' case because each of those cases involved searches that did not go beyond explicit limitations placed on the scope of consent. *See Lewis v. United States*, 385 U.S. 206, 209-10 (1966) (in discussing *Gouled*, highlighting the importance of remaining within the scope of consent); *Hoffa*, 385 U.S. at 303; *On Lee v. United States*, 343 U.S. 747 (1952); *see also United States v. Miller*, 425 U.S. 435 (1976); *Securities & Exchange Comm'n v. O'Brien*, 467 U.S. 735 (1984).

Furthermore, where consent to a search is procured through duress or coercion, it is invalid. *See Bumpers v. North Carolina*, 391 U.S. 543, 550 (1968); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.").[24] Here, six of the patients were admitted to the hospital while in labor or experiencing pre-term contractions; Ms. Singleton was admitted immediately after delivering her

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such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation" and when the government agent "misrepresent[s] the scope, nature or purpose" of his or her investigation. *Id.* Even where an officer or undercover agent "conceal[s] his or her identity to obtain an invitation to enter a suspect's home," "the undercover entry must be limited to the purposes contemplated by the suspect." *Id.* (citing *Lewis v. United States*, 385 U.S. 206, 210-11 (1966)); *see also Attson*, 900 F.2d at 1429 (noting district court's finding that defendant "did *not* consent to the taking of blood *for police use*" when he signed the general hospital consent form, but only consented to its use for "medical purposes") (emphasis in original).

[24] The holding for which Respondents cite *Schneckloth* and *Ohio v. Robinette*, 519 U.S. 33, 40 (1996), *see* Resp. Br. at 38-40, is not relevant here. In those cases, the Court merely held that knowledge *of a right to refuse* consent is not a prerequisite of a voluntary consent, although it is one of many factors that can be considered in determining "voluntariness." *Schneckloth*, 412 U.S. at 234; *see also Robinette*, 519 U.S. at 40. These cases did not involve the *scope* of a consent to a search.

child in an ambulance. *Ferguson v. City of Charleston*, 186 F.3d 469, 489 (4th Cir. 1999) (Blake, J., dissenting) (App. 24-26). As Judge Blake noted in dissenting from the judgment below, Respondents have not carried their burden of establishing "whether consent can be voluntary, in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state's public hospital." *Ferguson*, 186 F.3d at 489 (Blake, J., dissenting) (App. 31). Even if the patients had known that signing the consent to medical treatment would expose them to chemical surveillance and criminal prosecution, the emergency medical context in which their consent was obtained was inherently coercive.[25] Thus, their signature on a standard hospital consent form did not suspend the warrant and probable cause requirements of the Fourth Amendment.

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[25] Even in non-emergency situations, the South Carolina Supreme Court has recognized that a patient's disclosures to her physician for the purpose of diagnosis and treatment "are not totally voluntary." *McCormick*, 494 S.E.2d at 435.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be reversed.

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MOTION FILED

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No. 99-0936

In The
SUPREME COURT OF THE UNITED STATES

CRYSTAL FERGUSON, ET AL.,
Petitioners,

v.

CITY OF CHARLESTON, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements was properly applied to a discretionary drug testing program targeting hospital patients that was created and implemented primarily for law enforcement purposes by police and prosecutors?

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* on behalf of Petitioners. Counsel for Petitioners has consented to the filing of this brief. The consent of counsel for Respondents was requested and refused.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), and *Florida v. J.L.*, 120 S.Ct. 1375 (2000), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is submitting a brief *amicus curiae* in support of the Petitioners. In light of the important issues being raised in this case, the Institute respectfully requests that its arguments be

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[1] Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

heard.

Respectfully submitted,

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[2]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), *Illinois v. Wardlow*,120 S.Ct. 673 (2000), and *Florida v. J.L.*, 120 S.Ct. 1375 (2000), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

II. SUMMARY OF ARGUMENT

Respondent's clinical program of testing patients suspected of cocaine abuse without notice or consent and reporting the positive

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1 *Amicus curiae* The Rutherford Institute files this brief by leave of Court. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Jennifer Addie (*B.A.*, Univ. of Va. 2000). No person or entity, other than the Institute, is supporters, or is counsel, made a monetary contribution to the preparation or submission of this brief.

results of such tests to law enforcement authorities cannot be justified as a "special needs" search. The program is not "justified at its inception" because it relies on a gross and unwarranted violation of the ages-old physician-patient confidential relationship, and is in derogation of accepted medical practice in the health care community. The program is not "reasonable in scope" because the inclusion of law enforcement officials in the program, and the inherent threat of prosecution, run counter to accepted health care policy and elevate the burden of suffering on both the mother and the unborn child, and because urinalysis testing has not been shown to be as effective as other accepted modalities in detecting and treating chronic drug abuse. Further, in view of the fundamental nature of the mother-infant relationship, the State cannot demonstrate a legitimate interest in protecting the unborn by testing maternity patients, absent probable cause or particularized suspicion to believe that a mother is engaged in drug abuse.

III. ARGUMENT

A. INTRODUCTION

Petitioners are ten women, most of them African-American, who sought gynecological care from physicians and/or health care workers at Respondent Medical University of South Carolina ("MUSC"), a state-run heath care facility in Charleston, South Carolina. *Ferguson v. City of Charleston*, Civ. No. 2:93-2624-2, U.S.D.C. Dist. S. Carolina, Findings of Fact, Conclusions of Law and Order dated September 29, 1997; Petition for Writ of Certiorari, Appx. A at A-37. Beginning in 1989, MUSC maintained a policy of conducting urinalysis testing for cocaine use by maternity patients who presented with any one or more of several indicia of possible drug abuse. *Id.* at A-37-38. Pursuant to the program, when any of these factors was present, a treating physician had no discretion to decline to order a drug urinalysis. *Ferguson v. City of Charleston*, 186 F.3d 469, 479 (4th Cir. 1999). The tests were conducted without obtaining a warrant, and pursuant to a general consent form that made no mention of the prospect of reporting the results to criminal

authorities. 186 F.3d at 486 (Blake, D.J., dissenting in part).

The factors mandating drug testing included prenatal care that is absent, late (care initiated after 24 weeks gestation), or regarded as incomplete (fewer than five visits); a history of cocaine use; *abruptio placentae* (separation of the placenta from the uterus); unexplained growth retardation or fetal death; and unexplained birth defects. 186 F.3d at 474. Where the urinalysis result was positive for cocaine use, the patient was reported to the City of Charleston Police Department and the patient was arrested for distributing cocaine to a minor. 186 F.3d at 474. While the policy was amended in 1990 to permit patients to elect to enter drug abuse treatment, a patient was still reported and monitored by the Solicitor General for compliance with treatment requirements if she failed to comply with treatment obligations or tested positive again. Hildebrand Test., Tr. at 124-26, 134-35. At issue in Petitioner's case, then, is the hospital's mandate that physicians and health care workers automatically test patients with any one of a battery of symptoms or conditions indicating possible drug abuse, and the report or threat of report of the alleged criminal behavior to police by hospital officials.

The State of South Carolina does not assert a "special needs" justification in identifying cocaine abuse for the purpose of prosecuting patients; in fact, it has expressly foresworn that rationale. Rather, it asserts that a special need, "apart from the interests of law enforcement," exists in treating maternal and fetal prenatal patients who may be subjected to cocaine abuse. Testing and reporting such patients, MUSC contends, are integral to the treatment of chronic cocaine abusers. Thus, MUSC asserts an interest grounded in health care policy, not criminal justice, to justify its program of testing and reporting patients for cocaine abuse. In essence, it seeks to establish a substantial and important governmental need to employ a particular modality of treatment that implicates patients' rights to privacy and to be free from unreasonable searches. The Court's *amicus* contends that MUSC's program of subjecting prenatal patients to invasive searches and criminal liability is a patently unreasonable means of

furthering the interests of government health care providers, and hence cannot pass muster under the "special needs exception" jurisprudence of this Court.

The Supreme Court has held that the taking of a urine sample and testing of the sample by urinalysis is unquestionably a "search" within the meaning of the Fourth Amendment. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).[3] In assessing the constitutional validity of such drug testing programs, the Court has not differentiated the initial taking of the urine sample as an independent "seizure," but rather treats it as a component of the Fourth Amendment search. *Skinner*, 489 U.S. at 618 ("In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure."). The Court's *amicus* will follow this convention. Likewise, in addressing the issue presented, the Court's *amicus* will not attempt to delineate its analysis of Petitioners' constitutional interests between the Fourth, Fifth and Fourteenth Amendments. The Rutherford Institute believes that Petitioners clearly possess a reasonable expectation that what they disclose to their physicians and health care workers will not be reported to criminal authorities for the purpose of "encouraging" them to abide by their treatment regimens. *See Katz v. United States*, 389 U.S. 347, 350 (1967), *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Likewise, the Court has repeatedly held that Fourteenth Amendment rights pertain in matters relating to control over decisions relating to reproduction and parental authority over minor children. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484-485 (1965), *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This approach is consistent with that taken by the Court in *Roe v*

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[3] "It is not disputed ... that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." *Skinner*, 489 U.S. at 618.

Wade and its progeny:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

410 U.S. 113, 152 (1973) (citations omitted). This right of privacy, regardless of its source, "is broad enough to encompass" a woman's expectation of privacy in her communications to her doctor. *Roe*, 410 U.S. at 153.

The Supreme Court has emphasized that the Fourth Amendment is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). The Court has stressed that intrusions on the constitutionally protected right of privacy "should be judged by the standard of reasonableness under all the circumstances." *O'Connor v. Ortega*, 480 U.S. 709, 725-726 (1987). This standard requires a two-part inquiry: 1) Whether the search was "justified at its inception based upon reasonable, individualized grounds for suspecting the search will turn up evidence of misconduct," 480 U.S. at 726, citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968); and 2) Whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place," 480 U.S. at 726, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Rutherford Institute contends that the unauthorized drug testing conducted in this case was unreasonable both at inception and in the scope of its interference with the physician-patient relationship that gave rise to Petitioners' reasonable expectation of privacy, and therefore the Fourth Circuit Court of Appeals was in error in ruling that the "special needs exception" to the requirements of a warrant and probable cause justified Respondent's actions.

A. MUSC's DRUG TESTING AND REPORTING PROGRAM IS NOT "JUSTIFIED AT ITS INCEPTION" BECAUSE THE LACK OF OBJECTIVE TESTING CRITERIA AND THE OVERTLY CRIMINAL CONTEXT OF THE TESTING PROGRAM REQUIRE SOME FORM OF INDIVIDUALIZED SUSPICION UNDER THE COURT'S "SPECIAL NEEDS" JURISPRUDENCE

In assessing the quantum of suspicion required before a governmental agency may engage in a search and seizure outside the context of the criminal justice system, the Court has repeatedly stressed that "ordinarily, a search ... will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence of misconduct." *O'Connor*, 480 U.S. at 726; *New Jersey v. T.L.O.*, 469 U.S. at 342, n. 8. In both *O'Connor* and *T.L.O.*, the Court found it unnecessary to decide whether "reasonable suspicion" was an element of the standard of reasonableness the Court adopted for the instant circumstances. *O'Connor*, 480 U.S. at 726; *New Jersey v. T. L. O.*, 469 U.S. at 342, n. 8. In the instant case, however, it is essential for the Court to determine whether reasonable suspicion or probable cause is a requisite component of "reasonableness" for the type of health care search and seizure urged by Respondents, insofar as Respondent does not contend that its protocol for identifying maternal patients who may be engaged in cocaine abuse is a "suspicion-based" system.[4] While it is certainly true that no irreducible requirement of individualized suspicion is imposed by the Fourth Amendment in all circumstances, *United States v. Martinez-Fuerte*, 428 U.S. at 560-561, *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court has nonetheless emphasized

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[4] Nor may it so contend, in view of the cases that have viewed as "suspicionless" similar non-uniform drug testing programs that searched only individuals considered "at risk" for potential drug abuse, *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989), or only individuals involved in certain safety-sensitive positions or in certain circumstances. *See Skinner v. Railway Executives' Assn*, 489 U.S. at 609-610.

that "exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" *New Jersey v. T.L.O.*, 469 U.S. at 342, quoting *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979) (citations omitted). MUSC's policy does not admit of such exceptions, in view of the serious encroachment it makes upon historically cherished privacy interests and the absence of objective criteria for determining which patients are subjected to drug urinalysis.

Respondent's program tests only a restricted group of women who display signs or symptoms consistent with drug abuse; no protections are present to guard patients from abuses arising from discretionary testing and reporting. While Respondent argues that the policy's requirement of testing all patients who meet the criteria eliminates the risk of discriminatory application, this is far from true. In fact, the testing criteria are predominantly subjective, as factors such as "unexplained growth retardation" and "unexplained birth defects" require the exercise of clinical judgment. Nor are the criteria conducive to identifying a discrete class of individuals who may need to be subjected to testing based on governmental "special needs," as in *Skinner* and *Von Raab* as several of the testing factors (such as growth retardation) are consistent with symptoms displayed by a substantial portion of the maternal patient population. Governmental testing policies that define "reasonable suspicion" in a manner that does not restrict the predicate factors to objective, verifiable criteria have been repeatedly struck down by the lower federal courts as unconstitutionally vague and overbroad.[5] *See, e.g., National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 972-73 (D.C. Cir. 1990) (Dept. of Agriculture); *Bangert v. Hodel*, 705 F.Supp. 643, 650 (D.D.C. 1989) (Dept. of the Interior); *American Fed'n of*

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[5] The federal agencies' regulations stated that "[r]easonable suspicion" may be based on, "among other things," "observable phenomena" or "a pattern of abnormal conduct or erratic behavior." *See generally* cases *infra*.

Gov't Employees v. Sullivan, 744 F.Supp. 294, 302-303 (D.D.C. 1990) (Dept. of Health and Human Services); *National Federation of Federal Employees v. Cheney*, 742 F.Supp. 4, 6 (D.D.C. 1990) (Defense Mapping Agency). In particular, the use of *ad hoc* means of finding reasonable suspicion (*e.g.*, the use of catchall clauses such as "among other things") was summarily rejected in *Hodel*. 705 F.Supp. at 651 (holding government's only legitimate interest is in on-duty drug use or drug-related job impairment supported by evidence of specific, personal observations concerning performance, appearance, behavior, etc.). In view of the egregious violation of patients' expectation of the right to consent and to privacy, and the lack of objectivity inherent in Respondent's program, the program cannot be deemed a reasonable "special needs" search.

B. MUSC'S DRUG TESTING AND REPORTING PROGRAM IS UNREASONABLE IN SCOPE IN LIGHT OF THE VIOLATION OF PHYSICIAN-PATIENT CONFIDENTIALITY IT PERPETRATES

In assessing the reasonableness of the scope of a search, "[t]he first factor to be considered is the nature of the privacy interest upon which the search . . . at issue intrudes." *Vernonia*, 515 U.S. at 654. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *New Jersey v. T.L.O.*, 469 U.S. at 338. "What expectations are legitimate varies, of course, with context." *Id.*, at 337. The legitimacy of a privacy expectation also depends in large measure upon the individual's legal relationship with the State. The Court's decision in *Vernonia, supra*, for example, turned principally upon the fact that the subjects of the drug testing policy were children, who had been "committed to the temporary custody of the State as schoolmaster." 515 U.S. at 654. The State's role as schoolmaster, the Court noted, "permitt[ed] a degree of supervision and control *that could not be exercised over free adults*." *Id.* (emphasis supplied). In Petitioners' case, the relationship of physician and patient gave rise to a

heightened expectation of privacy, and a legitimate expectation that drug testing would not be done without knowledge and consent.

Without a doubt, government physicians, like all doctors, have not only the right, but moreover the duty, to inquire about suspected drug abuse with their patients. This is unquestionably a health issue. This duty becomes all the more pronounced in the context of obstetric care, in which the physician assumes duties of care toward both the maternal and fetal patients. The American College of Obstetricians and Gynecologists (ACOG) guidelines on ethical decision-making state:

> In the care of the obstetric patient, the traditional physician-patient relationship expands to include the fetus. The physician retains an obligation to respect the autonomy of the pregnant woman while promoting her medical well-being. In addition, the physician must assume an obligation of beneficence (promoting the well-being of others) toward a second patient, the fetus. The weight that this obligation is given in comparison with previously established obligations to the woman is central to many ethical dilemmas in the practice of obstetrics.[6]

In view of this dual obligation, and of the risks presented by drug abuse toward both patients, counseling patients against drug use is recommended as a standard intervention for periodic health examinations of pregnant women by the American Medical Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists and the U.S.

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6 "Ethical Decision-Making in Obstetrics and Gynecology," ACOG Technical Bulletin No. 136, November, 1989.

Preventive Systems Task Force.[7] Routine screening for drug abuse with standardized questionnaires or biologic assays (with informed consent) is recommended for all pregnant women by the Task Force.[8] The Task Force's guidelines for screening for drug abuse state that "[t]he diagnostic standard for drug abuse and dependence is the careful diagnostic interview."[9] Patient history information should include the quantity, frequency and pattern of drug use, as well as any adverse effects of drug use on work, health and social relationships.[10] "A careful history taken by trusted clinicians remains the most sensitive means of detecting drug use and abuse ...."[11] In fact, "clinical history may be more useful than toxicologic testing for identifying newborns at risk: among drug-exposed infants identified by meconium testing, adverse outcomes were limited to infants born to mothers who admitted to drug use."[12] The Task Force cautioned against the adverse effects of nonconsensual toxicological screening:

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7 *See* American Medical Assn., "Drug Abuse in the United States: A Policy Report," Board of Trustees Report (1988); American Academy of Family Physicians, "Age Charts for Periodic Health Examination," Reprint No. 510 (1994); American College of Obstetricians and Gynecologists, "Substance Abuse in Pregnancy," Technical Bulletin No. 195 (1994); U.S. Preventive Systems Task Force, Guide to Clinical Preventive Services (2d ed. 1995).

8 U.S. Preventive Systems Task Force, *supra*, Appdx. A, Table 53.

9 Guide to Clinical Preventive Services, supra, Chapter 53, citing American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994).

10 *Id.*

11 *Id.*, citing E.M. Ostrea et al., "Drug Screening of Newborns by Meconium Analysis: A Large-Scale, Prospective Epidemiologic Study," 89 Pediatrics 107 (1992).

12 *Id.*

> Drug testing is frequently performed without informed consent in the clinical setting on the grounds that it is a diagnostic test intended to improve the care of the patient. Because of the significance of a positive drug screen for the patient, however, the rights of patients to autonomy and privacy have important implications for screening of asymptomatic persons. If confidentiality is not ensured, test results may affect a patient's employment, insurance coverage, or personal relationships. Testing during pregnancy is especially problematic, because clinicians may be required by state laws to report evidence of potentially harmful drug or alcohol use in pregnant patients.[13]

In assessing the level of the intrusion on privacy interests in *O'Connor v. Ortega*, *supra*, the Court relied in part on the absence of evidence that the employer had established any reasonable regulation or policy discouraging employees from storing personal items in their offices. 480 U.S. at 719. Conversely, "courts have decided that an employee had no such expectation [of privacy] with respect to a workplace search because an established regulation permitted the search." 480 U.S. at 738 (Blackmun, J., dissenting). In this case, the right of medical patients to expect privacy in the patient-physician relationship is better established than virtually any other privacy expectation, and it has been codified in various policy statements by the medical profession, governmental agencies and patient advocate organizations.

A physician's duty of loyalty and trust to his or her patient has been established in medicine from time immemorial, since at least the articulation of the Oath of Hippocrates (c.~400 B.C.). According to the American Medical Association ("AMA"):

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13 *Id.*, citing J.C. Merrick, "Maternal Substance Abuse During Pregnancy: Policy Implications in the United States," 14 J. Legal Med. 57 (1993).

> The duty of confidentiality constitutes an integral part of professional ethics, and is featured in virtually every oath of medicine, most prominently the Hippocratic Oath: "What I may see or hear in the course of treatment, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about." ....Confidentiality is critical in health care because it is a vital prerequisite for trust and honesty in the patient-physician relationship; it allows patients to seek medical care and disclose sensitive details openly with their physicians without fear of consequences.[14]

The AMA Principles of Medical Ethics,[15] II and IV among others, mandate physician-patient trust as the foundation for medical treatment. The Second Principle provides that "[a] physician shall deal honestly with patients ..." The Fourth obligates a physician to "respect the rights of patients ... [and] safeguard patient confidences within the constraints of the law." This obligation is also codified in the AMA's Fundamental Elements of the Patient-Physician Relationship, which state in pertinent part:

> From ancient times, physicians have recognized

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[14] Report of the Board of Trustees of the American Medical Association, 9, A-98, citing Reich WT, ed., "Medical Codes and Oaths: Ethical Analysis." Encyclopedia of Bioethics, New York, Simon & Schuster, 1995, p. 1429.

[15] The AMA's Principals of Medical Ethics establish the core ethical principals that serve as the foundation for the AMA's Code of Ethics, which includes the Principles as well as other documents such as the Fundamental Elements of the Patient-Physician Relationship. AMA, Current Opinions of the Council on Ethical and Judicial Affairs (1980).

> that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. The patient-physician relationship is of greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion, provide information about their medical condition to the best of their ability, and work with their physician in a mutually respective alliance.[16]

The Fundamental Elements urge physicians to contribute to this physician-patient alliance "by serving as their patients' advocate and by fostering [patients'] rights. "A number of these rights are implicated by Respondent's policy of unauthorized testing and reporting, including "the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives" (Fundamental Elements, No. 1); the right to "have their questions answered [and] to be advised of potential conflicts of interests that their physician may have; (Fundamental Elements, No. 1); and the right to "accept or refuse any recommended medical treatment" (Fundamental Elements, No. 2). Most significantly, patients possess the right to confidentiality. "The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest." (Fundamental Elements, No. 4).

In view of this duty, "The AMA has insisted that conflicts between a patient's right to privacy and a third party's 'need to know'

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16 AMA, Fundamental Elements of the Patient-Physician Relationship (herein "Fundamental Elements"), Report of the Council on Ethical and Judicial Affairs of the American Medical Association (originally adopted June 1990, updated June 1994).

be resolved to the patient's benefit, 'except where that would result in serious health hazard or harm to the patient or others.'"[17] The AMA Council on Ethical and Judicial Affairs elaborates:

> The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.[18]

The AMA Board of Trustees has affirmed that "Disclosures of information about a patient to a third party may only be made upon consent by the patient or the patient's lawfully authorized nominee, *except in those cases in which the third party has a legal or predetermined right to gain access* to such information."[19]

Although AMA policy permits exceptions, none are applicable to the instant issue. Disclosures are permitted where "required by

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[17] Board of Trustees Report 9-A-98, quoting AMA Policy H-140.989.

[18] Current Opinions of the Council on Ethical and Judicial Affairs, E-5.05 (Issued December 1983; updated June 1994).

[19] Current Opinions of the Council on Ethical and Judicial Affairs, H-140.989(7), "Informed Consent and Decision-Making in Health Care," Board of Trustees Report NN, A-87 (reaffirmed, Sunset Report, I-97)(Emphasis added).

law,'" such as in the case of violent criminal activity[20] or communicable disease reporting.[21] The only disclosures to police authorities permitted (though not required) by the policy are disclosures made to discharge a physician's duty to a patient or third parties where the patient has threatened violence.[22] MUSC's testing

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20 "[G]un shot and knife wounds should be reported *as required by applicable statutes or ordinances.*" Current Opinions of the Council on Ethical and Judicial Affairs, E-5.05, *supra* (emphasis added.) Some jurisdictions mandate reporting of narcotic use by statute. Trandel-Korenchuk, D.M. & Trandel-Korenchuk, K.M., "Collection and Disclosure of Patient Information," in Nursing and the Law, 127-160 (Aspen 1997). Likewise, all but five jurisdictions require reporting of domestic violence in varying circumstances. Hyman, et al., "Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?" 273(22) JAMA 1781 (1995). In contrast to MUSC's policy, however, these are legislated duties, passed after due consideration to competing interests of physicians, patients and law enforcement authorities.

21 "[C]ommunicable diseases ... should be reported *as required by applicable statutes or ordinances*." *Id.* (Emphasis added.)

22 "Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, *including notification of law enforcement authorities*." *Id.* (Emphasis added.) In addition to serving important patient protection interests, this provision of the policy permits a physician to absolve himself or herself of the burden of potential liability under such circumstances. *See, e.g., Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976) (plaintiffs could state cause of action against defendant therapists for failure to warn third party of threat by patient; special relationship to patient was extended to victim, and therapists had duty to use reasonable care to warn victim of danger). *Cf.* Ferris, L., et al.,

and reporting policy was voluntarily promulgated and adopted by a committee of health care workers and criminal justice officials, not mandated by law.

The AMA recently reviewed and reaffirmed these "key principles" relating to patient privacy and confidentiality. The Association affirmatively repudiated any broad right of access to confidential patient information by law enforcement agencies:

> (2) Our AMA affirms:
>
> * * * *
>
> (c) that physicians should not be required to report any

"Defining the Physician's Duty to Warn: Consensus Statement of Ontario's Medical Expert Panel on Duty to Inform," 158(11) CMAJ 1473 (1998) (analyzing *Tarasoff* decision and recommending an obligation to warn third parties under such circumstances).

Nonetheless, there remain countervailing considerations of liability for practitioners who elect to divulge sensitive information. In the opinion of the AMA's Office of General Counsel (Division of Health Law), while the AMA's ethical guidelines are not binding as law:

> maintaining patient confidentiality is a legal duty as well as an ethical duty. A physician's legal obligations are defined by the U.S. Constitution, by federal and state laws and regulations, and by the courts. Even without applying ethical standards, courts generally allow a cause of action for a breach of confidentiality against a treating physician who divulges confidential medical information without proper authorization from a patient.

Statement on Patient Confidentiality, AMA, Office of General Counsel (Division of Health Law) (1998).

> aspects of their patients' medical history to governmental agencies or other entities, beyond that which would be *required by law*.[23]

While the AMA acknowledges that breaches of confidentiality may be compelled by concerns for public health and safety, it stresses that "those breaches must be as narrow in scope and content as possible; must contain the least identifiable and sensitive information possible; and must be disclosed to the fewest possible to achieve the necessary end."[24] Further,

> Law enforcement agencies requesting private medical information should be given access to such information only through a court order. This court order for disclosure should be granted only if the law enforcement entity has shown, by clear and convincing evidence, that the information sought is necessary to a legitimate law enforcement inquiry; that the needs of the law enforcement authority cannot be satisfied by non-identifiable health information or by any other information; and that the law enforcement need for the information outweighs the privacy interest of the individual to whom the information pertains.[25]

Clearly, Petitioners have the weight of millenia of medical philosophy and practice on their side of the balance. That history is what distinguishes Petitioners' valid expectation of privacy against

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23 Current Opinions of the Council on Ethical and Judicial Affairs, H-315.983, "Patient Privacy and Confidentiality," Board of Trustees Rep. 9, A-98 (Reaffirmation I-98; Appended: Res. 4, and Reaffirmed, Board of Trustees Rep. 36, A-99).

24 *Id.*

25 *Id.*

urinalysis testing and reporting from the type of everyday encounter with an airport or courtroom metal detector or a border check. It is more than the expectation of personal privacy that arises out of modesty; it is the expectation that a health care facility and a treating physician and staff are trustworthy confidants. More than the act of taking urine for testing without consent is at stake. What is at stake is the expectation that our doctors will not work against us and on behalf of the state. Although it is questionable that MUSC's policy of treating drug abuse by threatening arrest, if initiated by a private health care service, would amount to an improper invasion of constitutionally protected privacy, it is precisely MUSC's position as a government agent that subjects it to the constraints of the Fourth Amendment. *See O'Connor*, 480 U.S. at 715 (where government acts an employer, it is subject to the Fourth Amendment); *New Jersey v. T.L.O.*, 469 U.S. at 333; *Vernonia*, 515 U.S. at 652 (government subject to Fourth Amendment in discharging its public educational function); *Chandler v. Miller*, 520 U.S. 305 (1997) (state electoral system subject to Fourth Amendment constraints). Respondent's physicians took upon themselves an oath and an ethical obligation to respect patient confidentiality that, far from being disspelled or diminished by the fact that they were government actors, was actually *augmented* thereby, since to the constraints of medical ethics were added the constraints of the Fourth and Fourteenth Amendments.

C. RESPONDENT CANNOT ASSERT A LEGITIMATE GOVERNMENTAL INTEREST IN EMPLOYING UNAUTHORIZED DRUG TESTING AND REPORTING, SINCE SUCH "THERAPY" IS NOT A RECOMMENDED MODALITY IN THE HEALTH CARE PROFESSION.

Essentially, what Respondent asserts as a "special need" is the right of a government doctor to employ a modality for treatment of drug abuse that is contrary to accepted medical practice relating to patient drug abuse. According to the Centers for Disease Control and

Prevention, "[r]outine measurement of biochemical markers, such as serum GGT, and drug testing of urine or other body fluids are not recommended as the primary method of detecting alcohol or other drug abuse in asymptomatic persons."[26] In particular, "it has not been demonstrated in a controlled setting that the detection and treatment of alcohol and other drug abuse through screening asymptomatic persons can produce a better outcome than conventional treatment after signs and symptoms become apparent."[27] Additionally, "Urine testing is sensitive and specific for recent drug use but has many limitations as a routine screening test: it does not distinguish occasional use from drug abuse or dependence; sensitivity and specificity vary with timing of drug use; and the effectiveness of early intervention has not been examined in asymptomatic drug users detected by toxicologic screening."[28] On balance, "a careful history remains the best way to identify those who need [drug abuse] treatment." [29]

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[26] Centers for Disease Control and Prevention, "Recommendations on Screening," http://aepo-xdv-www.epo.cdc.gov/wonder/prevguid/p0000109/entire.htm#head052000000000000.

[27] *Id.*

[28] *Id.*, citing D.J. Greenblatt and R.I. Shader, "Say 'No' to Drug Testing," 10 J. Clin. Psychopharmacology 157 (1990).

[29] *Id.* Respondent's clinical approach, which adopts an outlook of paternalism toward the maternal and fetal patient, has been largely rejected by the medical community. The universally recognized guideline of nonmalificence urges practitioners to avoid causing harm and to prevent serious harm. B. Lo, Resolving Ethical Dilemmas: A Guide for Clinicians (1994). The related guideline of beneficence obligates physicians to act for the greater good of patients. *Id.* Nonetheless, where nonmalificence and beneficence conflict with patient autonomy, paternalism has been rejected in favor of patient authority. T.L. Beauchamp and J. Childress, *Principals of Biomedical Ethics* (3d ed. 1989). "It is now accepted that competent,

Furthermore, the State's mode of "treatment" actually *elevates* the burden of suffering on the maternal patient by imposing the considerable mental and emotional distress of pending prosecution, and hence elevates the burden on the fetal patient as well. *See Caban v. Mohammed*, 441 U.S. 380, 405 (1979) (Stevens, J., dissenting), citing 1&2 J. Bowldy, Attachment of Loss (1969, 1973); M. Mahler, The Psychological Birth of the Human Infant (1975).[30]

The test for "reasonableness" turns upon whether a "reasonable" actor under the circumstances would order the search. *Vernonia*, at 665, citing *O'Connor, supra*, 480 U.S. 709 ("just as when the government conducts a search in its capacity as employer ..., the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, so also when the government

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informed patients should retain the power to decide what is in their best interests. Participating in decisions increases patients' sense of control, self-determination, and adherence to care plans." A. Hyman, et al., "Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?" 273 (22) JAMA 1781 (1995).

[30] *Cf. Roe v. Wade*, 410 U.S. at 153, which took into consideration the mental and emotional distress consequent to a woman's decision whether to elect an abortion:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake"). The Court's *amicus* submits that in view of the egregious violation of patient confidentiality engendered by MUSC's drug testing program, and the availability of a host of other modalities for diagnosis and treatment of drug-abusing patients, this is not a search a "reasonable doctor" (such as a private physician in similar circumstances) would order. The "reasonable physician" approach gives government physicians and health care workers the authority of private practitioners, no more and no less. That is all that is required to discharge their duties as health care providers. *Cf. Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (public broadcasters possess only those limited First Amendment rights accorded private broadcasters).

D. ABSENT PROBABLE CAUSE OR INDIVIDUALIZED SUSPICION TO BELIEVE THE MATERNAL PATIENT IS ENGAGED IN COCAINE ABUSE, RESPONDENT CANNOT DEMONSTRATE AN INDEPENDENT INTEREST IN THE TESTING OF PREBORN MINORS AS AGAINST THE MATERNAL PATIENT'S RIGHT TO DIRECT AND CONTROL THE MEDICAL TREATMENT OF THE MINOR PATIENT.

The Rutherford Institute has no serious doubt that an important governmental interest exists in counteracting intrauterine drug transfer, both as a criminal matter and a health matter. *Vernonia*, 515 U.S. at 660-61 (deterring drug use by schoolchildren an "important," "perhaps compelling" concern); *Skinner, supra*, 489 U.S. at 628 ("compelling" interest in deterring drug use by railway workers); *Treasury Employees v. Von Raab*, 489 U.S. at 668 ("compelling" interest in deterring drug use by Customs agents); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (no serious dispute about magnitude of drunken driving problem or state's interest in eradicating

it). Nor does the Institute, as a leading organization in the pro-life movement, have any doubt about the importance of the governmental interest in protecting the unborn. *Roe v. Wade*, 410 U.S. at 162 (recognizing the State's "important and legitimate interests in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life"); *Planned Parenthood v. Casey*, 505 U.S. 833, 875-76 (1992) ("there is a substantial state interest in potential life throughout pregnancy"); But Respondent's attempt to justify the City of Charleston's policy of drug testing pregnant mothers by its interest in their preborn minor children is a constitutional *non sequitur*, since both before and after birth, parents possess a Fourteenth Amendment right to direct and control their children's medical care as well as other significant aspects of nurture, education and upbringing. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). A mother's relationship with her child, whether born or unborn, is considered a fundamental right that cannot be denied absent due process. *Santosky v. Kraemer*, 455 U.S. 745, 753, 759 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968). Although the interests of the State in protecting children may override parental rights in the presence of probable cause to suspect abuse (necessitating intervention by child protective services authorities or, in appropriate cases, law enforcement officials), in the absence of such particularized suspicion, the rights of parents must control. *Cf. Vernonia*, 515 U.S. at 650 (drug testing conducted on minor students only with notice to and consent of parents). While the State may have in interest in combating prenatal drug abuse, this is a relatively recent interest in jurisprudence. An interest newly assertable is not protectible if it derogates a substantive liberty interest traditionally recognized as protectible. *Smith v. Org. of Foster Families*, 431 U.S. 816, 846 (1977). Conflict between perceived interests must be resolved by the one giving way to the deeply rooted and traditionally recognized right. *Michael H. v. Gerald D.*, 419 U.S. 110, 128-31 (1989).

Conversely, a government employer's interest in conducting a

search receives significantly reduced constitutional consideration where, as here, the search was not in the nature of the type of "administrative" employer search sanctioned by the Court in *O'Connor v. Ortega*, but rather was clearly a "search for evidence of criminal misconduct." 480 U.S. at 721. In fact, the Court noted in that case, "The only cases that imply that a warrant should be required involve searches that are not work related ... *or searches for evidence of criminal misconduct*." 480 U.S. at 721 (citations omitted). There is no demonstration on the record herein of an attempt by Respondent MUSC to initiate and develop other clinical modalities for treatment of the problem. It was regarded as a criminal problem from the outset and treated thusly. In *Skinner*, *Von Raab* and *Vernonia*, it was considered a saving grace of the drug-testing programs under review was that the results were not turned over to law enforcement authorities. *Skinner*, 489 U.S. at 626-27; *Von Raab*, 489 U.S. at 663; *Vernonia*, 515 U.S. at 658. It is doubtful the Court would have reached the same result in those cases if the respective policies of the rail transit system, the Customs Department and the school system had mandated reporting of positive results to local police and the threat of prosecution as an "incentive" for employees and student athletes to remain drug-free.

Further, there is no indication on the record that the standard interview screening and counseling recommended by the AMA and other health care agencies would not have accomplished effective diagnosis and treatment. Where cocaine use was admitted by a patient, Respondent would have the identical range of treatment options available to it. Where it was denied, but clinical or historical information indicated otherwise, it could still have requested consent for a urinalysis; confronted the patient with the diagnostic indications of drug abuse; and counseled the patient against drug abuse or recommended inpatient therapy if the staff believed patients were not forthcoming.

CONCLUSION

Based on the foregoing, the Court's *amicus* respectfully suggests that the decision of the Fourth Circuit Court of Appeals be reversed and the case remanded to the appeals court for a determination whether the issue of consent was properly submitted to the jury or whether the verdict was supported by the evidence. 186 F.3d at 476 (finding it unnecessary to determine those issues in view of ruling that "special needs exception" applied). However, in keeping with a patient's reasonable expectation of privacy in her medical records and her communications to her doctor, the Court should instruct the Court of Appeals that consent may not be deemed to have been given absent a specific written waiver documenting the patient's fully informed consent.[31]

Respectfully submitted,

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[31] *See* Current Opinions of the Council on Ethical and Judicial Affairs, H-315.983, "Patient Privacy and Confidentiality," *supra* (cautioning against the use of "overbroad consent forms" and requiring waiver of patient's right to privacy "in a meaningful way"); Statement on Patient Confidentiality, AMA, Office of General Counsel, *supra* (requiring that a valid general release include the "identity of the party to be furnished information" and warning that "[g]eneral releases will not suffice for records containing HIV or other sensitive material").

GRANTED

No. 99-936

Supreme Court, U.S.
FILED
JAN 11 2000
CLERK

In the

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

On Petition for A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

Memorandum in Opposition to Motion for Leave To File Brief as *Amici Curiae*

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There is currently pending before the Court a petition for a writ of certiorari brought by ten women who are seeking relief under Section 1983 for alleged violations of their Fourth Amendment rights in connection with urine drug screens conducted by the MUSC Medical Center during treatment of their pregnancy. The Petitioners, all of whom tested positive for cocaine use during various stages of their pregnancies, contend that the Court of Appeals for the Fourth Circuit erred in finding the searches reasonable under the special needs doctrine as enunciated by this Court.

A group of physicians, nurses, counselors, and public health practitioners and their professional associations move for leave to file a brief as *amici curiae* in support of the petition for a writ of certiorari. The Petitioners refused to consent and oppose the motion to file a brief as *amici curiae* because it does not bring to the attention of the Court any new relevant matter that could provide any additional help to the Court. Sup. Ct. R. 37.

The Petitioners are ably represented by a number of counsel, including attorneys for the Women's Law Project and the Center for Reproductive Law & Policy, who have already filed a comprehensive petition which covers all the relevant issues. The *amici curiae* brief will only burden the Court with issues and arguments not relevant to the issue at hand and its filing should be denied.

The *Amici* purport to be experts in the areas of physician-patient relationship, the need to maintain the confidentiality of personal medical information, maternal and neonatal health, and the treatment and prevention of substance abuse among pregnant and parenting women. They claim to offer insight of basic medical misunderstandings that "infected" the Court of Appeals decision and alert the Court to the harms, which will be inflicted, if the decision is allowed to stand.

While the *Amici* may be experts in their fields, this case was tried for six-weeks during which time many experts in their fields testified. The record created at trial is the only relevant base of information for consideration by the Court.

The *Amici* claim that there is a lack of support for the finding that maternal cocaine use poses serious dangers to children. Relying on new medical research, unavailable at the time of the Policy was developed and implemented, they argue that there was no crisis. This new information, not available or not presented at trial, is not relevant to consideration of whether the Respondents had a reasonable belief, based on the documented studies available at the time, that there was an epidemic of prenatal cocaine abuse posing serious dangers to maternal and infant health.

The *Amici* contend that the Court of Appeals failed to consider the Policy's effect of deterring women from seeking prenatal care. However, this point was addressed at trial and evidence established that there was no adverse effect.

A dominant focus of the *A*mici's brief is the issue of physician-patient confidentiality – an issue that is not even before the Court. The Petitioners never asserted state common-law claims for breach of the physician-patient confidentiality. And, while they did assert a constitutional claim for violation of their right to privacy under the Fourteenth Amendment, that claim was resolved by the District Court and the Court of Appeals in favor of the Defendants and the Petitioners do not seek review on that issue. Thus, the *Amici*'s purported expertise and focus on this issue are irrelevant.

Finally, the body of law on the special needs doctrine, its application in this case, and the purported dangers of the Court of Appeals' decision have all been adequately addressed by

the able counsel for the Petitioners. The *Amici* repetition of the same arguments brings nothing new to the dialogue.

CONCLUSION

The motion for leave to file brief as *Amici Curiae* should be denied.

Respectfully submitted,

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Date: January 10, 2000

No. 99-936

In the

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 11th day of January, 2000, I served the foregoing Memorandum in Opposition to Motion for Leave to File Brief as Amici Curiae on the following by mailing them first-class postage prepaid, addressed as follows by U.S. Mail:

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No. 99-936 (17)

JUN - 1 2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.; AFRICAN-AMERICAN WOMEN EVOLVING; AMERICANS FOR DEMOCRATIC ACTION, INC.; CENTER FOR CONSTITUTIONAL RIGHTS; CENTER FOR WOMEN POLICY STUDIES; CHICAGO ABORTION FUND; CHOICE; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE; HAWAI'I WOMEN LAWYERS; IOWA COALITION AGAINST DOMESTIC VIOLENCE; MEDICAL STUDENTS FOR CHOICE; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL CENTER FOR PRO-CHOICE MAJORITY; NATIONAL NETWORK OF ABORTION FUNDS; NATIONAL SOCIETY OF GENETIC COUNSELORS; NORTHWEST WOMEN'S LAW CENTER; SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT; SOUTH DAKOTA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT; WOMEN'S LAW CENTER OF MARYLAND, INC.; AND WIDER OPPORTUNITIES FOR WOMEN, IN SUPPORT OF PETITIONERS

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No. 99-936

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

-v.-

CITY OF CHARLESTON,
SOUTH CAROLINA, *et al.*,

Respondents.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.; AFRICAN-AMERICAN WOMEN EVOLVING; AMERICANS FOR DEMOCRATIC ACTION, INC.; CENTER FOR CONSTITUTIONAL RIGHTS; CENTER FOR WOMEN POLICY STUDIES; CHICAGO ABORTION FUND; CHOICE; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE; HAWAI'I WOMEN LAWYERS; IOWA COALITION AGAINST DOMESTIC VIOLENCE; MEDICAL STUDENTS FOR CHOICE; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL CENTER FOR PRO-CHOICE MAJORITY; NATIONAL NETWORK OF ABORTION FUNDS; NATIONAL SOCIETY OF GENETIC COUNSELORS; NORTHWEST WOMEN'S LAW CENTER; SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT; SOUTH DAKOTA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT; WOMEN'S LAW CENTER OF MARYLAND, INC.; AND WIDER OPPORTUNITIES FOR WOMEN, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b), the organizations listed above respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioners. Separate statements of interest follow. Collectively, however, *amici* have a long history in defense of women's rights. Petitioners have granted consent, but respondents have refused to consent.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution, and has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU of South Carolina is its statewide affiliate. This case raises important questions about the right of pregnant women to be treated as fully autonomous beings entitled to equal status under the Constitution. That is an issue that the ACLU has addressed in numerous contexts over the years through the efforts, among others, of our Women's Rights Project and our Reproductive Freedom Project. The ACLU has also been deeply involved in the legal debate over suspicionless drug testing, more generally. The proper resolution of this case is therefore a matter of substantial concern to the ACLU and its members.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to combat gender-based discrimination and promote equal rights. A major goal of NOW LDEF's work is to secure reproductive rights for all women. To this end, NOW LDEF has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services.

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights

through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men and more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure full equality for women, including reproductive freedom and fair treatment in health care services. In furtherance of that goal, NOW Foundation has supported related litigation and legislation, and has an ongoing interest in full health care for pregnant women. Policies such as those at issue here infringe on the constitutional rights of pregnant women.

Founded in October 1996, African-American Women Evolving's (AAWE) mission is to examine and draw the connections between social justice and basic human rights issues (*i.e.*, violence against women, substance abuse, HIV/AIDS, economic development and sustainability, etc.) that directly and indirectly impact the ability of women of color to exercise complete autonomy over their lives and bodies. AAWE supports the protection of a woman's right to privacy and reproductive autonomy. AAWE further believes that a ruling permitting unlimited restrictions on pregnant women's privacy and autonomy could lead to the diminution of constitutional rights for nonpregnant women and men, and have an even harsher impact on women of color, who historically have not had the freedom to choose and have an even harsher impact on access to the information and resources to exercise their choices.

Americans for Democratic Action, Inc. (ADA) is an independent, liberal, political organization, founded in 1947 by Eleanor Roosevelt, Joseph Rauh, and others, dedicated to promoting individual liberty and economic justice. ADA publishes a weekly legislative newsletter for liberal activists, a quarterly newsletter, special reports, including an annual voting record report that ranks Members of Congress ac-

cording to a liberal quotient based on a full spectrum of domestic and international policy issues. In addition to its legislative advocacy, ADA maintains a political action committee to support liberal candidates for Congress. ADA also engages in independent campaign activity in support of presidential candidates.

The Center for Constitutional Rights (the Center) is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center undertakes litigation on behalf of women and women's rights organizations on a wide range of issues, and assists in the development of legislative policy at the municipal, state and federal levels of government. The Center's current women's rights litigation and education docket focuses primarily on issues surrounding the severe repression of women's choices regarding sexuality, reproduction and childrearing, discrimination and unfair treatment in employment, and violence against women in the home and workplace. The issues before the Court have significant implications for the reproductive freedoms of women, particularly indigent women of color, and are therefore of critical importance to the Center's mandate.

Founded in 1972, the Center for Women Policy Studies (the Center) is an independent, national, multiethnic and multicultural feminist policy research and advocacy institution. The Center is a founding member and serves on the steering committee of the National Coalition for Effective Drug Policy and co-chairs the Coalition's Women and Families Drug Policy Committee. Since 1989, the Center has addressed attempts to define a legal status for the fetus and create an artificial "maternal-fetal conflict" in both HIV/AIDS and drug policies. We currently are working with a network of state legislators to promote public health rather than punitive approaches to address the needs of pregnant

women in the context of substance abuse. The Court's decision in this case will have a significant impact on legislators' ability to enact comprehensive approaches that increase pregnant women's access to affordable health care, protect women's reproductive choices, and encourage women to seek prenatal care -- the single most important factor influencing a healthy pregnancy outcome.

The Chicago Abortion Fund (CAF) was founded in October 1985 by health-care providers and members of Chicago's pro-choice community to provide low-income women with access to safe, affordable abortion services. CAF's mission is to overturn economic barriers to reproductive choice. CAF further works to increase the awareness of policymakers and the public about low-income women's inability to access the full range of reproductive health care, including safe abortion. Through direct service and education/advocacy, CAF helps low-income women in obtaining safe abortion services by providing clinic referrals, negotiated discounts and financial assistance. In both its direct service and education/advocacy activities, CAF confronts the social and economic barriers that make it virtually impossible for low-income women, disproportionately women of color, to achieve reproductive autonomy.

CHOICE is a nonprofit agency dedicated to advocacy and education on issues of reproductive health, family planning, HIV/AIDS, and children's health. Founded in 1971, CHOICE currently serves over 36,000 people annually, primarily low-income women and teens in the Philadelphia area. CHOICE recognizes the detrimental effect of the drug-testing policy on women's and children's health. If women fear that their drug use will be discovered by law enforcement officials, they will be less likely to seek health services. Fewer pregnant women accessing prenatal care threatens a potential increase in maternal and infant mortality; greater high-risk deliveries and critical neonatal condi-

tions; and escalating public cost in financial and human resources to cope with preventable health crises.

The Connecticut Women's Education and Legal Fund (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,000 individuals and organizations. CWEALF has spent much of its history defending the rights of pregnant women in the courts, workplaces and in their private lives. We have participated in landmark cases on termination of parental rights based on prenatal drug use and have worked with the state's correctional institutions to promote drug treatment for female inmates. CWEALF believes that a ruling which upholds the diminished rights of pregnant women sets a precedent for prohibiting a wide range of activities for pregnant women. The drug-testing policy at issue in *Ferguson v. City of Charleston* demonstrates that pregnant women are impermissibly being subjected to invasions of privacy and autonomy.

The Hawaii State Coalition Against Domestic Violence (HSCADV) is a not-for-profit statewide coalition of twenty domestic violence programs, working collaboratively to affect public policy and establish a coordinated and consistent response for the safety and protection of battered women. Our goals include public recognition of domestic violence as a pervasive societal problem detrimental to all members of society and the obliteration of racism, sexism, and homophobia which contribute to domestic violence.

Hawai'i Women Lawyers (HWL) is a nonprofit organization devoted to the advancement of the civil rights and social welfare of Hawai'i's citizens -- particularly its women and children. Its membership consists of over 200 lawyers licensed to practice in the State of Hawai'i, together with auxiliary lay and unlicensed members. Throughout its 23-

year history HWL has been a strong supporter of the right to choose. In its efforts to preserve and extend the civil rights of Hawai'i's citizens, HWL has lobbied strenuously for many years in our State Legislature and has filed numerous *amicus* briefs in appellate courts, primarily in Hawai'i and the Ninth Circuit.

The Iowa Coalition Against Domestic Violence (ICADV) is a nonprofit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to domestic violence programs across Iowa, and also acts on a statewide level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. Recognizing that unequal power contributes to violence against women, ICADV advocates for social change, legal and judicial reform, and the end to all oppression.

Medical Students for Choice represents over 5,000 medical students and residents dedicated to ensuring that women receive comprehensive reproductive health care, including abortion. One of the greatest obstacles to safe, legal abortion is the absence of trained providers. Our goals are to build a network of support and resources for students and residents, to reform medical curricula and training to include abortion and reproductive health as a standard part of medical education, to increase reproductive health education and training opportunities for medical students and residents, and to advocate integrating abortion into medical training and practice by educating policymakers in medicine and government. We work on a grassroots basis at medical schools and residency programs throughout North America, sponsor national and regional educational meetings, provide reproductive health clinical training externships, maintain a presence on the Internet, and publish a quarterly newsletter.

The National Association of Women Lawyers (NAWL) is a one hundred year old bar association headquartered in Chicago. It was the first and is the oldest national women's bar association in the United States. NAWL's missions include preventing violence against women and achieving reproductive rights and economic justice for women. NAWL remains committed to ensuring that all women have safe and unobstructed access to health providers, without being subjected to unreasonable search or seizure.

The National Center for the Pro-Choice Majority is a nonprofit organization that provides research and information services to the pro-choice movement. It publishes a national newsletter, *The Pro-Choice Report*, which informs its subscribers about the numerous challenges to women's reproductive freedom which can prevent them from exercising their constitutional right to make and carry out reproductive decisions. The drug testing of pregnant women is an example of one such challenge.

The National Network of Abortion Funds (NNAF) created in 1993, is an association of 73 community-based abortion funds in the United States, including one in the state of South Carolina. In 1999 NNAF member funds helped approximately 10,000 women who would not have been able to obtain a safe, legal abortion with their own resources, by loaning or granting them a combined total of over $1.2 million. Restrictions on abortion access and funding are discriminatory because they especially burden poor women, young women, women of color and rural women. NNAF believes that involuntary drug testing of pregnant women is a violation of privacy which strikes the most vulnerable women -- those whose reproductive choices are already severely limited by government policies such as abortion-funding cutoffs and welfare child-exclusion laws.

The National Society of Genetic Counselors (NGSC), an organization comprised of 1800 individual members, is

the leading authority and advocate for the genetic counseling profession. The NSGC supports an increase in prevention efforts and treatment services for alcohol and drug-dependent women and their children. Treatment services have proven to be a successful way to overcome both drug and alcohol abuse and thus prevent prenatal exposure to these agents. These services are far preferable to punitive sanctions brought against alcoholic and drug-dependent women solely because they were pregnant when they used alcohol or drugs.

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to care. The NWLC has also challenged efforts by prosecutors to bring criminal charges of child abuse against women who use controlled substances while pregnant, successfully fought anti-choice initiatives, and challenged efforts to force sterilizations on developmentally disabled women. The NWLC continues to serve as a regional expert and leading advocate on reproductive freedom.

The South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA) is a strong voice for women's rights in South Carolina. SCCADVASA is a private, nonprofit statewide advocacy organization founded in 1981 to represent the needs of victims/survivors of domestic and sexual violence. SCCADVASA believes that the drug-testing policy adopted by law enforcement officials in Charleston, South Carolina in 1989 is a serious infringement on women's rights. As such it is absolutely unacceptable to this organization and we wholeheartedly volunteer our participation as *amicus curiae* in this case.

The South Dakota Coalition Against Domestic Violence and Sexual Assault (SDCADVSA) is a nonprofit organization of twenty-three local domestic violence/sexual assault programs dedicated to ending domestic violence. SDCADVSA provides services such as crisis phone counseling and temporary shelter for battered women and their children, and promotes public acknowledgment of the problems of domestic violence and sexual assault. SDCADVSA holds that oppression of every kind promotes and encourages domestic violence and believes that attempts to create rights for the fetus at the expense of the liberty of the mother are a form of oppression which cannot be condoned by our organization.

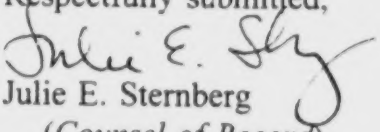
The Women's Law Center of Maryland, Inc. (WLC) was established in 1971 to meet the legal needs of women especially in the area of family law and in the workplace. Through impact litigation, legislative initiatives, direct service projects, and public education, the WLC works to eliminate discrimination and unfair practices for women in the state of Maryland. The WLC's membership includes approximately 200 women and men from all walks of life, including lawyers, business executives, elected officials, policy makers, artists, journalists, students, engineers, homemakers, and health-care professionals. The WLC is concerned that *Ferguson v. City of Charleston* presents significant issues concerning the basic constitutional rights of women, specifically pregnant women. We believe that the application of the special needs exception to pregnant women will open the door to unlimited restrictions on a woman's right to privacy.

Wider Opportunities for Women (WOW) is a national nonprofit women's employment organization with over three decades of experience helping women and girls achieve equality of opportunity in education and employment. WOW's mission is to help low-income women and their children achieve economic self-sufficiency and to move out of poverty. WOW is concerned with ensuring that women

have gender equality because the lack of such equality fundamentally and negatively impacts women's ability to attain economic independence.

For the reasons stated above, *amici* respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,



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INTEREST OF *AMICI* [1]

The interest of *amici* are set forth in the accompanying motion.

STATEMENT OF THE CASE

Petitioners in this case are ten women who were each subjected to warrantless, suspicionless, and nonconsensual urine testing for cocaine use by the Medical University of South Carolina (MUSC), a state hospital, in connection with their pregnancies. Because they tested positive for cocaine use, nine of the women, all of whom were African-American, were arrested for cocaine possession, distribution of cocaine to a minor, or child abuse. The tenth petitioner was compelled to admit herself "voluntarily" to the MUSC psychiatric unit for substance abuse treatment for a month in order to avoid arrest.

The policy at issue was developed in the fall of 1989 by a joint interagency task force that included representatives from the office of the local prosecuting attorney and the Charleston police department, as well as MUSC. Pursuant to the policy, any MUSC maternity patient who met one or more of nine generalized criteria was subject to a urine drug screen. The criteria were: (1) no prenatal care; (2) late prenatal care (beginning after 24 weeks); (3) incomplete prenatal care (fewer than five visits); (4) preterm labor without an obvious cause; (5) separation of the placenta from the uterine wall; (6) a history of drug or alcohol abuse; (7) unex-

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

plained birth defects; (8) intrauterine growth retardation without an obvious cause; or (9) intrauterine fetal death. This protocol undoubtedly resulted in the testing of dozens of pregnant women whose urine contained no trace of controlled substances, although MUSC's failure to keep records of its implementation of the policy makes that number impossible to quantify. *See* McCabe Tr.165:15-20, 177:6-17.

Under the policy as originally implemented, a patient whose urine tested positive for cocaine was reported to law enforcement and arrested. Later, the policy was amended so that a woman who had a single positive test for cocaine could choose to receive drug treatment or be arrested; however, a second positive test or failure to comply with drug treatment obligations would result in notification to authorities and her arrest. Thirty women were arrested pursuant to the MUSC policy, all but one or two of whom were African-American. *See* Shapiro Tr.187:15-17. Many women at MUSC were arrested during their pregnancies or immediately following delivery.

Petitioners brought this lawsuit against MUSC and other state defendants to challenge MUSC's policy of warrantless, suspicionless, and nonconsensual urine testing of pregnant women as a violation of, *inter alia*, their rights under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures. The court of appeals upheld the MUSC drug tests as reasonable "special needs" searches under the Fourth Amendment.

SUMMARY OF ARGUMENT

The question in this case is whether the Fourth Amendment permits the state, acting without either a warrant or individualized suspicion, to compel pregnant women who seek prenatal care in a public hospital to submit to a drug test. Respondents urge this Court to hold that MUSC's mandatory drug testing policy meets the "special needs" exception to Fourth Amendment requirements. To fit within the special needs exception, however, the state must establish both that its policy is unrelated to normal law enforcement needs and that the persons being searched have a diminished expectation of privacy. Here, respondents can establish neither. The integral involvement of law enforcement officials in the planning and execution of the challenged policy is fully discussed in other briefs. This brief is therefore focused on rebutting the claim that pregnant women have a diminished expectation of privacy, and thus diminished Fourth Amendment rights, merely by virtue of their pregnancy.

Respondents defend that claim in this case by pointing to the state's interest in protecting the health of pregnant women and the fetuses they carry. There is nothing new about these proposed justifications for treating women as less than fully autonomous and denying them rights routinely granted to men. Indeed, this Court not only acknowledged but endorsed such reasoning at an earlier stage of our history when women were commonly barred by law from participating in the nation's social, political, and economic life. But, as this Court recently observed, those decisions relegating women to a lesser constitutional status were written "when a different understanding . . . of the Constitution prevailed." *Planned Parenthood v. Casey*, 505 U.S. 833, 896 (1992). Just as this Court has refused to give husbands dominion over their wives for the purpose of enabling them to assert an interest in the fetus, *id.* at 898, so this Court

must prevent the state itself from exercising such dominion over pregnant women. Indeed, over the past several decades, this Court has repeatedly and forcefully rejected attempts to deny women equality, even in the face of benign assurances that the challenged actions were necessary to protect maternal and fetal health. *See, e.g., International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

As the Court has further recognized, once that justification is accepted as the basis for stripping rights away, there is no logical stopping point. Many things men and women do before and after conception can affect the health of future children, from smoking to drinking to bad dietary habits. If the state can drug test pregnant women based on criteria that have more to do with poverty than with actual drug use, there is no reason why the state could not claim an equivalent right to disregard constitutional constraints and monitor the behavior of women more generally throughout their pregnancies. Nor is this concern fanciful. In recent years, for example, pregnant women in this country have been forced to undergo cesarean sections without their consent and been imprisoned for alcohol use, all in the name of protecting fetal health.

Such intrusions by the state necessarily rest on the paternalistic assumption that the constitutional rights of pregnant women can be overridden whenever the state purports to be acting in furtherance of fetal health. This assumption is legally insupportable. And, as this case once again demonstrates, it is an assumption that results more often than not in policies that have a disproportionate impact on poor and minority women, thereby most heavily burdening those women whose personal and physical autonomy is already most threatened by the state.

ARGUMENT

I. ONLY PERSONS WITH A DIMINISHED EXPECTATION OF PRIVACY MAY BE SUBJECTED TO WARRANTLESS, SUSPICIONLESS, NONCONSENSUAL SEARCHES UNDER THE SPECIAL NEEDS DOCTRINE

The Fourth Amendment protects the people against "unreasonable searches and seizures." Searches performed without a warrant are generally unreasonable *per se*, unless they fit within a carefully defined exception to the warrant requirement. *See, e.g., Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973). Even in contexts where a warrant is not required, to be reasonable under the Fourth Amendment a search ordinarily must be based on individualized suspicion of wrongdoing. *See Chandler v. Miller*, 520 U.S. 305, 308 (1997); *see also Vernonia School District v. Acton*, 515 U.S. 646, 671 (1995)(O'Connor, J., dissenting)("'while the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures'")(quoting Clancy, "The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures," 25 Mem. St. U.L. Rev. 483, 489 (1994)).

The collection and testing of urine from maternity patients at MUSC constitutes a search subject to the Fourth and Fourteenth Amendments. *See Chandler*, 520 U.S. 305; *Acton*, 515 U.S. 646; *National Treasury Employees Union v. Von Raab (NTEU)*, 489 U.S. 656 (1989): *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). "As explained in *Skinner*, government-ordered 'collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable.'" *Chandler*, 520

U.S. at 313 (quoting *Skinner*, 489 U.S. at 617). Moreover, contrary to the conclusion of the court below, *Ferguson v. City of Charleston, South Carolina*, 186 F.3d 469, 479 (1999)("searches at issue here . . . were only minimally intrusive"), such urine testing is a severe intrusion on personal privacy. Indeed, at least four Justices of this Court have recognized that "state-compelled, state-monitored collection and testing of urine . . . is . . . 'particularly destructive of privacy and offensive to personal dignity.'" *Acton*, 515 U.S. at 672 (O'Connor, J., dissenting, joined by Stevens and Souter, JJ.)(quoting *NTEU*, 489 U.S. at 680 (Scalia, J., dissenting)).

The searches at issue in this case were not based on individualized suspicion. Although respondents have argued that the "criteria for performing the test . . . provided amble [sic] suspicion to believe that the patients had been using cocaine," Op.Cert. at 23, few if any of the factors in the MUSC policy are closely associated with cocaine use. The fact that a pregnant woman misses prenatal visits, has a prior history of alcohol abuse, or experiences medical difficulties during pregnancy does not provide any reasonable basis to believe that she may have ingested cocaine during her pregnancy. In fact, a number of the criteria are far more indicative of poverty than of cocaine use; poor women often lack ready access to prenatal care and suffer from health and nutritional deficiencies that may have adverse consequences for their pregnancies. *See, e.g.*, J.A. at 286-87 (Chasnoff). A claim of individualized suspicion cannot, therefore, rest on a patient's satisfaction of any one of the criteria that triggers testing under the MUSC policy.

This Court has recognized only a few narrow exceptions to the individualized suspicion requirement, based on "special needs, beyond the normal need for law enforcement." *Chandler*, 520 U.S. at 313; *Skinner*, 489 U.S. at 619. Even then, the Court has upheld a "special needs"

search only when the Court concluded that the person subjected to a suspicionless search possessed a "diminished expectation of privacy." *See Acton*, 515 U.S. at 657 ("school athletes have a reduced expectation of privacy"); *NTEU*, 489 U.S. at 679 (customs employees seeking promotions to positions involving drug interdiction or firearms use "enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions"); *Skinner*, 489 U.S. at 627 ("the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety"); *New York v. Burger*, 482 U.S. 691, 700 (1987)("expectation of privacy . . . is particularly attenuated in commercial property employed in 'closely regulated' industries"); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)("certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise")(citation omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985)(Powell, J., concurring)("students within the school environment have a lesser expectation of privacy than members of the population generally").

In particular, the Court has upheld suspicionless searches of certain classes of people over whom the state has supervisory or custodial authority, such as pretrial detainees, probationers, and public school students. *See Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979)(pretrial detainees); *Griffin v. Wisconsin*, 483 U.S. 868 (1987)(probationer); *Acton*, 515 U.S. 646 (public school athletes). Such a supervisory relationship, this Court has held, justifies "a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin*, 483 U.S. at 875; *cf. Acton*, 515 U.S. at 655 ("the nature of [the State's] power is custodial and tutelary, permitting a degree of su-

pervision and control that could not be exercised over free adults").

As discussed more fully below, pregnant women clearly cannot be placed in the same category.

II. PREGNANT WOMEN DO NOT, BY VIRTUE OF THEIR PREGNANCIES, HAVE A DIMINISHED EXPECTATION OF PRIVACY

In order to uphold the MUSC drug testing policy, this Court would have to determine that pregnant women, by virtue of their pregnancies, have a diminished expectation of privacy; that, like prisoners, parolees, and schoolchildren, they are not entitled to the full protection afforded free adults by the Fourth Amendment. This Court's recent jurisprudence leads to the opposite conclusion: pregnant women have as great a right to privacy as other free adults, as well as to autonomy and bodily integrity. Unlike its relationship to public school students, the state does not stand *in loco parentis* to pregnant women. Unlike prisoners, probationers, and detainees, pregnant women have not sacrificed their right to privacy. Because women do not in any sense become wards of the state by virtue of their pregnancies, the state cannot subject pregnant women to warrantless, suspicionless, nonconsensual searches.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 887-98 (1992), the Court struck down a Pennsylvania statutory provision that required a married woman to notify her husband before having an abortion. *See also Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)(spousal consent requirement for abortion held unconstitutional). The Court recognized that a husband has a "deep and proper concern and interest" in the fetus his wife is carrying. *Casey*, 505 U.S. at 895. Nevertheless, the Court ruled that the husband's interest did not "outweigh[] a wife's liberty"

and did not permit the state to regulate her pregnancy to protect his interest. *Id.* at 898.

Of particular relevance here, the Court recognized the slippery slope that a contrary ruling would have created:

> If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a post-fertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify -- a requirement of the husband's consent as well.

Id. Thus, the Court concluded: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Id.*

A fortiori, the state may not itself exercise the kind of dominion over pregnant women that parents exercise over their children. Yet, application of the special needs exception in this case would reduce the legal status of pregnant women to less than full adults. Any purported justification

for excepting pregnant women from the Fourth Amendment's general protection against unreasonable searches must ultimately rest on an outmoded view of women as mere incubators of the fetus and mothers to their children, subjecting women, on that basis, to otherwise unconstitutional intrusions into their privacy.

This traditional view of women's "proper" role has long been used in a variety of contexts to deny women full participation in the social and economic life of the country, as well as equal status under the Constitution. As this Court recognized in *International Union, UAW v. Johnson Controls*, 499 U.S. at 211, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." For example, this Court relied on that "concern" in *Muller v. Oregon*, 208 U.S. 412, 422 (1908), when it upheld a maximum hours law intended to protect a woman's "proper discharge of her maternal functions":

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

This concern for women's role in "the preservation of the race" was also cited by the Court as a valid basis for exempting women from poll taxes, on the assumption that the "burdens necessarily borne by them" as mothers prevented them from earning a living. *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937). Similarly, during the American Medical Association's nineteenth century campaign to outlaw abortions, anti-abortion advocates argued that childbearing was "a duty tacitly promised the state." D.H., "On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her," 17 Nashville J. Med. & Surgery 200, 201 (1876). *See generally* Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 Stan. L. Rev. 261, 280-323 (1992). During the same time period, women were excluded from higher education out of concern that "the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs." *United States v. Virginia*, 518 U.S. 515, 536 n.9 (1996).[2]

But, as this Court recently observed in *Casey*, those arguments were advanced at a time "when a different understanding of . . . the Constitution prevailed." 505 U.S. at 896. That "different understanding" is most famously encapsulated by Justice Bradley's concurring opinion in *Brad-*

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[2] Respondents here articulate similarly paternalistic purposes behind the MUSC policy. *E.g.*, Op.Cert. at 2 (MUSC has a "special interest in protecting the health of pregnant patients"), 1 ("drug screens were medically necessary for management of pregnancy patients"). Like other paternalistic rationales, this one cannot withstand scrutiny. The MUSC policy is punitive, not therapeutic, resting as it does on both the threat and the reality of arrest and imprisonment of noncompliant patients. A therapeutic policy cannot depend on coercion, for competent individuals in this society have the right to accept or reject medical interventions. *E.g.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

well v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873), where he offered the following rationale for the exclusion of Myra Bradwell from the practice of law:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Justice Bradley then concluded: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.*

By contrast, the *Casey* Court unequivocally rejected the notion that women have "special responsibilities" as "the center of home and family life" that "preclude[] full and independent legal status under the Constitution." 505 U.S. at 897 (quoting with disapproval *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)(upholding Florida's effective exclusion of women from jury service)); *see also Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)(acknowledging "our Nation['s] . . . long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage"). Similarly, in *Johnson Controls*, 499 U.S. 187, this Court unanimously invalidated an employment policy that barred fertile women, but not fertile men, from certain work

in a battery plant because of the risk of lead exposure. In so doing, this Court implicitly repudiated the paternalistic rationales for women's subordination that had animated decisions such as *Muller v. Oregon*, 208 U.S. 412. As both *Casey* and *Johnson Controls* make clear, even "professed moral and ethical concerns about the welfare of the next generation do not suffice" to justify reducing the legal status of women to less than full adults. *Johnson Controls*, 499 U.S. at 206; *see also Casey*, 505 U.S. at 896-98; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (invalidating public school policy that required pregnant teachers to leave work barely halfway through their pregnancies).

As the *Casey* Court further emphasized: "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family." 505 U.S. at 898. The MUSC drug-testing policy subjects pregnant women to just such an "abuse of governmental power . . . for the supposed benefit of a [prospective] member of the individual's family." It seeks to trump women's liberty with the state's interest in the health of the fetus. The policy thereby ignores this Court's rulings affirming the equal rights of pregnant women to autonomy, bodily integrity, and privacy. For this reason it cannot be sustained.

III. AN AFFIRMANCE BY THIS COURT WOULD OPEN THE DOOR TO EXTENSIVE RESTRICTIONS ON INDIVIDUAL AUTONOMY AND PRIVACY RIGHTS

This Court should also decline to apply the special needs exception in this case because doing so would pave the way for virtually boundless impingements on individual autonomy and privacy rights guaranteed by the Constitution.

This Court has refused in other contexts to allow the infringement of constitutional rights on the basis of a proffered state interest that has no logical stopping point, "thus allowing the exception to swallow the rule." *Florida v. J.L.*, __ U.S. __, No. 98-1993, slip op. at 6 (March 28, 2000) (footnote omitted)(refusing to recognize a firearms exception to the Fourth Amendment's insistence on reliable tips). The Court should likewise decline to do so here.

Allowing the diminution of constitutional protections in the name of the fetus could subject pregnant women to restrictions on virtually every aspect of their lives, including the most private aspects. For generations, a wide range of common conditions of and activities by pregnant women has been identified, rightly or wrongly, as posing some threat to their health and that of the fetus. Although the specific directives given to pregnant women have changed over time, the pervasive scope of the conduct that they address has not.

Thus, one generation ago, pregnant women were directed to modify everything from their smoking habits to their bathing and sexual habits. For instance, one popular pregnancy guide encouraged women to limit their smoking to ten cigarettes or fewer per day. Nicholson Eastman, M.D., EXPECTANT MOTHERHOOD 78 (3d ed. 1957). If, however, they had "been used to smoking considerably more than this for several years," then they were told "by no means to try to give them up during pregnancy," as doing so would be too upsetting. *Id.* Alcohol consumption was to be limited to "a cocktail now and then." *Id.* at 66. Baths during the later stages of pregnancy were forbidden because of the fear (later proved unfounded) of infection from bath water, among other reasons. *See id.* at 71; Arlene Eisenberg, *et al.*, WHAT TO EXPECT WHEN YOU'RE EXPECTING 249 (2d ed. 1996). Fetal welfare and that of pregnant women further mandated, as an "extremely important and absolute" rule, that "[u]nder no circumstances" could preg-

nant women engage in sexual intercourse during the last month of pregnancy. Eastman, *supra*, at 73. Pregnant women's diet was likewise strictly regulated: They were told to eat "no more and no less" than they had eaten before they became pregnant, *id.* at 46; to limit salt intake drastically, *id.* at 65; and to gain between 20 and 24 pounds, *id.* at 67.

Today, the range of behavioral guidelines urged on pregnant women in the name of fetal health is as broad if not broader. For example, to ensure optimal fetal development, pregnant women are now urged to stop smoking entirely and immediately, *see* Eisenberg, *et al.*, *supra*, at 54-57; American College of Obstetricians and Gynecologists, PLANNING FOR PREGNANCY, BIRTH, AND BEYOND 108-09 (2d ed. 1995)(hereinafter ACOG); to avoid contact with anyone who is smoking and who could thereby subject the fetus to contamination from second-hand smoke, Eisenberg, *et al.*, *supra*, at 57-58; and to abstain from alcohol consumption, "except perhaps for a celebratory half glass of wine on a birthday or anniversary," *id.* at 53; *see also* ACOG, *supra*, at 110-112. In the name of fetal safety, pregnant women are further urged to refrain from changing a cat litter box, consuming unpasteurized cheese or undercooked meat, and gardening without gloves in order to avoid contracting toxoplasmosis, Eisenberg, *et al.*, *supra*, at 64; to have microwave ovens checked for radiation leakage because of "talk that [the microwave] may be a modern menace," *id.* at 65; and to wear rubber gloves and avoid inhaling when using household cleaning products in order to limit exposure to potentially harmful chemicals, *id.* at 67-68. Pregnant women are also advised to ensure that their drinking water is free of lead, *id.* at 68, and to cut back on or give up caffeine, *id.* at 60; ACOG, *supra*, at 109-110. Gaining no less than 25, and no more than 35 pounds, is now encouraged, ACOG, *supra*, at 124; Eisenberg, *et al.*,

supra, at 148, as is regular but not too strenuous exercise, Eisenberg, *et al.*, *supra*, at 189-90; ACOG, *supra*, at 88-90. Pregnant women with certain medical histories are told to limit or avoid having sexual intercourse at all during pregnancy, ACOG, *supra*, at 104-05; and some physicians urge the use of condoms for all couples during the last eight weeks of pregnancy, Eisenberg, *et al.*, *supra*, at 250.

The directives given to pregnant women thus touch on virtually every aspect of their lives. Many of these directives may be salutary; if history is prologue, others may prove to be misguided. But, in either event, there is a critical constitutional distinction between medical advice that rests on the premise of patient autonomy, and state-coerced supervision that overrides individual autonomy in favor of government paternalism. Under respondents' proposed formulation of the special needs exception, what is to prevent the state from requiring blood alcohol level tests of pregnant women at every prenatal visit? Why could the state not require blood tests to measure nicotine and caffeine levels?[3] What is to stop the police from undertaking surveillance of pregnant women to ensure that they are making regular prenatal visits to an obstetrician, eating properly, taking appropriate precautions when using household cleaning products and changing the cat litter, and exercising enough but not too much? Why could the police not conduct warrantless searches of the homes of pregnant women to assess whether drinking water is being filtered? What about surveillance of

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[3] It is difficult to ascertain the relative risks to the fetus of various discouraged behaviors. As discussed more fully in the *amicus* brief of American Public Health Association, *et al.*, medical studies have not validated the assumption, underlying the MUSC policy, that prenatal exposure to cocaine poses risks of long-term, negative effects on child development that are different in degree from the risks posed by exposure to other maternal behavior, whether legal or illegal. *See id.* at Part III (citing studies).

the bedrooms of pregnant women to ensure that couples are following a physician's direction to abstain from sexual intercourse, or searches for condoms when their use has been directed? And what is to stop the police from placing under hospital or other detention those pregnant women whose failure to follow the rules is deemed a threat to the fetus? As this Court has recognized, the Constitution does not allow state action that opens the door to such a troubling degree of intrusion on the rights of pregnant women. *See* Point II, *supra*.[4]

It is by no means purely theoretical to assume that the state would attempt such measures. An array of incidents and policies evidences the willingness of state authorities to disregard the constitutional rights of pregnant women when

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[4] Moreover, there is no logical stopping point preventing similar impositions on all sexually active men and women with reproductive capacity. For example, recent epidemiological studies trace diverse forms of fetal injuries to sperm damaged by, *inter alia*, exposure to alcohol, lead, and pesticides, *see, e.g.*, Siegel, *supra*, at 337; and both paternal drug use and paternal smoking have been linked to certain birth defects, *see* Cynthia R. Daniels, "Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility," *in* FETAL SUBJECTS, FEMINIST POSITIONS 83, 85-88 (Lynn M. Morgan & Meredith W. Michaels eds., 1999)(citing studies). Furthermore, because a woman's conduct has the greatest impact on fetal development during the first several weeks of pregnancy, when a history of irregular menstrual cycles or bleeding caused by hormonal changes may obscure from the woman the fact of her pregnancy, the state might consider regular, mandatory pregnancy testing for all sexually active women. *See, e.g.*, Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," 95 Yale L.J. 599, 625 n.82 (1986). Thus, suspicionless searches of all sexually active men and women with reproductive capacity could be justified by the assertion of a "special need" to protect fetal health.

their behavior is deemed unsuitable to fetal development. Fortunately, in many such cases the invasive measures undertaken by state authorities have ultimately been rescinded by other officials or rejected by the courts; unfortunately, for practical reasons the reversals have often come too late to prevent unwarranted suffering and deprivation of rights.

In one line of cases, state authorities have seized and detained, or threatened to seize and detain, pregnant women in the name of protecting the fetus. Officials in the South Carolina Department of Alcohol and Other Drug Abuse Services, for example, recently distributed literature advising pregnant women that "it's . . . a crime in South Carolina" to "smoke, drink . . . or engage in other activities that risk harming" the fetus. South Carolina Department of Alcohol and Other Drug Abuse Services, "Important Facts to Remember: A Special Delivery Should be Handled With Care." Only after the state Attorney General -- in the midst of the briefing for this Court in this case -- learned of that message were the brochures hastily recalled and statements made by the Attorney General to the press that only pregnant women who use illegal drugs would be prosecuted. *See, e.g.*, "Agency Pulls Pregnancy Pamphlets: Brochures Recalled for Inaccurate Statements About Legality of Substance Abuse," Augusta Chron., May 14, 2000, at B2. The official from the Department of Alcohol and Other Drug Abuse Services who is responsible for redrafting the recalled literature has indicated, however, that he "has not decided whether to make reference to nicotine or alcohol abuse as potentially criminal" in the next edition of the brochures. *Id.* Moreover, at least one South Carolina woman has been arrested for consuming alcohol during her pregnancy. *See* Lynn M. Paltrow, "Pregnant Drug Users: Fetal Persons, and the Threat to *Roe v. Wade*," 62 Alb. L. Rev. 999, 1055 n.273 (1999)(citation omitted).

Wyoming officials have likewise arrested a pregnant woman because of alcohol use and charged her with felony child abuse. Rachel Roth, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 150 (2000)(citing Charles Levendosky, "Turning Women into Two-Legged Petri Dishes," Star-Tribune, Jan. 21, 1990, at A8; Charles Levendosky, "Using the Law to Make Justice the Victim," Star-Tribune, Feb. 4, 1990, at A8). She spent time in jail before a judge dismissed the charge. *Id.* And alcohol use is not the only ground cited for detaining pregnant women. In Wisconsin, for example, officials held a pregnant sixteen-year-old in secure detention for the sake of fetal development because the young woman tended "to be on the run" and to "lack motivation or ability to seek medical care." Veronika E. B. Kolder, M.D., *et al.*, "Court-Ordered Obstetrical Interventions," 316 New Eng. J. Med. 1192, 1195 (1987)(citing "Girl Detained to Protect Fetus," Wis. State J., Aug. 16, 1985, at 3.2).

These incidents are not unique. In California, a deputy district attorney, concerned about a pregnant woman's mental state but lacking sufficient evidence to have her committed for psychiatric treatment, instead obtained a juvenile court order declaring her fetus a dependent child of the state and detaining the woman pending birth. *In re Steven S.*, 126 Cal. App. 3d 23, 30-31 (Cal. Ct. App. 1981). The appellate court ultimately held that the district attorney had impermissibly manipulated the juvenile laws to detain a woman who, by all accounts, could not properly be committed under the applicable code. *Id.* at 30-31. By the time the appellate court issued its ruling, however, the woman had already been involuntarily detained for approximately two months until the delivery of her child, at which point she was released. *Id.* at 27, 31. Similarly, in New York, state officials sought to detain a pregnant woman in a mental hospital against her will on the sole ground that, if re-

leased, she would resume drug use and thereby pose a danger to her fetus. *In re the Retention of Tanya P.*, No. 530059/93, slip op. at 2-4 (N.Y. Sup. Ct. Feb. 24, 1995). The court rejected the state's petition, ordered the woman released, and, in a subsequently issued written decision, emphasized that the "right to determine one's medical treatment and to make reproductive choices is, and must be, superior to any interest which the state may have in an unborn fetus." *Id.* at 6, 26. Several weeks after her release, the woman gave birth to a healthy and drug-free baby. *Id.* at 1.

In other cases, state authorities have sought to compel pregnant women to submit to surgery in the name of promoting fetal health. In Massachusetts, for example, a lower court ordered a pregnant woman's cervix sewn up against her will to prevent a possible miscarriage. *See Taft v. Taft*, 446 N.E. 2d 395, 396 (Mass. 1983). The woman was ultimately spared from undergoing the procedure by the Supreme Court of Massachusetts, which vacated the lower court's order because that court had not adequately considered the woman's constitutional right of privacy, *id.* at 396-97, and because the record did not show "circumstances so compelling as to justify curtailing [her] constitutional rights," *id.* at 397. In Michigan, a court ordered a pregnant woman who refused on religious grounds to undergo a cesarean section to report to the hospital or be forcibly brought there by the police. *See* Janet Gallagher, "Prenatal Invasions and Interventions: What's Wrong with Fetal Rights," 10 Harv. Women's L.J. 9, 47 (1987)(citing Flanigan, "Fleeing the Law: A Matter of Faith," Det. Free Press, June 29, 1982, at 3A). Rather than submit to the police, the woman fled into hiding with her family and about two weeks later gave birth vaginally, with no complications, to a healthy baby. *Id.* In a similar case in Illinois, a pregnant woman was advised that, because of an insufficient flow of oxygen to the fetus, the fetus could be born dead or severely

retarded if she did not immediately undergo a cesarean. *In re Baby Doe*, 632 N.E.2d 326, 327 (Ill. App. Ct. 1994). When the woman opposed the surgery on religious grounds, the office of the State's Attorney sought a court order compelling her to submit to the cesarean. *Id.* That request was denied, and the Illinois appellate court ultimately issued a decision affirming that a woman's "right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy." *Id.* at 332. After the order was denied, the woman gave birth by vaginal delivery to an "apparently normal and healthy, although somewhat underweight, baby boy." *Id.* at 329.

Other women have been unable to avoid compelled cesarean sections, notwithstanding the attendant risks.[5] One young pregnant woman, severely ill with cancer, several times mouthed the words "I don't want it done" when told that a court had ordered her to undergo a cesarean and that she likely would not survive the operation. *In re A.C.*, 573 A.2d 1235, 1241 (D.C. 1990)(*en banc*). The cesarean was nonetheless performed; the baby died within a few hours of the surgery; and the woman died two days later. *Id.* An *en banc* panel of the District of Columbia Court of Appeals

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[5] Because a cesarean section is major surgery, it carries with it higher rates of maternal mortality and morbidity than vaginal delivery. *See, e.g.*, Nancy K. Rhoden, "The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans," 74 Cal. L. Rev. 1951, 1958 (1986). Post-operative infections, including infections of the endometrium, urinary tract, or surgical wound, are of particular concern, and occur five to ten times more often after cesarean section than after vaginal birth. *See id.* Other risks include "trauma to nearby organs (*e.g.*, uterus, bladder, bowel), pulmonary embolus, delayed wound healing, hernia, bowel obstruction, and hemorrhage." *Id.*

later reviewed the case notwithstanding mootness concerns, vacated the court order, and held that "in virtually all cases the question of what is to be done is to be decided by the patient -- the pregnant woman -- on behalf of herself and the fetus." *Id.* at 1237. It further held that if the pregnant woman's condition prevented her from clearly giving informed consent, the court must ascertain what her decision would have been through a substituted judgment procedure. *Id.*

Finally, because poor and minority women are more likely to give birth at public institutions and have more contact with state agencies, they are most often the targets of the draconian measures attempted by state officials. *See, e.g.*, Roth, *supra*, at 91, 147. One study of forced cesarean section cases, for example, found that eighty-one percent of the women involved were African-American, Asian, or Hispanic. Kolder, *et al.*, *supra*, at 1193. Likewise, the vast majority of women subjected to sterilization abuse in past decades were members of minority groups. *See* Dorothy E. Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," 104 Harv. L. Rev. 1419, 1442-43 (1991). The record in this case reveals similar racial bias. *See, e.g.*, J.A. at 287-91, 315-16 (Chasnoff); *id.* at 1192-93 (Williams). Thus, a decision by this Court allowing the diminution of constitutional protections for pregnant women will most severely impact those women whose personal and physical autonomy is already most threatened by the state.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit permitting the state to undertake warrantless, suspicionless, nonconsensual urine testing of pregnant women.

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In The

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

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MOTION OF AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Pursuant to Sup. Ct. Rule 37.2(b), *Amicus Curiae* the American Medical Association (the "AMA") moves this Court for leave to file the accompanying brief.

As the nation's largest association of physicians, the AMA can offer this Court a unique perspective on the public health issues implicated by the instant appeal, including an analysis of applicable scientific research. The AMA further seeks to inform this Court of the AMA's internal policies and opinions relevant to this case. The AMA believes that the United States Court of Appeals for the Fourth Circuit errantly disposed of issues critical to this appeal, and the AMA wishes to address public health concerns that are relevant to the proper resolution of those issues.

The American Medical Association has been unable to secure the consent of either party to the filing of its brief.

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STATEMENT OF INTEREST

Amicus Curiae the American Medical Association (the "AMA")[1], an Illinois non-profit corporation, represents approximately 300,000 physicians who practice throughout the United States, including South Carolina. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.

The holding of the United States Court of Appeals in *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), raises issues of significant interest to the AMA, because they concern the public health. The drug-testing practices at issue in this appeal are at odds with AMA research and policies concerning drug abuse. In the view of the AMA, those practices are not an effective means of addressing the problem of illegal drug usage. Moreover, the criminal penalties incorporated in the policy, and the burden imposed on physicians to enforce the policy, places physicians in a potentially adversarial relationship with their patients. Consequently, the policy undermines the absolute trust needed to sustain a successful physician/patient relationship. By eroding patients' faith in the confidentiality of their medical care, the drug-testing plan discourages pregnant mothers from seeking adequate

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[1] Counsel for the AMA authored this brief in its entirety. No monetary contributions to the preparation or submission of this brief were received from any source other than the AMA. Sup. Ct. R. 37.6.

care for their unborn children. Undermining the physician/patient relationship eliminates a window of opportunity for the physician to encourage sufficient postnatal care, as well.

The AMA believes that the Fourth Circuit's decision was in error, but the AMA does not file this brief in support of either party to the appeal. The AMA's interest lies solely in elucidating the medical background which underlies the legal questions that this Court must address.

SUMMARY OF ARGUMENT

The Fourth Circuit upheld a practice at the Medical University of South Carolina (MUSC), finding that the policy effectively furthered the public health. According to local law enforcement authorities, the policy was implemented to protect infants from *in utero* exposure to cocaine. In the view of the AMA, however, the protective instincts that purportedly motivated the authorities were, in fact, undermined by the policy. The drug-testing and law enforcement reporting policy, hereinafter, the "Charleston policy" or "the policy", is contrary to objective scientific research and to the consensus judgment of American medicine.

The Charleston policy reflects a basic misunderstanding of the nature of drug abuse. In the experience of medical science, drug abuse is a disease that requires treatment and education. It cannot be cured merely by an exercise of self-discipline, nor can it be cured by subjecting addicts to criminal penalties. By implementing the

policy, Charleston authorities necessarily implied that, when faced with the threat of criminal prosecution, a pregnant woman can simply decide to stop abusing drugs. The concept is unlikely to succeed and, consequently, will deprive pregnant women and their children, before and after birth, of effective medical treatment.

Attaching a threat of arrest to a drug-testing policy also weakens the physician/patient relationship. This relationship, which is central to the practice of medicine, depends upon confidential, frank discussions between patient and physician. Knowing that discovery of drug use may lead to arrest, a patient will avoid treatment altogether, or, at a minimum, will be reluctant to disclose such drug use. As a result, the potential harm to unborn infants was increased, not decreased, by the Charleston policy. The benefits of regular medical treatment during the course of pregnancy are obviously lost if a woman ceases contact with medical professionals; similarly, treatment is compromised if the patient has an incentive to refrain from disclosing drug abuse. The resulting lack of appropriate medical care deprives the patient and her fetus of treatment for the high-risk medical conditions that frequently accompany drug abuse, in addition to deprivation of treatment for the drug abuse itself. The lost opportunities for medical intervention at this important stage of fetal development may also result in poor postnatal care and development.

Moreover, the drug-testing policy forces physicians to compromise their commitment to patient confidentiality, as codified in AMA guidelines. By requiring physicians to act as agents of law enforcement, the Charleston

policy undercuts the physicians' ethical obligation to act as patient advocates and protectors.

ARGUMENT

In ruling that the Charleston policy did not violate the Petitioners' Fourth Amendment rights, the Fourth Circuit relied on the "special needs" exception to the Fourth Amendment. *Ferguson v. City of Charleston*, 186 F.3d 469, 476 (1999). This exception arises when "special needs" – other than crime detection – are alleged in justification of a Fourth Amendment intrusion. It involves a context-based analysis (*Chandler v. Miller*, 520 U.S. 305 (1997)), in which the court is to weigh "the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Ferguson*, 186 F.3d at 476, citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). "The balancing requires consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, i.e., the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective standpoint." *Ferguson*, 186 F.3d at 476.

This brief addresses the appellate court's application of the "effectiveness" prong of the special needs test and also provides an objective evaluation of the intrusion on

individual autonomy. The *Ferguson* court held that urinalysis is the "only effective means available to accomplish the primary policy goal of persuading women to stop using cocaine during their pregnancies in order to reduce health effects on children exposed to cocaine *in utero*." *Id.* at 478. The AMA respectfully suggests that the Fourth Circuit neglected to identify the true policy at issue in this case. Regardless of its effectiveness in identifying the ingestion of cocaine (*Id.*), the urinalysis was not, alone, the policy implemented at MUSC. The policy must be viewed in its entirety, i.e., a urine test that placed pregnant women at risk of arrest if their urine tested positive for cocaine. The incorporation of possible criminal penalties into the urine-testing regimen transformed a medical procedure into a tool of law enforcement. The failure to correctly identify the true policy crafted by Charleston authorities necessarily places the assumptions of the Fourth Circuit regarding "effectiveness" in doubt. Indeed, by relying on the threat of criminal sanctions as the ultimate means to enforce the drug-testing policy, the law enforcement authorities adopted a distinctly ineffective means of furthering the health of children *in utero*, as well as their mothers.

The Charleston policy was ineffective on several different levels. The policy reflected a fundamental misunderstanding of the nature of drug abuse and addiction. Moreover, the policy eroded the trust and openness central to the physician/patient relationship and effective patient care. By undermining the physician/patient relationship, the drug-testing regimen reduced the likelihood that the patients' children would receive needed medical care, *in utero* and after their birth.

I. Criminal Sanctions Are Not Effective in Halting Drug Abuse by Pregnant Women.

The Charleston policy subjected women who refused treatment, or failed to complete treatment to the satisfaction of law enforcement, to arrest. *Id.* at 474. Implicit in this policy is the assumption that the threat of criminal prosecution is sufficient to cause a woman to stop abusing drugs. In other words, patients who truly want to avoid prosecution will do so through will power and forced treatment. This assumption is flawed. Drug abuse signifies an addiction, particularly where the drug at issue is cocaine. Addiction is a disease, not a reflection of poor discipline. The hallmark of addiction is an inability to cease drug use, despite the possibility of adverse consequences. Thus, by resorting to arrest as the ultimate enforcement of its policy, Charleston authorities failed to acknowledge an elemental tenet of medical science and endorsed a response to drug abuse that the medical community has found to be fundamentally flawed.

The medical profession has long recognized that drug dependence is an illness that cannot generally be overcome without consensual treatment. "Psychoactive Substance Dependence" is listed as a mental illness with specific diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-R), which is prepared by the American Psychiatric Association and used by physicians to diagnose mental illness. The DSM-IV-R describes substance dependence as

> [a] cluster of cognitive, behavioral, and physiologic symptoms indicating that the individual

> continues use of the substance despite significant substance-related problems. There is a pattern of repeated self-administration that usually results in tolerance, withdrawal, and compulsive drug-taking behavior. The symptoms of dependence syndrome include, but are not limited to, the physiologic symptoms of tolerance and withdrawal. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-R)* 176 (4th ed. rev. 1994).

The AMA has itself examined the problem of drug dependence and issued a comprehensive analysis. According to the report,

> Treatment – in the form of medical, psychological and psychiatric care – is a necessary and appropriate response to drug abuse. Reluctance to provide such care to drug abusers reflects unwarranted misconceptions about the nature of addiction. While there is much to be learned about drug dependency, it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome. American Medical Ass'n, *Proceedings of the House of Delegates: 137th Annual Meeting*, Board of Trustees Report NN 236, 241 (June 26-30, 1988) ("AMA Rpt. NN").

In addition to social and psychological causes, drug dependence, like other diseases, is significantly influenced by biologic or genetic factors. *Id.* at 247.

Case law also recognizes that drug addiction is an illness requiring medical treatment. As early as 1925, this

Court stated that addicted persons are "diseased and proper subjects for [medical] treatment." *Linder v. United States*, 268 U.S. 5, 18 (1925). The Court reaffirmed this principle in *Robinson v. California*, 370 U.S. 660 (1962), when it found unconstitutional a law making the status of narcotic addiction a criminal offense. The Court stated that "narcotic addiction is an illness which may be contracted innocently or involuntarily." *Id.* at 667. In his concurring opinion in *Robinson*, Justice Douglas noted that,"the addict is under compulsions not capable of management without outside help." *Id.* at 671.

Because addicted individuals are physically and psychologically dependent on the substance to which they are addicted, they are unable to stop using the drug without outside assistance. People addicted to illicit substances have impaired ability to decide whether to continue their use of those substances. American Medical Ass'n, *Legal Interventions During Pregnancy*, 264 J.A.M.A. 2663, 2667 (1990) (*"Legal Interventions"*). In fact, as described by DSM-IV-R, one of the fundamental characteristics of drug dependency is the inability to reduce or control substance abuse despite adverse consequences. DSM-IV-R, at 178-79; see also American Medical Ass'n, *Policy Compendium* H-95.976 at 229 (1999) (Appendix) (stating that "alcoholism and drug dependence . . . are diseases characterized by compulsive use in the face of adverse consequences.")

More importantly, because of the compulsive nature of drug dependency, criminal sanctions are unlikely to achieve the goal of deterring drug use among pregnant women. As the Board of Trustees of the AMA has pointed out, punishing people for substance abuse:

> ignores the impaired capacity of substance-abusing individuals to make decisions for themselves. In all but a few cases, taking a harmful substance such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance. If a pregnant woman suffers from a substance dependency, it is the physical impossibility of avoiding an impact on fetal health that causes severe damage to the fetus, not an intentional or malicious wish to cause harm. *Legal Interventions*, at 2667-68.

For these reasons, the AMA promotes education and treatment for drug abusers, not criminalization. Specifically, the AMA "oppose[s] legislation which criminalizes maternal drug addiction or requires physicians to function as agents of law enforcement – gathering evidence for prosecution rather than provision of treatment." American Medical Ass'n, *Policy Compendium* H-420.970 at 612 (1999) (Appendix) ("AMA Policy H-420.970"). The AMA supports the funding of "maternal drug addiction treatment rather than prosecution." *Id.* Recognizing the inefficacy of criminalizing drug abuse as a means of preventing fetal exposure to drugs, the AMA has also expressly found that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate." American Medical Ass'n, *Policy Compendium* H-420.969 at 612 (1999) (Appendix). Similarly, the AMA believes that drug abuse is not a "criminal activity" but should be treated like the disease that it is. AMA Policy H-420.970 (Appendix); see also American Medical Ass'n, *Policy Compendium* H-420.962 at 610 (the AMA encourages the federal government to increase funds directed to "drug treatment,

prevention and education" and reaffirms that pregnant substance abusers should be provided with rehabilitative treatment tailored to their individual needs); H-95.983 at 231 (1999) (the AMA "encourages . . . government and other policymakers to become more well informed about drug dependencies, and to base their policies and activities on the recognition that drug dependencies are, in fact, diseases.") (Appendix).

Criminal penalties for possession of illicit substances already exist. However, these sanctions have generally been ineffective. Pregnant women who are not deterred by existing penalties are unlikely to be affected by additional sanctions. Therefore, the Charleston policy fails to effectively advance the alleged governmental interest in shielding fetuses from *in utero* cocaine exposure.

II. The Charleston Policy Discouraged Prenatal and Postnatal Care by Undermining the Physician/Patient Relationship.

The Charleston policy failed the special needs balancing test (*Ferguson*, 186 F.3d at 476) in other ways, as well. The Charleston policy could not have been implemented unless pregnant women submitted themselves to medical treatment. Yet pregnant women will inevitably avoid medical care if their physicians are compelled to report positive urine test results to law enforcement. A policy that results in substance abusing expectant mothers avoiding medical treatment obviously cannot be effective in enhancing the medical welfare of their fetuses. By turning the doctor/patient relationship into a potentially

hostile encounter, any possible effectiveness of the drug-testing plan is lost.

Meaningful medical care depends on a successful physician/patient relationship. At the core of this relationship lies trust and openness between the patient and the physician. People seek medical care with the understanding that confidences disclosed to their physician will not be revealed to third parties. Without complete faith in the sanctity of discussions with their physicians, patients will be reluctant to disclose potentially incriminating behaviors, even if such disclosures are necessary to receive diagnosis or treatment. American Medical Ass'n, *Policy Compendium* E-5.05 at 98 (1999) ("The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services.") (Appendix).

Drug-testing regimens like the Charleston policy drive a wedge between physicians and pregnant patients[2]. Once they know that urinalysis may lead to

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[2] The AMA recognizes that, on occasion, physicians must report criminal conduct by patients, or imminent harm threatened by or to their patients. See, e.g., American Medical Ass'n, *Policy Compendium* E-5.05 at 98; H-515.969 at 696 (recognizing existence of mandatory disclosure requirements for domestic violence); H-515.982 at 699-70 (physicians must familiarize themselves with "state reporting requirements" for "family violence"); H-515.992 at 701 (AMA supports legislation mandating reporting of elderly abuse); H-515.999 at 702 (AMA urges state medical societies to advise physicians of their responsibilities under child abuse laws) (1999). The harm inherent in the Charleston policy is the failure to recognize that, unlike other reportable conduct, the behavior at issue here is not avoidable, since the behavior itself is a disease. As stated

arrest, pregnant women will be motivated to conceal any drug use, or, more likely, will avoid medical treatment completely. American Medical Ass'n, *Perinatal Addiction: Issues in Care and Prevention*, Report of the Council on Scientific Affairs, Rpt. G. at 5 (1992) (*"Perinatal Addiction: Issues in Care and Prevention"*) (women who fear prosecution avoid prenatal care). By eroding the foundations of the physician/patient relationship, such plans prompt pregnant women, and particularly those ingesting cocaine, to avoid any prenatal care. An absence of prenatal care has lasting, far-reaching ramifications. Women who avoid treatment for drug abuse during pregnancy expose their unborn children to *in utero* damage from other, dangerous behaviors that frequently accompany drug use. They are also less likely to engage in adequate postnatal care, or to seek treatment to end their drug abuse. Thus, the negative consequences of a surreptitious drug-testing campaign like the one implemented in this case can extend well beyond a mere failure of the policy's stated purpose of intervening medically on behalf of infants exposed *in utero* to cocaine.

A. Failure to Disclose Drug Use Can Delay Treatment for Harm Caused by Exposure.

Drug use is one of the most commonly missed diagnoses in obstetric and pediatric medicine. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 The Pediatric Clinics of No. Am. J., 1403, 1410 (1988) ("Chasnoff"). In

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previously, the AMA contends that the disease is best addressed by education and treatment, not criminal penalties.

most cases, a patient's drug use is not apparent if the patient does not disclose it. Drug tests alone cannot be relied upon to diagnose drug use. American Medical Ass'n, *The Reduction of Medical and Public Health Consequences of Drug Abuse*, Report of the Council on Scientific Affairs, Rpt. 8-A-97 at 3 (1997). It has been estimated, for example, that postnatal toxicology screens may miss up to 50% of infants exposed prenatally to drugs. Lockwood, *What's Known and What's Not Known About Drug Exposed Infants*, 11 Youth Law News 15, 15 (1990) ("Lockwood"), citing Halfon, "Born Hooked," testimony before the U.S. Select Committee on Children, Youth, and Families (April 1989). Cocaine use is particularly difficult to diagnose through testing. Cocaine metabolites can be detected through urinalysis for only 24 to 72 hours after ingestion of cocaine. This creates problems for diagnosis because, unlike opiates or alcohol, cocaine is not generally used on a daily basis. Instead, use is characterized by episodic, prolonged high-intensity binges that are interspersed with days of abstinence or low-intensity use. Gain & Clabber, *Abstinence Symptomology and Psychiatric Diagnosis in Cocaine Abusers: Clinical Observations*, 43 Arch. Gen. Psychiatry 107, 107 (1986). Thus, even the most chronic user will at times have no cocaine metabolites in her urine.

This evidence demonstrates that, because of the limitations of drug screening, voluntary disclosure of drug use is the most effective means of treating the cocaine-exposed unborn child. Voluntary disclosures will not occur in the absence of an open, trusting physician/patient collaboration. The necessary trust will not exist

when one party to the collaboration must report the drug use of the other party to law enforcement authorities.

By contrast, when physicians and patients work together, with a shared goal of achieving the best possible outcome for mother and child, outcomes are improved. With appropriate prenatal counseling, women will reduce the impact of their addiction on their fetuses. *Perinatal Addiction: Issues in Care and Prevention*, at 7. One Philadelphia program, which treated pregnant heroin users with methadone maintenance, found that because of women's concerns about the impact of methadone on their unborn fetuses, the women were able to reduce their methadone to relatively low doses. Finnegan, Connaughton, Emich & Wieland, *Comprehensive Care of the Pregnant Addict and Its Effect on Maternal and Infant Outcome*, 1 Contemp. Drug Problems 795, 797 (1972) ("Finnegan"). A drug-testing policy truly committed to reducing harm to children *in utero* would, therefore, encourage frank and full communication between patient and physician. Frustrating incentives for voluntary disclosures by patients will have the opposite effect.

B. Even If Drug Use Is Not Discontinued, Prenatal Care Can Significantly Reduce The Risk of Harm to Infants.

The negative health effects associated with prenatal drug exposure can be significantly reduced through adequate prenatal care and counseling, even if women do not discontinue their drug use. Many of the adverse outcomes seen in drug-exposed infants may be caused by socioeconomic and lifestyle factors associated with drug

use rather than by drug use itself. Zuckerman, Frank & Brown, *Overview of the Effect of Abuse and Drugs on Pregnancy and Offspring*, 149 Nat'l Institute on Drug Abuse 16, 19 (1995) ("Zuckerman, Frank & Brown"); *Perinatal Addiction: Issues in Care and Prevention*, at 3; Zuckerman & Bresnahan, *Developmental and Behavioral Consequences of Prenatal Drug and Alcohol Exposure*, 38(6) The Pediatric Clinics of No. Am. J. 1387 (1991) ("Zuckerman & Bresnahan"); Chasnoff, at 1408-1410; Cherukuri, Minkoff, Feldman, Parekh, & Glass, *A Cohort Study of Alkaloidal Cocaine ("Crack") in Pregnancy*, 72 Obstetrics and Gynecology 147, 150 (1988). Several risk factors are associated with drug use. First, the use of illicit substances is highly correlated with the use of licit but nevertheless harmful substances such as alcohol and cigarettes. See, e.g., Frank, Zuckerman, et al., *Cocaine Use During Pregnancy, Prevalence and Correlates*, 82 Pediatrics 888, 892 (1988) ("Frank"); Chasnoff, at 1408, 1410; Weston, Ivins, Zuckerman, Jones, Lopez, *Drug Exposed Babies: Research and Clinical Issues*, 9 Zero to Three: Bulletin of the National Center for Clinical Infant Programs 1, 4 (1989) ("Weston"); AMA Rpt. NN, at 236, 248. These licit substances are particularly dangerous to fetal health. Fetal alcohol syndrome is now the leading known cause of mental retardation in the Western World, exceeding both Down syndrome and cerebral palsy. American Medical Ass'n, *Proceedings of the House of Delegates: 43rd Interim Meeting*, Board of Trustees Report Y 95, 105 (Dec. 3-6, 1989) ("AMA Rpt. Y"). Overall, fetal alcohol syndrome is one of the three leading causes of birth defects and the only one which is currently preventable. AMA Rpt. NN, at 248. Similarly, cigarette smoking increases the likelihood of spontaneous

abortion, premature birth, perinatal mortality, and low birth weight, and negatively affects later growth and development. *Legal Interventions*, at 2666; see also *Getting Straight, Overcoming Treatment Barriers for Addicted Women and Their Children: Hearing Before the Select Committee on Children, Youth, and Families, House of Representatives*, 101st Cong., 2d Sess. (1990) (Fact Sheet at 7) ("Fact Sheet, *Hearing*.")

Another problem commonly associated with drug use and potentially harmful to infant health is poor nutrition. Zuckerman, Frank & Brown, at 19. Studies have shown that drug-using women have lower pregnancy weights and less weight gain during pregnancy than non-users. Frank, at 892. Drug users are also more likely to suffer from anemia. *Id.*; AMA Rpt. Y, at 97.

Similarly, drug-using women are also at risk of exposure to sexually transmitted diseases, including AIDS. Woods, *Clinical Management of Drug Dependency in Pregnancy*, 149 Nat'l Institute on Drug Abuse 39, 47 (1995) ("*Clinical Management of Drug Dependency*"); Zuckerman, Frank & Brown, at 19; AMA Rpt. Y, at 101; see also, Fact Sheet, *Hearing*, at 5, citing The National Institute on Drug Abuse, 1990. Cocaine, particularly, can be injected intravenously, which greatly increases the chance of becoming infected with HIV through the use of a contaminated needle. AMA Rpt. NN, at 247. When women contract sexually transmitted diseases or HIV infection, their fetuses are also at risk. Fact Sheet, *Hearing*, at 7, citing the Centers for Disease Control, 1990. Other risk factors associated with drug use include co-existing maternal mental

illness, non-sexually transmitted infections such as hepatitis, and the possibility of inadvertent maternal overdose. AMA Report Y, at 97; Lockwood, at 16.

Through prenatal care and counseling, women can come to understand the risk factors associated with drug use and be encouraged to reduce or avoid them. This would greatly reduce the risk of harm to infants. For example, low birth weight, a primary cause of infant mortality and disability as well as higher health care costs, is commonly associated with prenatal drug exposure. *Perinatal Addiction: Issues in Care and Prevention*, at 1. One study found that, while cocaine-exposed infants were on average 400 grams lighter at birth than non-exposed infants, only 25% of this difference was attributable to cocaine use itself. Among the factors responsible for the other 75% of the deficit were poor maternal nutrition and cigarette smoking. Zuckerman, et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 New Eng. J. Med. 762, 767 (1989); see also Zuckerman & Bresnahan, at 10. In accordance with this finding, adequate prenatal care has been shown to reduce the incidence of low birth weight among drug-exposed infants by 18 to 50 percent (United States General Accounting Office, *Drug Exposed Infants, A Generation at Risk: Report to the Chairman, Committee on Finance*, U.S. Senate 9 (1990 GAO/HRD-90-138)) and to significantly reduce the incidence of perinatal morbidity among cocaine-exposed infants. MacGregor, Keith, Bachicha & Chasnoff, *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 Obstetrics and Gynecology 882, 884 (1989).

Open communication with physicians regarding drug use is also necessary to insure safe deliveries. Narcotic analgesia and morphine are commonly administered to patients during labor and delivery. Women who abuse narcotics such as heroin or methadone are, therefore, at risk of overdose during labor and delivery if physicians are unaware of their drug use. If physicians are aware of maternal drug use, they can avoid these types of medication or carefully monitor their use during labor and delivery to prevent overdose. Finnegan, at 798.

Detection of high risk behaviors requires contact and uninhibited communication with medical providers. Prenatal care must be offered in an environment of cooperation and trust. Physicians cannot detect potential problems and provide counseling if women are unwilling to be completely frank about their lifestyles. With appropriate counseling and assistance, many women would be able to avoid additional risks to their infants even if they are unable to stop using drugs. Neither logic nor experience suggests that such counseling and assistance is feasible in an atmosphere of mistrust and coercion.

C. Positive Contact With Medical Providers Prenatally Can Contribute to Postnatal Infant Health and Development. Criminalization Detracts From Postnatal Development.

Just as a variety of prenatal factors affect neonatal outcomes, numerous postnatal factors affect the long-term developmental outcomes of drug-exposed infants. Drug exposure and other prenatal risk factors create a "biologic vulnerability" which can be compensated "by

competent caretaking, but which renders the child more vulnerable to the effects of poor caretaking." Zuckerman & Bresnahan, at 1-2; see also Zuckerman, Frank & Brown, at 18. For example, cocaine-exposed infants "tend towards hyperactivity and decreased social responsiveness." Kandall, *Treatment Options For Drug Exposed Infants*, 149 Nat'l Institute on Drug Abuse 78, 94 (1995) ("Kandall"); *Perinatal Addiction: Issues in Care and Prevention*, at 4. For optimal development of such children, their caretakers must be informed of the most effective interactive techniques to use with the children: "gentle handling with support of the head and body, soft social talking, and eye contact without overstimulation." Kandall, at 94. Prematurity, which is commonly associated with prenatal exposure to various substances, may cause neurologic immaturity and therefore lead to low IQ scores. In one study, however, only those neurologically immature infants who had poor caretaking during their first two years had subnormal IQ scores. Neurologically immature infants with caretakers attuned to their particular needs developed normal IQ scores. Zuckerman & Bresnahan, at 4. Positive, regular contacts with physicians during pregnancy, therefore, may influence whether children receive adequate postnatal care.

Consistent interaction with healthcare providers also increases the possibility that women will seek treatment for their drug abuse. This, too, yields benefits to the infant prenatally as well as postnatally. Even if drug treatment cannot be accomplished during pregnancy, the development of a positive alliance with health care providers makes it more likely that women can be brought into treatment later. Treatment experts concur that the

motivation created by pregnancy offers a unique opportunity for positive intervention into the lives of drug-dependent women. *Clinical Management of Drug Dependency in Pregnancy*, at 42-43. Maternal drug treatment, at whatever point possible, is necessary to the healthy development of a child because drug-dependent women may be unable to provide a supportive environment for their children's development unless they are able to overcome their addiction. Zuckerman & Bresnahan, at 34; Krondstadt, *Complex Developmental Issues of Prenatal Drug Exposure*, 1 The Future of Children 36, 45 (1991) ("Krondstadt"). In addition, many drug-dependent women lack proper models for parenting and can be helped in their role as parents by positive intervention from the health care or social service community. Chasnoff, at 1409-1410. Even where successful intervention strategies for vulnerable children and their families exist, these cannot be implemented in an environment that drives women away from health and social service providers. Krondstadt, at 45.

Bringing women into drug treatment, whenever possible, is critical for a woman's other children as well. *Perinatal Addiction: Issues in Care and Prevention*, at 3; Zuckerman, Frank & Brown, at 19. In a 1986 survey, members of the National Council of Juvenile and Family Court Judges estimated that substance abuse among adults was a significant factor in 60-90% of the cases referred to their courts. Grimm, *Drug Exposed Infants Pose New Problems for Juvenile Courts*, 11 Youth Law News 9, 9 (1990). The unique opportunity for positive intervention during pregnancy should not be lost.

On the other hand, if mothers of drug-exposed infants are convicted and imprisoned, they will be unable to care for their infants or other children, and foster placement will be unavoidable. Lengthy temporary placements in foster care are extremely detrimental, especially for infants. Children in foster care are deprived of the opportunity to begin bonding with their mothers. In addition, child welfare agencies are not equipped to provide substitute care. In many areas, there are not enough foster parents even for healthy children and fewer still who are trained to provide the kind of specialized care required by some drug-exposed infants. This means that children may either be placed in unqualified homes which might cause permanent harm, or be left as "boarder babies" in hospitals and other inappropriate long term shelters. *Id.* at 12; *Perinatal Addiction: Issues in Care and Prevention,* at 5.

The discontinuity brought about by temporary foster placement can be devastating for children's psychological development. Children reared without permanent parental relationships may have higher levels of language retardation and diminished mental development, as well as higher rates of delinquency. Several serious personality disorders also correlate with multiple separations from parental figures. Garrison, *Why Terminate Parental Rights?,* 35 Stan. L. Rev. 423, 458 (1983). In the absence of regular, positive contacts between health care professionals and pregnant mothers, therefore, the potentially devastating effects of poor prenatal care can extend far beyond the birth of the at-risk child.

CONCLUSION

The AMA urges reversal of the Fourth Circuit's decision, for reconsideration. The AMA believes that the Fourth Circuit was mistaken in its understanding of drug abuse. Drug abuse is a disease amenable to medical treatment. It is not a criminal activity, and criminal sanctions are an inappropriate means of addressing this public health problem.

Respectfully submitted,

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APPENDIX

AMA Policies E-5.05, H-95.976, H-95.983, H-420.962; H-420.969; H-420.970

E-5.05 **Confidentiality**. The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities. Also, communicable diseases, gun shot and knife wounds should be reported as required by applicable statutes or ordinances. Issued December 1983; Updated June 1994.

H-95.976 **Drug Abuse in the United States – the Next Generation:** The AMA is committed to

efforts that can help prevent this national problem from becoming a chronic burden. The AMA pledges its continuing involvement in programs to alert physicians and the public to the dimensions of the problem and the most promising solutions. The AMA, therefore:

(1) supports cooperation in activities of organizations such as the National Association for Perinatal Addiction Research and Education (NAPARE) in fostering education, research, prevention, and treatment of substance abuse;

(2) encourages the development of model substance abuse treatment programs, complete with an evaluation component that is designed to meet the special needs of pregnant women and women with infant children through a comprehensive array of essential services;

(3) urges physicians to routinely provide, at a minimum, a historical screen for all pregnant women, and those of childbearing age for substance abuse and to follow up positive screens with appropriate counseling, interventions and referrals;

(4) supports pursuing the development of educational materials for physicians, physicians in training, other health care providers, and the public on prevention, diagnosis, and treatment of perinatal addiction. In this regard, the AMA encourages further collaboration with the Partnership for a Drug-Free America in delivering appropriate messages to health professionals and the public on the risks and ramifications of perinatal drug and alcohol use;

(5) urges the National Institute on Drug Abuse, the National Institute on Alcohol Abuse and Alcoholism,

and the Federal Office for Substance Abuse Prevention to continue to support research and demonstration projects around effective prevention and intervention strategies;

(6) urges that public policy be predicated on the understanding that alcoholism and drug dependence, including tobacco dependence as indicated by the Surgeon General's report, are diseases characterized by compulsive use in the face of adverse consequences;

(7) affirms the concept that substance abuse is a disease and supports developing model legislation to appropriately address perinatal addiction as a disease, bearing in mind physicians' concern for the health of the mother, the fetus and resultant offspring; and

(8) calls for better coordination of research, prevention, and intervention services for women and infants at risk for both HIV infection and perinatal addiction. (BOT Rep. Y, I-89)

H-95.983 **Drug Dependencies as Diseases**: The AMA (1) endorses the proposition that drug dependencies, including alcoholism, are diseases and their treatment is a legitimate part of medical practice, and (2) encourages physicians, other health professionals, medical and other health related organizations, and government and other policymakers to become more well informed about drug dependencies, and to base their policies and activities on the recognition that drug dependencies are, in fact, diseases. (Res. 113, A-87; Reaffirmed by CSA Rep. 14, A097; Reaffirmed: Sunset Report, I-97 Reaffirmed: CME Rep. 10, I-98)

H-420.962 Perinatal Addiction – Issues in Care and Prevention: The AMA: (1) adopts the following statement: transplacental drug transfer should not be subject to criminal sanctions or civil liability; (2) encourages the federal government to expand the proportion of funds allocated to drug treatment, prevention, and education within the context of its "War on Drugs." In particular, support is crucial for establishing and making broadly available specialized treatment programs for drug-addicted pregnant women wherever possible; (3) urges the federal government to fund additional research to further knowledge about and effective treatment programs for drug-addicted pregnant women, and encourages also the support of research that provides long-term follow-up data on the developmental consequences of perinatal drug exposure and identifies appropriate methodologies for early intervention with perinatally exposed children; (4) reaffirms the following statement: pregnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs; (5) through its communication vehicles, encourages all physicians to increase their knowledge regarding the effects of drug and alcohol abuse during pregnancy and to routinely inquire about alcohol and drug use in the course of providing prenatal care; and (6) will address the special needs of pregnant drug abusers within the course of providing prenatal care; and (6) will address the special needs of pregnant drug abusers within the

context of its ongoing Health Access America programs. (CSA Rep. G, A-92)

H-420.969 Legal Interventions During Pregnancy: Court Ordered Medical Treatments and Legal Penalties For Potentially Harmful Behavior By Pregnant Women: (1) Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus. If an exceptional circumstance could be found in which a medical treatment poses an insignificant or no health risk to the woman, entails a minimal invasion of her bodily integrity, and would clearly prevent substantial and irreversible harm to her fetus, it might be appropriate for a physician to seek judicial intervention. However, the fundamental principle against compelled medical procedures should control in all cases which do not present such exceptional circumstances. (2) The physician's duty is to provide appropriate information, such that the pregnant woman may make an informed and thoughtful decision, not to dictate the woman's informed refusal of medical treatment designed to benefit the fetus. (4) Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate. (5) Pregnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs. (6) To minimize the risk of legal action by a pregnant patient or an injured fetus, the physician should document medical recommendations made including the consequences of

failure to comply with the physician's recommendation. (BOT Rep. OO, A-90)

H-420.970 **Treatment Versus Criminalization – Physician Role in Drug Addiction During Pregnancy:** It is the policy of the AMA (1) to reconfirm its position that drug addiction is a disease amenable to treatment rather than a criminal activity; (2) to forewarn the U.S. government and the public at large that there are extremely serious implications of drug addiction during pregnancy and there is a pressing need for adequate maternal drug treatment and family supportive child protective services; (3) to oppose legislation which criminalizes maternal drug addiction or requires physicians to function as agents of law enforcement – gathering evidence for prosecution rather than provision of treatment; and (4) to provide concentrated lobbying efforts to encourage legislature funding for maternal drug addiction treatment rather than prosecution, and to encourage state and specialty medical societies to do the same. (Res. 131, A-90)

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No. 99-936

In The

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

On Writ Of *Certiorari* To The
United States Court Of Appeals
For The Fourth Circuit

MOTION FOR LEAVE TO FILE AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL COALITION FOR CHILD PROTECTION REFORM, NATIONAL CENTER FOR YOUTH LAW, JUVENILE LAW CENTER, THE CHILDREN AND FAMILY JUSTICE CENTER, THE CHICAGO COALITION FOR THE HOMELESS, ILLINOIS ASSOCIATION FOR CHILDREN, and LOYOLA UNIVERSITY CHILDLAW CENTER IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Sup. Ct. Rule 37.2, Amici curiae – the National Coalition for Child Protection Reform, the National Center for Youth Law, the Juvenile Law Center, Children and Family Justice Center of the Northwestern University School of Law, Chicago Coalition for the Homeless, Illinois Action for Children and Loyola University ChildLaw Center – move for leave to file the attached brief in support of the Petitioners.

In the decision below, a divided panel of the Fourth Circuit upheld Respondents' policy of conducting non-consensual urine toxicology tests on certain pregnant women and arresting those who tested positive. Respondents thereby separated these women from their children. The Respondents claimed that the policy promotes the interests of children, and the Court of Appeals agreed.

Amici have expertise in the issues of child welfare, children's advocacy, mental health, housing, and other issues affecting children. Based upon that expertise, *Amici* believe that, rather than benefitting children, the "arrest upon positive toxicology" policy harms children. This brief is offered to highlight these misunderstandings and to alert the Court to real harms that children suffer when they are separated from their mothers, even if the mothers have used drugs. The Fourth Circuit's decision, if left undisturbed, will allow governmental organizations to ignore the important psychological needs and Constitutional rights of vulnerable children. It will further allow cities to bypass programs and protocols put

into place by Federal and State governments which ultimately assure these children important services – services which the children will not receive if their families are involved in the criminal justice system rather than the child welfare system.

This motion is necessary because Respondents have declined to consent to the filing of the following brief.

INTEREST OF AMICI CURIAE

As the names of the Amici organizations suggest, and the descriptions of these organizations appended to the attached brief underscore, Amici are organizations of professionals – attorneys, professors, law students, social workers, policy makers, researchers, community organizers, psychologists, journalists – who are all dedicated to the goal of improving the lives of children. Some Amici work to change laws and policies concerning child protection; others provide much-needed services and legal assistance to children; and still others create policies and programs that will assist children. What unites these organizations and practitioners is a belief that children who are separated from their mothers as a result of a single positive drug test, with no evidence of parental unfitness, will suffer harm.

Amici are concerned that, contrary to promoting the interests of vulnerable newborn children, a policy which calls for the arrest of those children's mothers based upon a single positive urine toxicology, after nonconsensual testing, causes children to suffer unnecessary psychological harm and trauma from being separated from their

mothers. Amici are also concerned that such a separation interferes with the children's constitutionally protected liberty interest in their relationship with their mothers.

In addition, Amici note that the Respondents' policy runs contrary to federal and state laws which direct that child welfare proceedings and services should take place in a civil and not a criminal context. Under these laws, certain services are available to preserve families, even families where the mothers have substance abuse problems. In the instant action, the Respondents did not offer the less disruptive preventive services prior to separating the mothers and children through the arrest of the mothers. Amici submit that the tragic result of such a policy is that children are deprived of both their families and important services.

Respectfully submitted,

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June 2, 2000

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BRIEF OF *AMICI CURIAE*

INTERESTS OF AMICI NATIONAL COALITION FOR CHILD PROTECTION REFORM

Amicus curiae National Coalition for Child Protection Reform ("NCCPR") is an organization of professionals – including attorneys, law professors, psychologists, and journalists – who are dedicated to improving child welfare systems through public education and advocacy. NCCPR, a tax-exempt non-profit organization[1] founded at a 1991 meeting at Harvard Law School, is incorporated in Massachusetts and headquartered in Alexandria, Virginia, with offices in New York City and Chicago. Further information about the organization is available on its website, www.nccpr.org.

NCCPR devotes much of its attention to public education concerning widespread public misconceptions about the child protective system and its impact on the children it is intended to serve. Lawyer members of NCCPR also individually have litigated numerous precedential cases involving child protection policies and proceedings. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), *cert. den.*, 120 S.Ct. 1832 (2000); *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Youakim v. McDonald*, 71 F.3d 1274 (7th Cir. 1995), *cert. den.*, 518 U.S. 1028 (1996); *R.C. v. Nachman*, 969 F. Supp. 682, *aff'd per curiam*, table, 145 F.3d 363 (11th Cir.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

1998); *Norman v. McDonald*, 930 F. Supp. 1219 (N.D. Ill. 1996).

NATIONAL CENTER FOR YOUTH LAW

Amicus curiae National Center for Youth Law ("NCYL"), founded in 1970 and based in Oakland, California, engages in litigation, legislative and administrative advocacy, and policy development on behalf of low-income children, adolescents, and their families. NCYL also provides technical assistance, training and publications to attorneys, health and social service providers, and other child-serving professionals on legal issues affecting low-income children and youth. NCYL's work includes advocacy to promote effective and balanced child welfare policies; improve the quality of states' child welfare systems; and ensure that families have fair and adequate access to services and supports needed so that children can safely remain in or return to their parents' homes.

JUVENILE LAW CENTER

Amicus curiae Juvenile Law Center ("JLC") is a private, non-profit public interest law firm based in Philadelphia, Pennsylvania that advances the rights and well-being of children in jeopardy. Since 1975, JLC has represented children in cases involving Pennsylvania's child welfare, juvenile justice, mental health and public health and public health systems, and has worked to ensure, *inter alia*, that children's constitutional and statutory

rights are rigorously enforced throughout these systems. JLC has also worked on children's policy issues at the national level. JLC has participated as amicus curiae in numerous cases involving children's rights in both the juvenile justice and child welfare systems before the Pennsylvania Supreme and Superior Courts, United States Courts of Appeals and the United States Supreme Court.

CHILDREN AND FAMILY JUSTICE CENTER

Amicus curiae Children and Family Justice Center of the Northwestern University School of Law ("Center") is a multi-disciplinary project employing attorneys, social workers and researchers. Through the Law School's Legal clinic, the Center provides legal advocacy for both children and indigent parents in neglect and abuse proceedings in the Circuit Court of Cook County's Juvenile Court, as well as in the appellate courts of Illinois. In addition, the Center trains law and social work students and attorneys, conducts research, and develops policy in the field of child welfare. The Center has a particular interest in the issues raised by this case, arising out of its work in the area of developing standards governing state intervention in the parent-child relationship.

CHICAGO COALITION FOR THE HOMELESS

Amicus curiae Chicago Coalition for the Homeless ("CCH") is a not-for-profit advocacy organization in existence for almost twenty years that is dedicated to

addressing the causes and effects of homelessness. CCH works with many homeless families and has seen first-hand the destructive impact of government policies that needlessly separate children from their parents. CCH works to empower women to solve their problems and secure needed services, including drug treatment, educational opportunities, health care and housing. CCH participates in many legal efforts to protect the constitutional and statutory rights of persons who are homeless.

ILLINOIS ACTION FOR CHILDREN

Amicus curiae Illinois Action for Children ("IAFC") is a non-profit child welfare advocacy organization based in Chicago, Illinois. IAFC sponsors programs and projects that educate child welfare professionals to better serve children and families; to engage the public in child welfare reform and to provide opportunities for concerned citizens to volunteer as mentors and advocates for neglected and abused children. IAFC develops policy in the field of child welfare, emphasizing the preservation and rehabilitation of families so that children can safely remain in their own homes.

LOYOLA UNIVERSITY CHILDLAW CENTER

Amicus curiae Loyola ChildLaw Center houses the children's law programs at Loyola University Chicago School of Law. The ChildLaw Center's mission includes training law students to become effective legal advocates for children, providing quality legal representation to

child clients in legal proceedings, and improving the quality of justice for children and their families through legislative and policy advocacy. The ChildLaw Center represents over 100 children, and has a particular focus on abuse and neglect and foster care concerns. The Child-Law Center also offers an extensive training curriculum for attorneys, social workers and other child welfare professionals in pediatric law and child and family advocacy. ChildLaw Center faculty members have worked on state and federal legislative initiatives, as well as with the Cook County Juvenile Court and State of Illinois child welfare systems to develop appropriate standards for state intervention in family matters.

SUMMARY OF ARGUMENT

The City of Charleston and the other Respondents (collectively "City") claimed that their "arrest upon positive toxicology" policy promotes the interests of children. Amici submit that it does not. First, the children's most fundamental interest is in remaining in the care and custody of their mothers. No serious danger to the children was demonstrated by virtue of a single positive toxicology screen as would justify the most extreme intrusion into the family – removal of the mother through arrest. The City policy incorrectly assumed that a single positive drug toxicology was conclusive proof of parental unfitness.

Contrary to promoting their interests, the children are likely to have suffered serious psychological harm as a result of being deprived of the chance to bond with

their parents at a critical point of their lives – just after birth. There is empirical evidence that even infants who have been exposed prenatally to cocaine, as a group, fare better in the care of their mothers than in the care of relatives or foster parents.

The City's policy contravenes a key policy that Congress and the state legislatures have adopted to protect children: provision of child protective services in a civil, not criminal, context. Those services include services to preserve families, rather than destroy them. Rather than pursue that aim of child protection, the City unwisely turned to punitive measures that disrupted families. By resorting exclusively to the punitive approach of police intervention, the policy also failed to make use of less disruptive preventive services available to child protection agencies. The City's program constituted not only an unjustified intrusion into the family, but also an unsound child welfare policy.

ARGUMENT

POINT I
SEPARATING CHILDREN FROM THEIR MOTHERS HARMS CHILDREN

The City arrested and incarcerated the petitioners in the instant action, and more than 20 other new mothers and pregnant women, based upon a single positive urine toxicology (in some cases two toxicologies), obtained through nonconsensual urine testing. The City made a calculated decision not to report positive toxicologies to the Department of Social Services, but rather to report directly to the Police Department (Plaintiff's Exhibit 28,

reproduced at Appendix to the Petition for Writ of Certiorari 73) which would then arrest the women based solely upon the positive urine toxicology. As a result, dozens of newborn children were deprived of their mothers for the period of the mothers' arrest and incarceration.

Many of the newborns had older siblings. Petitioner Crystal Ferguson, for example, had two sons. (JA 457)[2] Siblings are also deprived of the love and companionship of their mothers, when their mothers are arrested and incarcerated.

The City defended the policy as justified by "a desire to protect the health of children. . . . " *Ferguson v. City of Charleston, S.C.*, 186 F.3d 469, 475 n.3 (4th Cir. 1999). Indeed, one of the nurses at the Medical University of South Carolina Hospital asserted that the "reason for the policy was 'concern . . . for the health and safety and care of these fetuses and soon to be children. . . . ' " *Id.*

No infants or children were parties to the action. Yet it is their purported interests which motivated the Court of Appeals to reach the decision to uphold the drug testing, arrest and incarceration of their mothers. The court concluded that the "primary goal" of the policy was "to reduce health effects on children exposed to cocaine in utero." *Ferguson v. City of Charleston, S.C.*, 186 F.3d 469, 478 (4th Cir. 1999).

Amici do not dispute the interest of the government in protecting children from abusive or neglectful parents.

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[2] "JA" refers to the Joint Appendix, submitted by Petitioners with their brief.

However, the "arrest upon positive toxicology" policy which the City has chosen to effectuate that interest has been counterproductive. Instead of helping newborns, the policy of arresting mothers severely harms newborns and their older siblings.

A. Psychological Harm

As the courts have realized, "society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family." *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999), *cert. den.*, 120 S.Ct. 1832 (2000), quoting *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993). Indeed, "governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child. . . . " *Wallis v. Spencer*, 202 F.3d 1126, 1130 (9th Cir. 2000).

Here, dozens of women were arrested. As a result of those arrests, dozens of newborn infants were separated from their mothers at the beginning of their lives. The older siblings of those newborns also lost their mothers.

The neo-natal period is a crucial time in a baby's life, when parents and child have the best chance to form the emotional bonds that should last a lifetime. Child abuse researcher Ray Helfer has written: "When this sensitive period goes well, the relationship between new parents

and their newly-born infant has the potential of progressing far beyond . . . expectations . . . [W]hen this interaction goes poorly, a vicious cycle can develop when the infant and the new parent[s] do not engage, resulting in a degree of discontent and frustration which can lead to a breakdown in the interactions between [parent and newborn]." Helfer, *The Perinatal Period: A Window of Opportunity for Enhancing Parent-Infant Communication: An Approach to Prevention*, 11 Child Abuse and Neglect: The International Journal 566 (1987).

Other researchers go further: "because the human infant is wholly dependent upon his mother or caretaker for all his physical and emotional needs, the strength of these attachment ties may well determine whether he will survive and develop optimally." Klaus and Kennell, *Mothers Separated from their Newborn Infants*, 17 Pediatric Clinics of North America 1015 (1970). Moreover, early separation of a newborn from his or her mother "may be a significant factor" causing child abuse. *Id.* Thus, by separating newborns from their mothers, the "arrest upon positive toxicology" policy may, ironically, promote the very harm it is allegedly intended to prevent. Such harm to children cannot be justified under any circumstances, least of all in the name of child protection.

Infancy is a state of helplessness that requires the parent's day-to-day care in order to build the bond between parent and child. *See*, J. Goldstein, A. Freud & A.J. Solnit, *Before the Best Interests of the Child* 8 (1979). Three of the leading experts on child development have concluded that: "The younger the child, the greater is his need for [his parents]. When family integrity is broken or weakened by state intrusion, his needs are thwarted. . . .

The effect on the child's developmental progress is invariably detrimental." *Id.* at 9.

Of course, there are times when the harm of a parent's drug addiction is worse than the harm caused by taking away the child, and the child must be removed from the home. It is not the position of amici that children should never be removed from drug-using parents. But the City of Charleston takes the drastic, and entirely erroneous, position that children always should be taken from such parents. The Charleston policy assumes that all newborns always are better off removed from parents who have a drug problem – or even from parents who are presumed to have a drug problem based on a single urine test. This is manifestly untrue.

The "mother's ongoing substance use, by itself, should not be a criterion for mandating removal from the home." United States Department of Health and Human Services, *Improving Treatment for Drug-Exposed Infants* 32 (1993). By contrast, the police, in carrying out the policy of the City of Charleston, will separate a child from the parent, by placing the parent in jail, based solely upon the results of such a test.

That a newborn suffers harm when separated from his or her mother, even if the mother has ingested cocaine during her pregnancy, is not merely a hypothesis. A University of Florida study of "crack babies" compared newborns placed in foster care to those who were allowed to remain with their mothers. At six months of age, all of the infants were tested. The infants placed in foster care were significantly less likely to reach, roll over

or sit up, a finding which the authors termed "surprising." Wobie, Behnke, et al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine* (Paper presented at joint annual meeting of the American Pediatric Society and the Society for Pediatric Research, May 3, 1998).

Other experts have also concluded that it is better for children to remain with their mothers: "staying at home with an addicted mother who is actively participating in a rehabilitation program can, in many cases, be the more promising and safer route for the child." Willwerth, *Should We Take Away Their Kids? Often The Best Way to Save the Child is to Save the Mother as Well*, Time, May 13, 1991.

Other researchers have also concluded that removing children from their families "may cause serious psychological damage – damage more serious than the harm intervention is supposed to prevent." Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 994 (1975). In addition, if those children are placed in foster care, "the mere act of placement and the uncertain position of a child in foster care creates psychological difficulties, even for children who are not required to move to different foster homes." *Id.* at 995; *see also, K.H. v. Morgan*, 914 F.2d 846, 853, (7th Cir. 1990) ("[W]rong lies . . . in a system of foster care that is unable to achieve a reasonable balance among safety, competence, and stability. . . . Good foster parents are difficult to find.")

Arresting and incarcerating mothers is one of the most drastic ways of separating children from parents.

"The arrest and incarceration of a parent can have a profound effect on a child. It can cause financial dislocation to the family, family dismemberment or dysfunction, and great social and emotional pain." The Osborne Association, *How Can I Help? Working with Children of Incarcerated Parents* 3 (1998). And when children watch their mothers being taken away in handcuffs, as happened at least once in the instant case (JA 779), the trauma to the children is both overt and immediate.

This is not to suggest that pregnant women who use drugs do not need any preventive services. However, the "arrest" prong of the "arrest upon positive toxicology" policy portends greater harm to these newborn and vulnerable children than the harm of leaving them with their mothers, particularly since numerous studies have found that women who use illicit drugs can be adequate parents. *See* Boyd, *Mothers and Illicit Drugs: Transcending the Myths*, 14-16 (1999) (listing at least twelve studies which reach that conclusion).

A panel of experts convened by the United States Department of Health and Human Services has concluded that effective treatment for a child exposed to drugs *in utero* must occur within the relationship of the mother-child dyad, because that relationship defines the child's existence early in life. United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Improving Treatment for Drug-Exposed Infants* 21 (1993). The panel also pointed out that those children need follow-up psychological services that include both mother and child. *Id.* at 27. Specifically, it emphasized that outreach programs and community-based organizations need to work with

the mother and child to provide the full range of social services available to assist the infant. *Id.* The panel concluded that the best way to help the drug-exposed child is to help the mother recover from addiction. *Id.* at 28. The panel also stressed that treatment should be nonthreatening, nonstigmatizing and supportive, *id.*, exactly the opposite of the policy of the City of Charleston.

B. Constitutional Harm

The importance of the psychological attachment of child to parent is reflected in the United States Constitution. This Court has long recognized the "rights and privileges inherent in family and personal relations." *M.L.B. v. S.L.J.*, 519 U.S. 107, 128 (1996) (Kennedy, J., concurring). The family, as a unit, is protected by the Constitution. "[T]he right of the individual . . . to marry, establish a home and bring up children" is "essential." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It is one of the "basic civil rights of man. . . . " *Skinner v. Oklahoma*, 316 U.S. 536, 541 (1942).

The right of the family to exist, free of unwarranted state interference, is a right "far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953). Indeed, it is one component of the right to liberty, a right guaranteed by the Fourteenth Amendment of the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 746 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Constitution "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

The constitutionally protected liberty interest in the parent-child relationship is not the right of the parent alone. Rather, it is "the right of the *family* to remain together without the coercive interference of the awesome power of the state." *Robison v. Via*, 821 F.2d 913, 920 (2d Cir. 1987), quoting *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (emphasis added).

The right to preservation of family integrity "encompasses the reciprocal rights of both parent and children." *Greene v. City of New York*, 675 F. Supp. 110, 114 (S.D.N.Y. 1987). Thus, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760 (1982). The government's interference with that interest, by depriving a child of his or her parent, is a compensable violation of the Constitution. *Greene, supra.*

The courts of appeals which have reached that issue are unanimous. Thus, it is has specifically been held that children have "liberty interests in continued companionship with their parents." *Croft v. Westmoreland County Children and Youth*, 103 F.3d 1123, 1126 n.4 (3d Cir. 1997). A "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." *Curnow v. Ridgecrest Police*, 952 F.2d 321, 326 (9th Cir. 1991). "The integrity of the parent-child relationship is harmed by depriving children of adult care." *White v. Rochford*, 592 F.2d 381, 383 n.1 (7th Cir. 1979). The government's interest in protecting children "embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully

exercised authority of their parents." *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

Because children have a weighty constitutional interest in being raised by their own parents, the state requires a compelling interest in order to intrude on the family. A single positive toxicology screen, without any other evidence of parental unfitness, does not constitute a sufficiently compelling justification for the extensive, punitive intrusion that the policy effects.

In the first place, a positive toxicology may be false; ten percent of the positive results are false positives. Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 Journal of Psychoactive Drugs 305, 312 (1984). Moreover, even if true, the toxicology screen reveals only that the mother ingested drugs shortly before the test. "It tells us nothing about the extent of the mother's drug use, any harm to the baby, or the mother's parenting abilities. Equating evidence of maternal drug use with child neglect circumvents the inquiry into the mother's competence to care for her child that is customarily necessary to deprive a parent of custody." Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 160 (1997).

By contrast to the City policy, the Charleston County Department of Social Services, in handling cases of child abuse and neglect based upon allegations of drug use by the mother, had a policy of not making child welfare decisions based upon a single positive toxicology. "No single factor," not even a positive drug screening test, "was ever enough to make a determination of child abuse. That was always made as a result of analyzing

every factor involving the environment of the children." (Durban Tr. 89-90; JA 427).

In investigating cases of child abuse or neglect based upon alleged drug use, the Department "would send an assessment worker who was trained in identifying risks to children to interview the relevant players, anyone who had been providing treatment to the parents, the parent themselves and extended family members. . . . And a decision would be made as to whether or not the behavior that was reported constituted a risk to the child. The next step in that analysis would be . . . whether it was a risk sufficient to warrant the removal of the child from that environment or whether it was the risk that could be addressed with the family unit intact[,] in other words, leaving the child where the child was and working with the entire family unit without removing the child." (Durban Tr. 74-75; JA 414). Amici submit that such a policy is better for children, from both a psychological and a constitutional standpoint, than the "arrest upon positive toxicology" policy at issue in the instant action.

POINT II

CHARLESTON'S POLICY CONTRAVENES THE INTENT OF CONGRESS AND OF THE STATE LEGISLATURES

The "arrest upon positive toxicology" policy cannot be justified in terms of protecting children, because that policy conflicts with South Carolina's own child welfare laws and policies. It is also in conflict with federal law and the laws of all 49 other states.

The State of South Carolina must not only "safeguard the well-being and development of endangered children," but, in doing so, it must also "preserve and stabilize family life, wherever appropriate. . . . " S.C. Code § 20-7-480 (1976). The law of South Carolina itself recognizes that "family life [is] the most appropriate environment for the care and nurturing of children." S.C. Code § 20-7-20(D) (1976). Consequently, South Carolina requires that "[t]he state shall direct its efforts first to strengthen and encourage family life as the most appropriate environment for the care and nurturing of children." S.C. Code § 20-7-20(D).

In child protective situations, South Carolina law emphasizes voluntary compliance, and discourages coercive governmental intervention. "The agency may petition the family court to invoke the jurisdiction of the court . . . to intervene, but in no case shall the agency threaten action to coerce participation." S.C. Code § 20-7-650(K). Even when the parents refuse to cooperate, the child is not to be separated from the parent unless there is clear and convincing evidence that the child cannot be protected from any further harm without being removed. *See*, S.C. Code § 20-7-736(E)(2). Those statutes reflect mainstream child welfare policy, as expressed in federal statutes and policy guidance, social science research, and in other state's laws.

Congress has mandated that all states make reasonable efforts to keep families together, even where the children in those families may suffer from abuse or neglect. That mandate requires that all states have preventive services programs. Specifically, states must have a plan which provides that:

> reasonable efforts shall be made to preserve and reunify families
>
> (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return home. . . .

42 U.S.C. § 671(a)(15)(B). States that fail to comply risk the loss of federal funding. 42 U.S.C. § 671(b). *See also, Suter v. Artist M.*, 503 U.S. 347, 348 (1992). Federal law also provides that "in determining reasonable efforts to be made with respect to a child, . . . the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A). For all of the reasons stated earlier, removing a newborn from a parent because of a single positive urine test clearly is detrimental to the health and safety of that child.

After careful study over a lengthy period of time, including the holding of numerous hearings, Congress found that:

> the problem of child abuse and neglect requires a comprehensive approach that:
>
> (A) integrates the work of social service, legal, health, mental health, education, and substance abuse agencies and organizations; . . .
>
> (C) emphasizes the need for abuse and neglect prevention, investigation, and treatment at the neighborhood level;
>
> (D) ensures properly trained and support staff with specialized knowledge, to carry out their child protection duties. . . .

Pub. L. 102-295 § 102(a)(3), 106 Stat. 188 (1992).

Federal regulations further explain and clarify that mandate. Those regulations provide for preventive services, which may include services such as substance abuse treatment, housing, mental health, health, education, training, child care, and informal support networks. 45 C.F.R. § 1355.25(f).

The mainstream child-centered approach involves primarily the child welfare authorities, not criminal justice authorities. "Within the child welfare system, child protective services (CPS) is the administrative unit responsible for investigating allegations of abuse and neglect. The focus of CPS is on strengthening and empowering the families who are at risk of child abuse and neglect; removing children from their home is seen as a last resort when working with the family has failed." United States Department of Health and Human Services, Public Health Service, *Improving Treatment for Drug-Exposed Infants* 31 (1993). When a pregnant woman uses drugs, involuntary civil commitment and criminal prosecution, ostensibly for the benefit of the fetus, should not be used at all. *Id.* at 31.

The primary goal of child welfare agencies is to foster the health of families and to keep them intact. "Child protective services agencies are mandated to help keep families together." United States Department of Health and Human Services, Public Health Service, *Pregnant, Substance-Using Women* 58 (1993). That goal recognizes that the family is an entity which deserves protection from unwarranted state intervention. "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither

supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Thus:

> national policy should strengthen families to remedy the causes of child abuse and neglect, provide support for intensive services to prevent the unnecessary removal of children from families, and promote the reunification of families if removal has taken place. . . .

Pub. L. 102-295 § 102(a)(7), 106 Stat. 188 (1992).

The states have heeded the Congressional mandate, and have incorporated that mandate into their own statutes. Following the lead of Congress, all fifty states have enacted laws establishing child protection programs. *See*, United States Department of Health and Human Services, National Center on Child Abuse and Neglect, *Child Maltreatment 1995: Reports from the States to the National Child Abuse and Neglect Data System* (1997). Those laws are based upon the premise that the optimum form of child protection is to preserve family ties, not to sever them. Thus, a primary goal of state child protection laws is to keep children safely with their parents.

State statutory schemes are based upon that premise. "[I]t is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home. . . . " N.Y. Soc. Serv. L. § 384-b(1)(a)(ii). Accordingly, "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home. . . . " N.Y. Soc. Serv. L. §384-b(1)(a)(iii). To carry out that obligation, a "social service official shall provide preventive services to a child and his or her family . . . upon a finding by such official

that (i) the child will be placed or continued in foster care unless such services are provided . . . " N.Y. Soc. Serv. L. § 409-a(1)(a).

The statutory schemes recognize the goals of safeguarding endangered children and preserving families are not antagonistic. The state can accomplish both goals – child protection and family preservation – by providing services to the children and families.

Preventive services include a wide array of social services. The state of New York, for example, provides funding for 19 different types of services including, *inter alia*: day care; homemaking assistance; housekeeper/chore services; family planning services; home management services; psychotherapy; parent aides; parenting skills training; transportation of children and families to and from service sites; emergency cash and goods; emergency shelter; rent subsidies; and intensive home-based family preservation services. 18 N.Y.C.R.R. § 423.2(b).

Research has shown that, in most cases, those preventive services programs are effective in keeping families together and, at the same time, keeping children safe from abuse and neglect.

See, e.g., Berquist, et al., *Evaluation of Michigan's Families First Program* (1993); Fraser, et al., *Families in Crisis: The Impact of Intensive Family Preservation Services* (1991) (Utah and Washington State); Bath and Haapala, *Family Preservation Services: What Does the Outcome Research Really Tell Us*, 69 Soc. Serv. Rev. 400 (1994) citing, Wood, et al., *In-Home Treatment of Abusive Families: Cost and Placement at One Year*, 25 Psychotherapy 409 (1988) (California); Schwartz, et al., *Family Preservation Services as an*

Alternative to Out-of-Home Placement of Adolescents (1991) (Minnesota); Wells and Biegel, *Family Preservation Services: Research and Evaluation* 33 (1991) (Minnesota).

In addition to experiments, there is real-world experience. As a result of a consent decree of a class action lawsuit, almost every county in Alabama has fully adopted a comprehensive system of care involving extensive efforts to keep families together tailored to the specific needs of individual families, including families with substance abuse problems. *See, R.C. v. Nachman*, 969 F. Supp. 682, *aff'd per curiam*, table, 145 F.3d 363 (11th Cir. 1998). In those counties, foster care placements have declined by 35 percent. Office of the Court Monitor for the R.C. Consent Decree, Human Systems and Outcomes, Inc. (1999). The independent monitor, appointed by the District Court for the Middle District of Alabama, concluded that children in Alabama are actually safer now than before the efforts to improve on family preservation. Groves, *System of Care Implementation: Performance, Outcomes, and Compliance*, Executive Summary 3 (1996). Each of the evaluations clearly demonstrates that preventive services work: children are both safer than they would be without the services and able to remain with their families.

By contrast, arresting and incarcerating mothers has not been shown to be effective. "The panel does not support the criminal prosecution of pregnant, substance-using women. There is no evidence that punitive approaches work." United States Department of Health and Human Services, *Pregnant, Substance-Using Women* 2 (1993).

By deliberately choosing to arrest women based upon a positive toxicology, and to bypass the Department of Social Services entirely, the City of Charleston has developed an unsound and harmful child welfare policy.

CONCLUSION

For all the aforementioned reasons, *amici curiae* National Coalition for Child Protection Reform, National Center for Youth Law, Juvenile Law Center, Children and Family Justice Center of the Northwestern University School of Law, Chicago Coalition for the Homeless, Illinois Action for Children, and Loyola University Child-Law Center respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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No. 99-936

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, et al.,
Petitioners,
v.
THE CITY OF CHARLESTON, SOUTH CAROLINA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF THE NARAL FOUNDATION® ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE NARAL FOUNDATION ET AL. FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

The NARAL Foundation et al. hereby move, pursuant to Rule 37 of this Court, for leave to file an *amicus curiae* brief in support of Petitioners. The motion is necessitated by Respondents' refusal to consent to the filing of the brief. A copy of Petitioners' letter providing such consent is submitted herewith.

The resolution of this case is of great significance to the NARAL Foundation et al. The NARAL Foundation and

several co-*amici* are organizations dedicated to promoting women's reproductive health and freedom, ensuring that women are not punished based on their reproductive capacities, and helping decision-makers understand the impact of policies and laws on women's health and lives. Other groups join us, due to their commitment to sound drug policy, promotion of minority health, knowledge of behavioral health, and advocacy for the health and rights of prisoners and the homeless. The Court's decision in this case will have a profound effect on women's lives, freedoms, and reproductive rights. Punitive policies that impose involuntary drug searches on pregnant women and threaten incarceration upon a positive drug test infringe upon women's reproductive rights and impose burdens on women due to their reproductive capacity that are not imposed on men. Moreover, because such punitive policies can actually deter women from seeking necessary medical care, they fail to promote healthy childbearing. Additionally, such policies as historically and currently implemented bear most heavily on women of color.

The NARAL Foundation et al. seek to help inform the Court about the dangers to women's health inherent in such punitive policies and the unmet need for adequate, voluntary drug treatment programs designed to meet the needs of pregnant women and their families. The NARAL Foundation et al. believe our *amicus curiae* brief will serve this purpose by providing the Court with relevant legal and factual information not already brought to the Court's attention by the parties, particularly with respect to the societal circumstances that may lead women to drug addiction, the barriers such women face in attempting to overcome their addiction, and the deficiencies of the measures applied by Respondents in this case as a means to address the particular needs of pregnant women battling drug addiction.

To bring such additional information before the Court, the NARAL Foundation et al. respectfully request leave to file the *amicus curiae* brief submitted herewith.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*

The NARAL Foundation and several co-*amici* are organizations committed to promoting women's reproductive health and freedom, ensuring that women are not punished based on their reproductive capacities, and helping decision-makers understand the impact of policies and laws on women's health and lives. Other groups join us, due to their commitment to sound drug policy, promotion of minority health, knowledge of behavioral health, and advocacy for the health and rights of prisoners and the homeless. All of the *amici* have a strong interest in the Court's decision in this case, which will have a profound effect on women's lives, freedoms, and reproductive rights. Descriptions of each of the *amici* are provided in the Appendix hereto.[1]

SUMMARY OF ARGUMENT

Respondents undertook the involuntary drug searches at issue in this case for a purpose and in a manner that cannot be justified under the narrow "special needs" exception to the warrant and individualized suspicion requirements of the Fourth Amendment to the United States Constitution.

This Court has sustained warrantless, suspicionless searches only in cases where "special governmental needs, beyond the normal need for law enforcement" existed that made it impractical to require a warrant or some level of individualized suspicion, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989), and the searches were premised on "concerns other than crime

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[1] This brief was not authored, in whole or in part, by any counsel for a party. No person or entity, other than the *amici curiae*, their members, or counsel contributed monetarily to the preparation or submission of this brief.

detection," *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (citation omitted). The Court has found such searches permissible, however, only if they are both effective at advancing the asserted non-law enforcement interest and minimally intrusive on an individual's privacy. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658-63 (1995). The hospital's searches neither had a true non-law enforcement purpose nor were they effective to accomplish Respondents' purported goals, and they were highly intrusive.

Respondents designed their drug search policy with a dominant law enforcement purpose. From the moment Medical University of South Carolina ("MUSC") Nurse Shirley Brown mentioned the possibility of prosecuting pregnant drug users to the MUSC General Counsel, Respondents pursued punishment for such women, collaborating with law enforcement personnel to develop and implement the policy and turning over search results to law enforcement personnel in order to facilitate the arrest of women who tested positive for cocaine. Although the searches were conducted in the hospital, rather than at a police station, they were very much intended for law enforcement purposes. Women subjected to the search policy were arrested on the spot, some being led out of the hospital in handcuffs just after giving birth, still dressed in their hospital gowns. The fact that the person conducting the search wore a white hospital coat instead of a police uniform cannot, under proper scrutiny, obscure the policy's dominant law enforcement aim.

Even if Respondents had undertaken the searches for the asserted purpose of protecting the health of pregnant women and their fetuses, they failed egregiously to achieve that end because the searches did not result in appropriate drug treatment. Respondents did not provide the women they searched with treatment or services that came even close to meeting the women's needs or those of their future children.

Respondents purportedly offered pregnant women a "choice" between arrest and treatment. In fact, this purported "choice" was merely illusory: the only treatment available did not provide childcare, was difficult for some women to access, did not appear to account for the societal factors that led to and compromised the women's ability to recover from their addiction, and was not designed to treat pregnant women. Respondents offered, therefore, no realistic treatment option.

Furthermore, involuntary drug search programs such as Respondents' can perversely discourage women from seeking treatment. The fear of punishment engendered by such policies deters some women from going to the hospital to receive prenatal medical care. By discouraging women from seeking treatment, involuntary search policies actually threaten the health of pregnant women and their fetuses because some pregnant women undoubtedly go through their pregnancies without appropriate medical attention.

In addition to being ineffective to achieve Respondents' asserted goal, the involuntary searches constituted a major intrusion into the privacy interests of the women in question. They were not the "normal, routine, and expected part of a medical examination," as the court below erroneously found. *Ferguson v. City of Charleston,* 186 F.3d 469, 479 (4th Cir. 1999). The fact that they took place in a hospital made them no less intrusive than if they had been conducted in the jailhouse, because their principal purpose and effect was to incriminate those searched. Moreover, the criteria that were used to select whom to test accorded the MUSC staff wide discretion, making the searches highly intrusive on a subjective basis and inviting abuse. *Cf. Von Raab*, 489 U.S. at 667 (concluding warrant not required to protect against major intrusion where discretion is absent). This is particularly evident from the disparate impact of the selection criteria on African American women: rather than selecting women for testing based solely on neutral,

objective standards, Respondents focused on factors closely tied to race and poverty.

For all these reasons, Respondents' search policy cannot be justified under the "special needs" exception. The search policy is representative of policies that punish, rather than effectively aid, pregnant drug users. Such punitive approaches fail to recognize that drug addiction is a disease requiring medical treatment. While it is tragic if an infant is born suffering negative effects from prenatal drug exposure, adopting a punitive approach to this dilemma only compounds the tragedy. Providing voluntary treatment opportunities for drug-addicted pregnant women, not incarcerating or demonizing them, is the proper method for addressing this social concern. The search policy at issue in this case and others like it are counterproductive and harmful to women and children, serving as pretexts for punitive, evidence-gathering missions, where law enforcement masquerades as medicine.

Because drug-addicted pregnant women may face multiple obstacles to overcoming their addiction, they need comprehensive drug treatment and related social services addressing the totality of circumstances surrounding their drug use. Research demonstrates that women with drug problems experience violence, such as rape, incest, and domestic violence, at a substantial rate. Effective treatment addresses these concerns, while incorporating a therapeutic, rather than an adversarial, approach to recovery. Additionally, appropriate programs provide childcare in recognition of the fact that women taking care of other children may be forced to forgo treatment without such service. Transportation services also are essential for those women, especially poor women, lacking access to treatment.

To properly judge the legitimacy of the searches Respondents conducted requires probing beyond the seemingly benign interests asserted. This Court's experience

with policies aimed at protecting women, children, and fetuses that in fact violate fundamental rights should be instructive. *See, e.g., International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (recognizing that an employment policy premised on protecting women and their children from actual or potential lead exposure discriminated against women on the basis of gender); *see also* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219 (1987) (criticizing fetal vulnerability and protectionist policies as actually threatening the health of women and children). Had Respondents in fact sought to promote healthy childbearing, they would have offered voluntary and appropriate treatment for women of childbearing years struggling with addiction, poverty, abuse, and the lack of childcare. Respondents failed to do so, instead devising a policy that resulted in the arrest of pregnant and postpartum women, who in effect were targeted for prosecution based on their reproductive capacity. Respondents' involuntary drug search policy cannot, therefore, be justified under the special needs exception.

ARGUMENT

I. RESPONDENTS CONDUCTED THEIR DRUG SEARCHES PRIMARILY FOR AN INCRIMINATORY PURPOSE.

Respondents claimed that the search policy aimed to improve the health of pregnant women and their future children. However, the record amply belies this claim, demonstrating that Respondents' primary goal was to seek out and punish lawbreakers. That goal cannot support application of the "special needs" exception to the Fourth Amendment. *Cf. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620-21 & n.5 (1989) (finding governmental interest acceptable in part because searches were conducted "not to assist in the prosecution of

employees" and observing that showing of pretextual searches might render search program invalid).[2]

Police and prosecutors, particularly the Office of the Solicitor of the Ninth Judicial Circuit of South Carolina, were integrally involved in formulating the search policy. In the fall of 1989, MUSC Nurse Shirley Brown heard of Greenville's program of arresting drug-using pregnant women. She spurred MUSC's General Counsel to write to Solicitor Condon regarding the Greenville Solicitor who was "prosecuting mothers who gave birth to children who tested positive for drugs" and to ask Solicitor Condon to "advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter." (App. to Pet. for Cert. 67.) Next, Solicitor Condon wrote to Police Chief Reuben Greenberg about "forming a task force to consider possible prosecution of the mothers," and asked the Police Chief to co-chair the task force on this matter. *Id.* at 69.

MUSC, the Charleston City Police Department, and the Solicitor's Office then met to formulate the search policy, focusing on arrest of drug-using pregnant women. *See id.* at 64. Arrest likewise became the theme of the MUSC Medical Center Policy Manual M-7, which explained that "[p]regnant women abusing illegal drugs" is a problem that necessitates "medical/police intervention." *Id.* at 53. The manual urged hospital staff to follow chain-of-custody procedures with respect to urine samples and prescribed procedures for providing search results to the Police

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[2] Petitioners' brief examines the "special needs" exception, and *amici* will not undertake a comprehensive examination here. As the relevant case law makes clear, the "special needs" doctrine is fundamentally inconsistent with an underlying purpose of incrimination and prosecution. *Amici* incorporate by reference here the documentation to that effect provided by Petitioners.

Department. *See id.* at 53-56. The Police Department, in turn, established operational guidelines regarding arrest of hospital patients when a search revealed evidence of cocaine use. *See id.* at 49-52. The police were instructed that "[a]s in the case of all arrests, the suspect shall be questioned concerning the charges against her and a written record made of same." *Id.* at 51.

The search policy was not only grounded on investigative purposes and effectively crafted by law enforcement authorities, but also administered in conjunction with police. For example, the Charleston City Police Department designated a "lead investigator" and instructed MUSC staff "to contact the police dispatcher and request a Crimes v. Persons detective" for after-business hours cases. *Id.* at 52 (revealing the implicit assumption that a pregnant woman's drug use is a crime against the fetus as a person). Similarly, the hospital employed proper chain-of-custody procedures, underscoring the expectation that search results would be used in criminal prosecutions. *See id.* at 54. Medical staff so identified with law enforcement that nursing notes included such comments as, "At this point *we* do not have legal ground to arrest." (J.A. 618 (Hilderbrand Test.)) (emphasis added).

These facts, and in particular the systematic release of drug search results to law enforcement by Respondents, distinguish this case from every one of the cases in which this Court found drug testing to be justified under the special needs doctrine. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Skinner*, 489 U.S. at 621 n.5. Based on its law enforcement purpose alone, the search policy cannot be justified under that exception.

II. THE SEARCH POLICY WAS NEITHER EFFECTIVE TO ACHIEVE RESPONDENTS' ASSERTED GOAL NOR MINIMALLY INTRUSIVE.

Even if, as Respondents assert, the search policy was not aimed primarily at law enforcement, the searches they undertook in this case were unreasonable because they were not effective in serving Respondents' purported drug treatment objective. *See Vernonia*, 515 U.S. at 660-61 (evaluating whether a search policy was effective in meeting the stated governmental concern). Further, even if the policy could have helped some women, the searches were unreasonable because, by their very nature, they were more than minimally intrusive upon the searched women's right to privacy.[3]

The search policy was ineffective because Respondents did not offer those women who tested positive treatment options that were either realistic or appropriate, and because the involuntary drug searches most likely deterred some pregnant women from seeking prenatal care – a result directly contrary to Respondents' purported interest. *Cf. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.*, 886 F.2d 871, 916-18 (7th Cir. 1989) (Easterbrook, J., dissenting) (observing that "Title VII does not allow an employer to adopt a policy that simultaneously makes both women and their children worse off"), *rev'd*, 499 U.S. 187 (1991); *see also* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219 (1987) (criticizing fetal vulnerability and protectionist policies as actually threatening the health of women and

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[3] *Amici* cannot, in fact, conceive of an involuntary drug search program for women that would only "minimally" intrude on fundamental privacy rights.

children). Both in failing to serve its purported governmental purpose of treatment and in failing to reach the women needing treatment, the search policy was ineffective and therefore disqualified for justification under the special needs exception.

A. Respondents' Involuntary Drug Searches Failed To Improve the Health of Pregnant Women and Their Fetuses.

Under the special needs exception, effectiveness is measured by the degree to which a search advances the asserted governmental interest. *Cf. Chandler,* 520 U.S. at 319 (concluding Georgia drug testing regime was not well designed to advance interest in identifying candidates who violated drug laws). Respondents' involuntary drug searches did not result in appropriate treatment or otherwise end pregnant women's drug use. Contrary to the findings of the Fourth Circuit below, the mere identification of some pregnant women using cocaine was not sufficient to render the search policy effective to achieve its purported goal.

1. Involuntary Drug Searches Alone Do Not Stop Drug Use.

A drug search is not a form of drug treatment. Rather, a drug search is simply one tool – neither the only nor even the best tool – for identifying substance use. Respondents could not have achieved their asserted objective unless they offered the women subject to the search policy some reasonable means of addressing their addiction, namely appropriate treatment.[4] However, Respondents did not

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[4] Respondents should have been aware of the need for an effective therapeutic program. (J.A. 710-11 (Jessup Test.)) Solicitor Condon contacted Dr. Ira Chasnoff, the only national expert Respondents consulted when they developed the policy, for

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provide appropriate drug treatment. For example, Patricia Williams testified that she was never offered referral to a substance abuse program other than the Charleston County Substance Abuse Treatment Program ("CCSA"), which provided only generic outpatient services. (J.A. 1208-09 (P. Williams Test.)) Lori Griffin stated that she was never given or referred to counseling or treatment. (J.A. 546, 548, 562 (Griffin Test.))

Drug addiction is a disease and to be treated effectively must be understood as such. *See* American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders* 222-23 (4th ed. 1994) (cocaine dependence classified as a disease); 1 ICD-9-CM International Classification of Diseases 49-50 (5th ed. 9th Rev. 1997) (cocaine dependence classified as a disease); *see also* Pier Vincenzo Piazza et al., *Behavioral and Biological Factors Associated with Individual Vulnerability to Psychostimulant Abuse*, in Medications Development for the Treatment of Pregnant Addicts and Their Infants 105, 105 (1995) (suggesting possible genetic predisposition to drug addiction). Respondents claimed the search policy would scare pregnant women off drugs; however, drug users cannot overcome their addiction simply because someone tells them to stop. (J.A. 294-95 (Chasnoff Test.)); (J.A. 656-57

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an opinion on the search policy. (J.A. 279-80 (Chasnoff Test.)) Chasnoff opposed the policy and informed Solicitor Condon that such a punitive policy would steer women away from treatment and prenatal care, that focusing exclusively on cocaine was unwarranted, and that the policy would not improve fetal health. (J.A. 281-82, 293-94 (Chasnoff Test.)) Moreover, Sarah Schuh, a pediatrician at MUSC, testified that around 1989, she developed a grant proposal that would have provided much-needed services, counseling, and transportation. The grant proposal never went forward. (J.A. 1107-13 (Schuh Test.))

(Horger Test.)) Indeed, criminal action ignores the underlying disease and demonizes such women when, in fact, research demonstrates the attempts of some such women to protect fetal health: they "separated drug use and parental roles, budgeted money, tried to get away from the crack scene . . . [and] tried to lower their intake, switched from 'harder' to 'softer' drugs . . . and ingested health-promoting substances such as vitamins." Marsha Rosenbaum, *Women: Research and Policy*, in Substance Abuse, A Comprehensive Textbook 654, 656-57 (Joyce H. Lowinson et al. eds., 3d ed. 1997) (footnote omitted) [hereinafter "Research and Policy"]. Pregnancy may actually be an incentive for women to enter drug treatment. *See* Marsha Rosenbaum, *Women and Treatment*, Drug Policy Letter 10, 12 (Winter 1998) [hereinafter "Women and Treatment"]. The search policy countered this incentive by threatening arrest rather than offering appropriate treatment to pregnant women.

2. Respondents Offered Only an Illusory Treatment "Choice."

Initially, the search policy required that a woman who tested positive for cocaine upon delivery be arrested, based on that single search. *See Ferguson*, 186 F.3d at 474. During the initial phase of the policy, three of the Petitioners were arrested after giving birth. *See id.* at 485 (Blake, J., dissenting in part).[5] Additionally, women testing positive prior to delivery were supposed to be offered treatment in

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[5] Sandra Powell delivered her child at MUSC, tested positive for cocaine, and was arrested at the hospital the next day. Laverne Singleton delivered her child in the ambulance en route to MUSC, tested positive for cocaine upon admission and was arrested at the hospital the following morning. Although Ellen Knight tested negative, her child tested positive at birth and Ms. Knight was arrested at the hospital. *See id.* (Blake, J., dissenting in part).

lieu of arrest. (J.A. 342-43 (Condon Test.)) (describing policy as purportedly "amnesty"-based when first implemented). Respondents concede, however, that this did not happen when the search policy was first implemented. *See* Respondents' Br. in Opp'n to Pet. for Cert. at 7 n.4.[6]

In early 1990, the policy was revised to require the offer of treatment to all women whose first search indicated the presence of cocaine. *See Ferguson*, 186 F.3d at 474. Under the revised policy, a woman who tested positive for cocaine could avoid arrest and prosecution if (and only if) she entered into a generic drug treatment program. *See id.* However, if a second search yielded evidence of cocaine, she would be arrested. *See id.* The purported choice between treatment and arrest under the search policy was illusory, however, because the treatment offered was neither realistically accessible to nor adequate for the women in need.

a. Charleston had no treatment facilities geared to treat indigent pregnant women.

Charleston – and indeed South Carolina in general – had no drug treatment centers designed to treat indigent pregnant women when the search policy was implemented. (J.A. 135 (Brown Test.)); (J.A. 601 (Haynes Test.))[7] The

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[6] For example, Lori Griffin tested positive upon entering the hospital with contractions, and was jailed, returning to the hospital several weeks later to deliver. *See Ferguson*, 186 F.3d at 485 (Blake, J., dissenting in part). While in state custody, Griffin endured premature labor pains, received medical care, and delivered her baby all while shackled and handcuffed. (J.A. 559-563 (Griffin Test.))

[7] *See also* U.S. General Accounting Office, GAO/HRD-91-80, *ADMS Block Grant: Women's Set-Aside Does Not Assure Drug*

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hospital's own psychiatric department did not provide substance abuse treatment to indigent pregnant women until 1991. (J.A. 135-36 (Brown Test.)) CCSA had no programs specifically geared toward women, pregnant women, or cocaine users. (J.A. 57 (Beckett Test.)); (J.A. 601 (Haynes Test.)) In addition, CCSA was temporarily closed in 1989 due to Hurricane Hugo (J.A. 54-55 (Beckett Test.)) Consequently, plaintiff Ellen Knight, who tested positive for cocaine in November of 1989, had to wait until January of 1990 for treatment – by which time she had already been arrested and criminal prosecution had been initiated. (J.A. 777-78, 784-86 (Knight Test.))

b. The treatment available was inadequate.

To have been effective to accomplish Respondents' purported goal, the drug treatment offered would have to have been designed to address the particular needs of pregnant women, including childcare and transportation. Generally, women without a spouse, partner, or support system to care for their children while they seek treatment, or the funds for an alternate caregiver, are forced either to forego treatment or to risk leaving children unattended. This deters women with drug problems from seeking treatment or prenatal care because they fear losing their children. *See* Embry M. Howell et al., *A Review of Recent Findings on Substance Abuse Treatment for Pregnant Women*, 16 J. Subst. Abuse Treat. 195, 209 (1999); *see also* ADMS Block Grant, *supra*, at 20. Provision of childcare and transportation for addicted mothers are not perks but

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Treatment for Pregnant Women, App. I at 12 (1991) [hereinafter "ADMS Block Grant"] (in 1990, South Carolina had no "specific treatment services for pregnant women and mothers with young children").

essential elements for effective treatment. (J.A. 720-21 (Jessup Test.)); (J.A. 296-97 (Chasnoff Test.)); (J.A. 604 (Haynes Test.))[8]

CCSA did not offer childcare. (J.A. 604 (Haynes Test.)) Indeed, "[c]hild care services and women-only substance abuse treatment programs . . . were not available in Charleston until November 1994." Philip H. Jos et al., *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale*, 23 J.L. Med. & Ethics 120, 128 n.47 (1995). Nor was adequate transportation available, as Petitioners made evident. Patricia Williams wanted treatment but had no transportation to get there, a fact to which Nurse Shirley Brown was unsympathetic. (J.A. 1204-06 (P. Williams Test.)) Ms. Nicholson needed to be home to take care of her 7-year-old son when he returned from school, but instead was forced to attend immediate

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[8] Women taking care of other children of any age are often inhibited from entering treatment because they lack childcare alternatives. *See* South Carolina Department of Alcohol and Other Drug Abuse Services, *Specialized Services for Women and Children* (visited Apr. 26, 2000) <http://www.daodas.state.sc.us/services/womenchildren.html>; ADMS Block Grant, *supra*, at 17. Studies have found that "women who have their children with them during residential treatment are less likely to drop out and are more successful after treatment than women whose children are not with them during treatment." Drug Strategies, Keeping Score: Women and Drugs: Looking at the Federal Drug Control Budget *17* (1998); *see also* National Institute on Drug Abuse, *Sixth Triennial Report to Congress from the Secretary of Health and Human Services, Drug Abuse and Addiction Research* (visited Apr. 19, 2000) <http://www.nida.nih.gov/STRC/Role6.html> [hereinafter "Sixth Triennial Report"]. In addition, "[t]reatment programs are often located in areas that are relatively inaccessible by public transportation; this can be a formidable barrier for pregnant women and mothers with young children." ADMS Block Grant, *supra*, at 18.

inpatient drug treatment. (J.A. 900-02 (Nicholson Test.)) Similarly, Ms. Ferguson requested outpatient treatment to care for her children, but was arrested for not going to the inpatient psychiatric unit on the very day she was supposed to start outpatient treatment at CCSA. (J.A. 457-58, 460-62, 478-79 (Ferguson Test.)) Because the majority of women seeking prenatal care at the hospital were poor, *see Ferguson*, 186 F.3d at 489 (Blake, J., dissenting), and many of them had children, they had difficulties availing themselves of the "treatment" offered.

Even beyond their lack of childcare and failure to provide transportation, the limited drug treatment programs that were available do not appear to have been designed to deal with the circumstances facing pregnant drug users. As experts have recognized:

> Women with alcohol and drug problems report high rates of violence, including rape, incest, and domestic violence. Suppression of past violent experiences is identified throughout the literature as a major relapse trigger and is a critical issue that must be addressed as women move into recovery.

Legal Action Center, Steps to Success: Helping Women with Alcohol and Drug Problems Move from Welfare to Work 14 (1999); *see also* 2 Center for Substance Abuse Treatment, U.S. Dep't of Health and Human Services, Pub. No. (SMA) 95-3056, Pregnant, Substance-Using Women 6-7 (1993) [hereinafter "HHS TIP"] (listing characteristics of pregnant women seeking drug treatment through publicly funded programs).[9] Furthermore, whether as a result of

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[9] *See generally* Maia Szalavitz, *War on Drugs, War on Women*, 8 On The Issues Magazine 42 (1999), *reprinted in* Lindesmith

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abuse or other physical and psychological disruptions in their lives, drug-dependent women have higher levels of depression, lower self-esteem and lower overall self-satisfaction than the population generally, and some become suicidal. *See* Carol J. Boyd, *The Antecedents of Women's Crack Cocaine Abuse: Family Substance Abuse, Sexual Abuse, Depression, and Illicit Drug Use*, 10 J. Subst. Abuse Treat. 433, 437 (1993); Amin N. Daghestani, *Psychosocial Characteristics of Pregnant Women Addicts in Treatment*, in Drugs, Alcohol, Pregnancy and Parenting 7, 8 (Ira J. Chasnoff ed., 1988).

Drug treatment centers historically have concentrated on male addiction patterns and treatment needs. *See* Howell et al., *supra*, at 203. The existing treatment paradigm has proven dramatically less effective for women patients than for men. *See* Women and Treatment, *supra*, at 11. Women typically utilize drugs as a form of self-medication for the physical and mental trauma they have sustained. *See* Jean

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Center (visited Apr. 26, 2000) <http://www.lindesmith.org/lindesmith/library/szalavitz2. html> (noting that "most treatment doesn't deal with . . . the long-term mental health care needs of addicted women, who've commonly experienced molestation, rape, and other violent traumas.") (internal quotation marks omitted). Physical or sexual assault is the most prevalent correlate for drug use in pregnant women and is often thought to be a cause of drug use. *See, e.g.*, Dianne O. Regan et al., *Infants of Drug Addicts: At Risk for Child Abuse, Neglect, and Placement in Foster Care*, 9 Neurotoxicology and Terotology 315, 318 (1987); Teresa Ann Hagan, *A Retrospective Search for the Etiology of Drug Abuse: A Background Comparison of a Drug-Addicted Population of Women and a Control Group of Non-Addicted Women*, in 81 Monograph Series National Inst. on Drug Abuse Research 254, 259 (1987); *see also* Sixth Triennial Report, *supra* ("up to 70 percent of women in drug use treatment report histories of physical and sexual abuse").

Reith Schroedel, Is the Fetus A Person? A Comparison of Policies Across the Fifty States (Cornell University Press, forthcoming 2000) (manuscript at 103).

As of 1990, South Carolina generally did not provide drug treatment tailored to the particular needs of women. *See* ADMS Block Grant, *supra*, at 15. Effective drug treatment for Petitioners required, at a minimum, the establishment of a therapeutic alliance with a health care provider, which was lacking in this case. (J.A. 699-702 (Jessup Test.))[10] Such an alliance is critical to effective treatment for women. A therapeutic alliance takes a "compassionate" approach offering a "continuum of help" starting with prenatal care and continuing through successful completion of treatment. (J.A. 718, 720-21 (Jessup Test.)) Furthermore, "[s]ervice providers need to be sensitive to the feelings and the cultural background of pregnant, substance-using women and offer care in an environment that is supportive, nurturing, and nonjudgmental." HHS TIP, *supra*, at 2. The coercive environment created by Respondents' search policy was the antithesis of establishing a relationship and environment conducive to recovery from drug addiction. (J.A. 699, 700-02, 725-26 (Jessup Test.)) None of the MUSC staff who had direct contact with Petitioners under the policy had the training in substance abuse counseling or treatment necessary for effective communications with the patients. (J.A. 643-45 (Horger Test.)); (J.A. 296-97 (Chasnoff Test.))

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[10] "[T]reatment of drug-dependent women was more likely to be successful if treatment was provided in a mutually supportive therapeutic environment . . . ." Sixth Triennial Report, *supra*. *See generally* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 Hastings L.J. 569, 573-75 (1992) (explaining the social policy ramifications and positive social benefits of utilizing a "facilitative," as opposed to "adversarial," model to address pregnant women's health issues).

Unfortunately, many of the deficiencies that faced Petitioners still exist. Drug treatment programs geared to pregnant women that employ a therapeutic model are scarce. *See* Research and Policy, *supra*, at 659. Despite federal government recognition that "[i]t is imperative that programs include services designed specifically for women, particularly pregnant women," HHS TIP, *supra*, at 6, some drug treatment centers turn away pregnant women because they fear legal liability, ADMS Block Grant, *supra*, at 18.

B. Involuntary Search Policies Deter Drug-Using Pregnant Women From Obtaining Treatment.

The knowledge or fear that a positive drug search would lead to punitive measures commonly deters women from seeking any prenatal medical care. *See* ADMS Block Grant, *supra*, at 5, 20. Contrary to Respondents' claim that the search policy would lead women simply to stop using drugs or seek treatment on their own, criminalization of substance abuse during pregnancy is counter to the best interests of fetuses and "pregnant women as pregnant women may forgo early prenatal care or substance abuse treatment for fear of losing their children or of being arrested." Lawrence J. Nelson & Mary Faith Marshall, Ethical and Legal Analyses of Three Coercive Policies Aimed at Substance Abuse by Pregnant Women 12 (1998).[11] Abundant evidence demonstrates that laws and policies similar to the search policy at issue in this case deter women from coming to the hospital for prenatal care or to deliver.

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[11] *See also* American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990).

See, e.g., ADMS Block Grant, *supra* at 20.[12] These punitive laws and policies "drive women underground." Maia Szalavitz, *War on Drugs, War on Women*, 8 On The Issues Magazine 42 (1999), *reprinted in* Lindesmith Center (visited Apr. 26, 2000) <http://www.lindesmith.org/lindesmith/library/szalavitz2.html>. The net result is that children and society are harmed rather than helped. *See* Nelson, *supra*, at 12; *see also* Board of Directors of the American Society of Addiction Medicine, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (visited May 26, 2000) <http://www.asam.org/frames.html>. Here, the record demonstrates that Respondents' search policy likely had exactly this harmful deterrent effect. (J.A. 700-09, 719-20 (Jessup Test.)); (J.A. 905-06 (Nicholson Test.)) (describing how she avoided prenatal care for some time because she feared being put in jail). Ironically, in some extreme cases, the fear of involuntary drug searches may even lead a woman to have an abortion when she otherwise would not have had one. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1445 (1991).

Further undermining the ability of the search policy to identify drug-addicted pregnant women was the fact that it focused only on cocaine users, despite ample evidence that many other substances, both legal and otherwise, are equally or more harmful to a developing fetus. (J.A. 706 (Jessup Test.)); (J.A. 281-85 (Chasnoff Test.)) While *amici* do not mean to suggest either that cocaine use during pregnancy is acceptable or that involuntary searches for all drugs would

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[12] Additionally, women fear that they will be stigmatized if it becomes known that they have used drugs. *See* HHS TIP, *supra*, at 8. Many pregnant substance users have experienced indifferent or harsh treatment from medical personnel, who treat them like they are "just junkies." *See* Women and Treatment, *supra*, at 11.

be appropriate, focusing solely on cocaine use was not the right approach. Moreover, the undue discretion afforded to MUSC staff to determine subjectively which women to test (discussed further below) created a selectivity that inaccurately identified the women to be searched.[13]

In finding the policy effective for identifying the target population, the court below ignored the consequences of Respondents' penal and discriminatory approach. The court below additionally ignored the inevitable outcome of a policy that deters women from seeking prenatal care or medical attention during childbirth: the endangerment of both the pregnant woman and the fetus. Instead of encouraging pregnant women to obtain medical treatment and other services that often result from a prenatal examination, such as information, referrals, social services, and the like, the search policy likely left some women feeling they had no choice but to deal in isolation with their problems. The search policy thereby deprived these women of the assistance they needed to overcome the societal and economic hurdles that stood in their way.

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[13] *See also* National Council on Alcoholism and Drug Dependence, Policy Statement, *Women, Alcohol, Other Drugs and Pregnancy* (1990) (there is "increasing evidence of disparities regarding the screening and reporting of positive toxicologies of newborns, with women of color, poor women and women receiving care in public hospitals having the greatest likelihood of being subject to drug testing and subsequent reporting to legal authorities").

C. The Degree of Intrusion Caused By The Search Policy Was Neither Objectively Nor Subjectively Minimal.

1. Conducting Involuntary Drug Searches During Medical Examinations Does Not Make Them Minimally Intrusive.

The searches in this case were highly intrusive under established Fourth Amendment jurisprudence. In *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989), this Court held that the collection and testing of urine intrudes upon unquestionably reasonable expectations of privacy, *id.* at 617, and requires its subject "to perform an excretory function traditionally shielded by great privacy," *id.* at 626. Moreover, urine testing invades the subject's privacy insofar as "it discloses [information] concerning the state of the subject's body, and the materials [she] has ingested." *Acton*, 515 U.S. at 658.

Here, the court below held that "the context in which the searches at issue here occurred" made them only minimally intrusive, reasoning that "[t]he giving of a urine sample is a normal, routine, and expected part of a medical examination." *Ferguson*, 186 F.3d at 479 (citation omitted). That reasoning misconstrues the applicable Fourth Amendment principles. Searches based on urine samples taken in a medical environment may sometimes be less intrusive than comparable searches in which urine samples are taken in the field (*i.e.*, by police officers, or direct supervisors of employees), *see Skinner*, 489 U.S. at 626, but that does *not* make them minimally intrusive. In this case, Respondents co-opted the symbols of professional medicine to conceal the actual purpose and consequences of the drug searches effected through urinalysis – which were revealed

only later when law enforcement personnel handcuffed and arrested Petitioners.[14] In fact, Petitioner Nicholson was even lied to about the purposes for which her sample was taken. (J.A. 900 (Nicholson Test.)) As such, the searches were highly intrusive, which distinguishes them from those at issue in *Acton*, 515 U.S. at 658 ("[T]he results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function."), and *Pierce v. Smith*, 117 F.3d 866, 875 (5th Cir. 1997) (holding that a urine test was relatively noninvasive where "the test was not undertaken for law enforcement purposes, law enforcement personnel were not involved, and there was no threat of force and no potential criminal or civil penalty for refusing.").[15] Respondents' attempt to cloak the

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[14] The Fourth Amendment cases this Court and others will likely face in the future may increasingly involve seemingly innocuous search policies with disastrous consequences for privacy. Technological advances and the sophistication of law enforcement enable the government to craft search methods that appear unintrusive but in fact may cause severe invasions of personal dignity and autonomy. *Amici* urge this Court to consider these ramifications of this important "special needs" case, and to clarify the analytical framework to make it responsive to the changing face of the intrusiveness inquiry.

[15] This case is also distinguishable from *Chandler v. Miller*, 520 U.S. 305 (1997), where this Court held that Georgia's program of urine testing of prospective candidates for political office was "relatively noninvasive." *Id.* at 318. The policy at issue there provided that "the results of the test are given first to the candidate, who controls further dissemination of the report." *Id.* Here, in contrast, hospital staff routed drug search results to police, and the subjects of those searches could not control dissemination of search results. Moreover, unlike *Chandler* (and all of this Court's prior "special needs" drug testing cases), the Petitioners did not necessarily know that their urine would be

(footnote continued on next page)

searches in a medical mantle should not mislead this Court into believing the urine testing was no different than a "regular physical examination" consistent with medical norms and incidental to medical care and treatment and therefore minimally intrusive.

2. The Involuntary Drug Searches Were Highly Subjectively Intrusive.

The intrusiveness of a search also has a subjective component measured by the amount of discretion vested in the person conducting the search, *see Von Raab,* 489 U.S. at 667, and the threat of risk, trauma, or pain to the person being searched, *see Skinner*, 489 U.S. at 625. The court below acknowledged this point, yet found the searches here subjectively minimally intrusive because "urine drug screens were conducted whenever one of the criteria for testing was met; a treating physician had no discretion to decline to order a urine test under the policy." *Ferguson*, 186 F.3d at 479. This conclusion is flawed for three reasons.

First, the hospital staff used inaccurate and subjective criteria to determine who would be searched. Hospital staff chose certain identifying characteristics to determine who would be searched. Several of the characteristics (*e.g.*, "late" or "incomplete prenatal care") were thinly veiled proxies for low socioeconomic status or race – thereby exacerbating the invidiousness of a policy framed in the shadow of racial animus.[16] (J.A. 286-91 (Chasnoff Test.)) ("Women who are

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tested for drug use at the time they submitted urine samples, as illustrated by Petitioner Nicholson's testimony cited above.

[16] *Amici* are aware that Petitioners' Title VI discrimination claim is not presently before this Court. *Amici* submit, however, that the policy's racial impact must be considered in evaluating the level of subjective intrusion.

poor have very little access to prenatal care, so that if you say, well, you didn't get prenatal care and so we're going to test your urine for drugs, what you're also saying is, you're poor, we're going to test your urine for drugs.") The plethora of triggering characteristics invited the medical staff to apply far-reaching discretion in deciding who was to be searched. Indeed, a hospital social worker who observed firsthand the operation of the policy testified that Nurse Brown boasted that she dictated which patients should be tested. (J.A. 1199 (M. Williams Test.)) *See also* J.A. 209, 250, 256-57 (Brown Test.) (Brown believes "mixing of races is against God's way" and admits she recorded the race of her patients and their boyfriends in medical charts).

Petitioners' nationally renowned expert witness, Dr. Ira Chasnoff, described certain triggers for testing as subjective and medically senseless. (J.A. 286 (Chasnoff Test.)) For example, two criteria, premature delivery and abruption, may be associated with tobacco use and a "wide range of problems." *Id.* A prominent 1990 research article co-authored by Dr. Chasnoff explained that where vague standards are used to identify drug users in this context, African-Americans are disproportionately targeted because of prejudices and preconceptions, even though the rates of substance use during pregnancy are similar across racial groups. *See* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 New Eng. J. Med. 1202, 1205-06 (1990); *see also* (J.A. 286-93 (Chasnoff Test.)).

Second, the selection of the site for drug searches was itself subjective and resulted in overly intrusive searches of disadvantaged African-American women. The policy was instituted at only one hospital in Charleston – the hospital that served a large number of African-American, economically disadvantaged patients. (J.A. 24-25 (Annibale

Test.)); (J.A. 429 (Durban Test.)); (J.A. 1121, 1123 (Schwacke Test.))

Third, although the urinalysis Respondents used detected all drugs used, not just cocaine, *Ferguson,* 186 F.3d at 482, the search policy had an unmistakably discriminatory impact on African-American women because Respondents acted only upon positive results for cocaine and made no effort to track or punish women who tested positive for other drugs. *See id.* at 489 (Blake, J., dissenting). In fact, "90 percent of maternity patients who tested positive for cocaine were African-American," while "only 68 percent of maternity patients who tested positive for any drug were African-American." *Ferguson*, 186 F.3d at 481. That is, cocaine use, compared to that of other drugs, was disproportionately concentrated among African-Americans. Yet cocaine may be far less dangerous to fetuses than substances like nicotine and alcohol. Dan Steinberg & Shelly Gehshan, National Conference of State Legislatures, State Responses to Maternal Drug and Alcohol Use: An Update, at 4 (2000). Respondents' decision to target only cocaine users was an unwarranted exercise of discretion.

For all of the above-stated reasons, the level of subjective intrusion in this case was exponentially greater than that in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). *Sitz* was a checkpoint case, not a special needs case, *see id.* at 450, and therefore is not controlling. However, because the Fourth Circuit relied on *Sitz*, *amici* discuss the *Sitz* framework to demonstrate why the Fourth Circuit's analysis was wrong. In *Sitz*, all motorists passing a checkpoint were treated universally and uniformly when police simply glanced into their passing cars. Here, in contrast, individual women were singled out from the population of pregnant hospital admittees at the whim of certain members of the medical staff because they exhibited some trait perceived to be marginally correlated with possible drug use. In at least one instance, the

discretion of the hospital staff did not stop with the determination of who was to be searched. Following the testing and identification of a *white* patient as a drug user and that patient's noncompliance with treatment, Nurse Shirley Brown called the Solicitor's Office to intervene on behalf of the white patient and requested that she be given another chance before arrest. (J.A. 265-66 (Brown Test.)) The Fourth Circuit's analysis of subjective intrusiveness erroneously ignored the fundamental racial slant of the policy. Had the court sufficiently probed the record, it could not have overlooked the fact that the policy plainly created a grave risk that MUSC staff would abuse the discretion accorded them.

Because it was subjectively intrusive and arbitrarily applied, the search policy and others like it have dire consequences for minority participation in America's health care system. Indeed, drug search policies such as Respondents' add fuel to the minority mistrust of the medical profession that has existed historically because of incidents like the Tuskegee Study, in which syphilis-afflicted African-American men were systematically denied treatment in the name of science. *See* Lisa A. Eckenwiler, *Pursuing Reform in Clinical Research: Lessons from Women's Experience*, 27 J.L. Med. & Ethics 158, 160 (1999). Several Petitioners acknowledged that Respondents' search policy has caused them to mistrust doctors. *See, e.g.*, (J.A. 550 (Griffin Test.)) ("I will never trust a doctor or a physician again . . . They just – they just tormented – tormented me."); (J.A. 1146-47 (Singleton Test.)) ("I don't trust the system anymore . . . . And from now on I'll be right particular of whom I go to for medical care."). A holding by this Court that the search policy was unconstitutional will help heal that mistrust and create an atmosphere in which African-Americans have a basis for embracing, rather than fearing and being victimized by, our health care system.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to reverse the decision below and clarify that the special needs exception cannot be used to justify the types of fundamental rights violations that occurred in this case.

Respectfully submitted,

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June 2, 2000

APPENDIX

DESCRIPTIONS OF THE *AMICI*

The Abortion Access Project is a group of activists and health care providers that seeks to increase awareness of abortion as a critical part of comprehensive reproductive health services, address the shortage of abortion providers, and ensure access to abortion for all women. The Abortion Access Project works to ensure that reproductive health services meet all of women's health needs and allow women to make their own decisions around their health, including decisions about preventing unintended pregnancy and having children, without government intrusion.

The American Jewish Congress is a national organization of American Jews founded to protect fundamental constitutional freedoms and American democratic institutions. Its Commission for Women's Equality is an activist group seeking to advance women's rights in a Jewish context. It believes these rights can only be secured if women's reproductive health and freedom is ensured.

Catholics for a Free Choice ("CFFC") shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the moral capacity of women and men to make sound decisions about their lives. Through discourse, education and advocacy, CFFC works in the United States and internationally to infuse these values into public policy, community life, feminist analysis and Catholic social thinking and teaching.

As such, CFFC is committed to promoting the just and equal treatment of all women, specifically with regard to sexual and reproductive health practices and policies, regardless of race, class and sexual orientation.

The Coalition of Labor Union Women ("CLUW") is a national association of over 20,000 union members which advances the benefits of organized workplaces for women. Since the AFL-CIO Executive Council decision in 1991 to remain neutral on supporting or opposing the issue of a woman's right to choose, CLUW's Reproductive Rights Project is the only vehicle to join the pro-choice labor movement with the pro-choice movement. The Project's mission is to raise the support of union members for reproductive health issues and to increase their involvement in the pro-choice movement. CLUW is especially committed to addressing the reproductive health needs and concerns of minority women to provide ALL women with the means to achieve economic self-sufficiency.

The mission of the *Connecticut Consortium for Women and Their Children with Behavioral Health Needs ("CT Consortium")* is to improve behavioral health care for women and their children. The CT Consortium works through facilitation, collaboration, communication, and cooperation within the women's behavioral health community in Connecticut by researching, educating, and advocating with respect to salient issues. We promote and support promising practices, programs, and policies through consultation, technical assistance, and training. We believe the consortium model encourages diversity and meaningful participation by consumers and persons in recovery. We believe that the success of the consortium model depends on mutual respect, trust, and collaboration. We believe the results of our work should be widely shared to promote positive changes in policy and practice. We believe that the work needed to improve women's behavioral health must address social, economic, environmental, physical, political, and legal issues and policies as well as mental health and addiction treatment. Our goals and objectives are to improve behavioral health care for women and their children through: integration and coordination of services across disciplines and agencies; increased access to treatment and recovery

support services; improved matching of women's service needs to appropriate, state-of-the-art treatment; and provision of technical assistance and support to consumers, providers, and policymakers.

Family Watch is a national network of parents and other family members concerned about the impact of drug abuse and drug policy on families, women and children. We are dedicated to educating the public and increasing the availability of drug abuse prevention programs that preserve the health and well-being of the family unit and each of its individual members, particularly the children.

The Feminist Majority Foundation ("Foundation") is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights and safe access to abortion and birth control. The Foundation actively pursues legal protection for reproductive health services, including having provided legal counsel for Respondents in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), which upheld the use of clinic safety buffer zones.

The Institute for Health and Recovery ("IHR") is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol and drug dependent women and their families throughout Massachusetts. IHR is committed to establishing collaborative models of service delivery and fostering family-centered services. IHR firmly believes that addiction is an illness requiring treatment, not a crime requiring punishment. IHR members know firsthand the fears pregnant substance abusing women have regarding prosecution and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Prosecution of pregnant women only serves to keep women out of treatment, thereby endangering the health and well

being of more women and children. Arresting substance abusing mothers and pregnant women is not a substitute for providing accessible, supportive and therapeutic treatment for their addiction. Therefore, we fully support the NARAL Foundation's brief in support of the Petitioners.

The Legal Action Center is a non-profit organization with offices in New York City and Washington, D.C., specializing in legal issues of concern to alcohol, drug and AIDS prevention/treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting women with alcohol and drug problems and their families, working to enact public policies that promote increased access to care for them. The Legal Action Center also provides legal representation to individuals who have faced discrimination because of their alcohol and drug dependencies. This petition raises issues of great importance to the Legal Action Center and the individuals and treatment programs it represents.

Medical Students for Choice represents over 5,000 medical students and residents who are demanding a comprehensive medical education including abortion training. Our goals are to build a network of support and resources for students and residents, to reform medical curricula and training to include abortion and reproductive health as a standard part of medical education, to increase reproductive health education and training opportunities for medical students and residents, and to advocate integrating abortion into medical training and practice by educating policymakers in medicine and government. We work on a grassroots basis at medical schools and residency programs throughout North America, sponsor national and regional educational meetings, provide reproductive health clinical training externships, maintain a presence on the Internet, and publish a quarterly newsletter.

Medical Students for Choice is dedicated to ensuring that women receive comprehensive reproductive health care,

including abortion. One of the greatest obstacles to safe, legal abortion is the absence of trained providers. Abortion and reproductive health care must be a part of standard medical training and practice. As medical students and residents, we are committed to ensuring that medical practitioners are prepared to provide their patients with a full range of reproductive health care choices.

The National Abortion and Reproductive Rights Action League Foundation ("the NARAL Foundation") is a national, non-profit organization dedicated to keeping abortion safe, legal, and accessible for all women. The NARAL Foundation's mission is to work for the right of every woman to make personal decisions regarding the full range of reproductive services, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. In fulfilling this mission, the NARAL Foundation promotes the input and participation of a diverse group of individuals and is committed to combating institutional racism and discrimination.

The National Asian Women's Health Organization ("NAWHO") is a non-profit, community-based advocacy organization that has significantly changed the health and well-being of Asian Americans since its founding in 1993. NAWHO's mission is to improve the health status of Asian American families through research, education, leadership and public policy programs that empower women, and address broader social justice issues for under-served communities of the entire American population.

The National Black Women's Health Project is the only national organization dedicated to the health and well-being of African American women. We support the right of every woman – regardless of age, income, or education – to make her own decisions regarding whether, when, and under what conditions she will bear children and to receive confidential, comprehensive and quality health care.

The National Partnership for Women & Families, founded as the Women's Legal Defense Fund in 1971, is a non-partisan, non-profit advocacy group that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership firmly believes that quality health care must never include punitive policies that infringe on a woman's reproductive health. The National Partnership has a long history of promoting and defending a woman's right to choose by filing *amicus curiae* briefs in major reproductive rights and health cases.

The National Women's Health Network is an independent, member-supported organization dedicated to safeguarding women's health rights and interests. The Network advocates for policies that will improve the health of women and provides women with information and resources to assist them in making better health care decisions. Nationwide, the Network has more than 12,000 individual members and 300 organizational members. It is the only national member-based organization devoted solely to the health of all women.

The National Women's Law Center is a non-profit legal advocacy organization that has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. Women's ability to access the full range of reproductive health services, including abortion services (the fundamental right to which is recognized in *Roe v. Wade*) is of profound importance to the women's lives throughout the country. Because of the tremendous impact that barriers to health services can have on to women's ability to participate fully in society, the National Women's Law Center seeks to preserve their right to the full range of reproductive health services.

Neighborhood Youth & Family Services is a 30-year-old, Bronx, community-based, minority-led social service agency. Its mission is to prevent the placement of children in any but their natural homes whenever possible. The agency serves two thousand families annually in its six divisions. One of its largest divisions is a woman-specific drug treatment program that has integrated domestic violence services. The program also provides infant and childcare, job development and placement, a basic education school leading to a high school diploma, pre and postnatal care, pediatric care as well as van services. It is a medically supervised, drug free intensive day treatment program.

The Osborne Association ("OA") is a 75-year-old non-profit criminal justice organization that provides educational, vocational and treatment services to prisoners, former prisoners and their families. We have service sites in Brooklyn, Manhattan and the Bronx in New York City, as well as 10 city and state correctional facilities.

Physicians for Reproductive Choice and Health® ("PRCH") is a national physician-led not-for-profit organization founded in 1992. PRCH represents more than 3,700 physicians of various disciplines and non-physician supporters. The mission of PRCH is to enable concerned physicians to take a more active and visible role in support of voluntary universal reproductive health. PRCH is committed to ensuring that all people have the knowledge, equal access to quality services and freedom of choice to make their own reproductive health care decisions. Non-consensual drug testing of pregnant women directly opposes PRCH's mission.

The ProChoice Resource Center ("PCRC") provides on-site workshops, extensive technical assistance, innovative print and electronic publications, and other resources to the pro-choice grass roots. PCRC also serves as a clearinghouse of information about the grass roots for the reproductive rights

community, policymakers, and the media. PCRC is an independent, nonpartisan, nonprofit organization.

We are interested in *Ferguson v. City of Charleston* because the issue of non-consensual drug testing of pregnant women seeking obstetrical care affects the reproductive freedom of women all over America, and the grass roots groups that we work with consequently have a strong interest in the case.

Women In Need, Inc. ("WIN") was established in 1983 by Rita Zimmer, who serves today as President and CEO. WIN serves more than 2,500 homeless and disadvantaged women and children each year. WIN's programs and counselors address the leading causes of homelessness: *domestic violence, substance abuse*, and lack of job skills or education. WIN provides comprehensive services ranging from childcare to educational programs to help clients achieve permanent housing and compete for employment opportunities that will allow them stable and secure futures.

We at WIN feel the rights and needs of women are of the utmost importance and we are constantly examining new ways of implementing help to Women in Need of a broad range of services that are currently unavailable to them now. It is important that disadvantaged women are given a chance to succeed and become independent wage earning citizens.

The YWCA of the U.S.A. is the nation's oldest and largest women's membership movement. Operating out of thousands of locations in all 50 states, the YWCA of the U.S.A. represents approximately 2 million women, girls, and their families. Because the YWCA's Mission is to empower women, to eliminate racism and to pursue justice, freedom and dignity for all people, the YWCA has historically been concerned about women's health and access to health care services. This concern extends to the quality of services, the availability of health care to women of all socioeconomic backgrounds, the right of women to be informed about legal

options, and the right of an individual to make her own decisions privately with her physician's guidance based on her own religious and ethical values.

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No. 99-936

IN THE

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,
Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion of the American Public Health Association, South Carolina Medical Association, American College of Obstetricians and Gynecologists, American Nurses Association, *et al.*, for Leave to File Brief as *Amici Curiae* and Brief *Amici Curiae* In Support of Petitioners [additional *Amici* listed on inside front cover]

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ADDITIONAL *AMICI*

National Association of Alcoholism and Drug Abuse Counselors, Inc., South Carolina Nurses Association, National Association of Social Workers, Inc., Society of General Internal Medicine, National Council on Alcoholism and Drug Dependence, American Society of Addiction Medicine, National Medical Association American Academy of Addiction Psychiatry, Association for Medical Education and Research in Substance Abuse, Physicians for Human Rights, American Medical Women's Association, Association of Reproductive Health Professionals, Planned Parenthood Federation of America, Society for Medical Anthropology, California Medical Association, California Society of Addiction Medicine, Robert E. Arendt, Ph.D, Marylou Behnke, M.D., Maureen M. Black, Ph.D., Ira J. Chasnoff, M.D., Sterling K. Clarren, M.D., Claire D. Coles, Ph.D., Nancy Day, M.P.H., Virginia Delaney-Black, M.D., M.P.H., Fonda Davis Eyler, Ph.D., Deborah A. Frank, M.D., Sydney L. Hans, Ph.D., Hallam Hurt, M.D., Joseph L. Jacobson, Ph.D., Helen Johnson, Ph.D., Stephen Kandall, M.D., Bernard Z. Karmel, Ph.D., Nancy Kass, Sc.D., Barry E. Kosofsky, M.D., Ph.D., Barry M. Lester, Ph.D., Robert David Needlman, M.D., Daniel R. Neuspiel, M.D., Robert G. Newman, M.D., Gale A. Richardson, Ph.D., Lynn T. Singer, Ph.D., Robert J. Sokol, M.D. and Edward Tronick, Ph.D.

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MOTION OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, *ET AL.*, FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Sup. Ct. Rule 37.2(b), *Amici* – physicians, nurses, public health officers, substance abuse treatment professionals, and medical researchers from around the country, and their professional associations – move for leave to file the attached brief *Amici Curiae* in support of Petitioners seeking review of Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999).

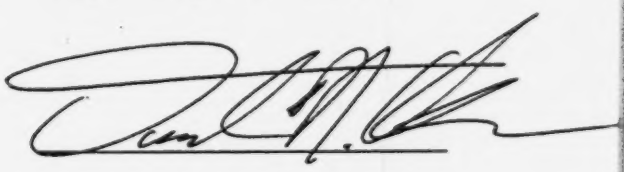
In the decision below, a divided panel of the Fourth Circuit upheld a governmental policy whereby the trust inherent in the relationship between the patient and the treatment provider was manipulated by law enforcement authorities to obtain bodily fluids from indigent pregnant women for use as incriminating evidence. The parties and both courts below

recognized that the constitutional issues presented by the policy in this case cannot properly be decided in isolation from the scientific, medical, and public health context from which the policy arose.

Amici have recognized expertise in the areas of the physician-patient relationship, the need to maintain the confidentiality of personal medical information, maternal and neonatal health, and the treatment and prevention of substance abuse among pregnant and parenting women. This brief is offered to illuminate the basic medical misunderstandings that infected the decision below, and to alert this Court to the unwelcome uncertainty that the panel majority has injected into the treatment provider-patient relationship, and to the real harms that this uncertainty can cause individuals, their families and their communities.

This motion is necessary because Respondents have declined to consent to the filing of this brief *Amici Curiae*.

Respectfully submitted,



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INTEREST OF *AMICI CURIAE*[*]

All parties and both courts below recognized that the legal issues presented by the policy at issue in this case cannot properly be decided in isolation from the scientific, medical, and public health context from which the policy arose. The resolution of these issues necessarily depends on an understanding of this context, and how this Court decides those issues could have direct and deleterious consequences for health and health care.

Amici are physicians, nurses, public health officers, substance abuse treatment professionals, and medical researchers, as well as state, local, and national medical and professional associations, with longstanding interest in and understanding of issues of substance abuse, pregnancy, neonatal health, and medical ethics.[1] While there is great variety among *Amici* as to experience, expertise, and perspective on medical, scientific, and public health issues, *Amici* are united in their condemnation of the policy implemented at the Medical University of South Carolina in Charleston ("MUSC") and the judicial decision approving it. They join together in this brief to explain how the policy lacks foundation in medicine and science and to inform this Court of the dangers the decision below portends for treatment professionals and their patients.

PRELIMINARY STATEMENT

As will be explained, *Amici* are firmly convinced, based on years of clinical experience and rigorous scientific study, that policies such as the one at issue in this case are medically

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[*] No entity or counsel apart from those whose names appear on this Brief have contributed monetarily or substantively to its production. Sup. Ct. R. 37.6.

[1] Descriptions of the *Amici* are set forth in the Appendix to this brief.

unsound and yield adverse health consequences, including for – indeed, especially for – the women and children in whose interests they are purportedly carried out.

Amici are especially troubled by the law enforcement rules that governed the medical and hospital personnel under the policy at issue in this case. The policy's purported concern for maternal and fetal health should not, in and of itself, excuse incursion into Petitioners' basic privacy rights as a matter of medical practice, professional ethics, and law.

Indeed, for all the professed concern for health, the policy showed a deplorable lack of interest in the medical, psychological, and behavioral problem it sought to address – substance abuse – and a surprising incuriosity about whether the approach taken – which placed patients at risk of years of incarceration – had any prospect of achieving its avowed purpose.

The decision below, though evidently influenced by medical considerations – to the point of excusing Defendants from Fourth Amendment responsibility based on their health-related motivations – has unsettled not only the law of Search and Seizure but also key understandings governing both the pursuit and provision of health care. Specifically, the appellate court's approval of the policy as constitutional and reasonable has injected unwelcome uncertainty into doctor-patient relationships, especially those involving patients at risk of criminal liability and has, in the name of advancing health interests, complicated the relationship between the health care system and the criminal law.

Although *Amici* believe it is important that legal rules appreciate the nature of medical practice, judicial solicitude of the sort exhibited by the decision below can only be appropriate, if at all, when physicians are truly engaged in medical treatment, *i.e.*, when exercising independent professional judgment, subject to the full range of ethical

restraints and responsibilities. When, as here, physicians, nurses, and hospital administrators are compelled to abdicate their professional roles and assist in a campaign to arrest and prosecute their patients, the dangers to individual freedom multiply, and special vigilance – not solicitude – from the judiciary is in order.

SUMMARY OF ARGUMENT

As this Court has long recognized, the imperatives of the practice of medicine and those of the legal system do not always travel together. This case, however, presents no such tension. Here, the central concerns of the Fourth Amendment in securing the individual against improper governmental intrusions on personal privacy, the basic tenets of professional ethics directing that health care providers uphold the trust and confidence placed in them by patients, and society's strong interest in promoting public health all teach the same lesson: government physicians and nurses should not act as agents of law enforcement, nor should they use "routine" medical examinations to covertly gather evidence for use against patients in criminal proceedings.

Rather than perceive the special dangers that inhere when law enforcement officers make hospital decisions and require health care providers to help build prosecutors' cases against their patients, the decision below took a very different view. The panel majority essentially assumed that the physicians' and nurses' participation in the challenged policy somehow diminished the potency of the constitutional threat. Thus, the court below applied a more forgiving, "special needs" standard to the policy at issue. In deciding that the policy would only be reviewed for its "reasonableness," the Court of Appeals pointed both to the presumed motives of the governmental actors responsible, *i.e.*, the court's belief that concern for fetal health (and not "vindictiveness") animated their actions, and to their professional identities, *i.e.*, the fact

that many of the governmental actors who carried out the policy wore doctors' and nurses' uniforms, rather than those of police officers.

Taken separately or together, *Amici* submit, these considerations should not have excused Defendants from compliance with the privacy protections the Fourth Amendment presumptively imposes on law enforcement efforts. First, "good" motives, including the asserted concern for health, may not in themselves exempt a policy from otherwise applicable Fourth Amendment requirements. If the less demanding "special needs" exception were triggered whenever government actors could show that their ultimate concern was for the well-being of the person searched, or that of a third party, little would remain of the constitutional "rule," that the absence of probable cause or a warrant renders a search unconstitutional *per se*. Indeed, the answer to any suggestion that well-intentioned government actions should be subject to more forgiving Fourth Amendment scrutiny was forcefully stated many years ago:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Nor was the decision below correct to assume that the conscription of government-employed health professionals to carry out the policy automatically imparted to it a "medical" or therapeutic character, let alone one that provided benefits to parents, children or society. On the contrary, the policy required physicians and nurses to choose between their loyalty

to patients and their obligation, as law-abiding citizens, to follow the policy implemented by law enforcement officials at the Medical University of South Carolina. This policy depended at its core on compelling health care professionals to abandon their duties to patients. It is evident that the policy's stated aim of "changing human behavior through legal intervention" could hardly have been attempted without a broad suspension of ethical obligations – including, among others, the core duties to deal honestly with patients, to safeguard their confidences, and to advocate on patients' behalf.

Nor could the policy rightly be described as "medical," based on its understanding of the problem and choice of approach. Although substance abuse treatment may not be a field characterized by lockstep uniformity of professional judgment, the policy at issue here departed drastically from a basic, widely shared understanding of what may be considered medically responsible "treatment." The core premise of the policy – that the patients who sought prenatal care could stop themselves from ingesting drugs simply as a result of being warned of the negative consequences that could befall them (or their children), or by being threatened with even more dire consequences – is wholly inconsistent with medical knowledge about drug dependency, its causes and most promising treatment approaches. Indeed, the policy was formulated in defiance of the counsel of the independent substance abuse treatment expert, Dr. Ira Chasnoff, whose input Defendants had solicited.

No effort was made to verify untested initial hunches about the scope or seriousness of the problem of *in utero* exposure to cocaine or the validity of the criteria for selecting the patients who were to be tested. No effort was made to properly assess the scope and severity of the substance use of the women who tested positive for cocaine, or to tailor treatment options to the particular needs of individual patients.

And no effort was made to incorporate therapeutic approaches that in 1988 already had been shown to be particularly effective with pregnant drug-dependent women. At its inception, the policy provided for arrest of women who had been denied any real option to obtain treatment, and when a "treatment" element was belatedly inserted into the policy (in apparent response to concerns about unfairness), it was manifestly unsuited to the medical needs of the individuals involved.

The policy at issue and the judicial decision upholding its legality share a defining error: the failure to take account of the special ethical and medical significance of the relationship between patient and health care provider. While the ethical duties of honesty and confidentiality ultimately rest on principles of morality, their practical importance to the daily delivery of health care is immense. Competent health care cannot be rendered unless a patient trusts her care giver sufficiently to share medically relevant, but potentially embarrassing (or incriminating) information; or, for that matter, unless she is willing to see a treatment provider in the first place. This necessary trust does not attach automatically. It must be earned and sustained. The challenges of establishing this relationship are particularly formidable where a patient is indigent, drug-dependent, or pregnant; or, as we [illegible] many Petitioners here, all three. Research and clinical experience teach that when, as here, the personal risks of seeking medical care are raised to intolerably high levels, it is more likely that prenatal care and patient candor – and not drug use – will be what is deterred, often with tragic health consequences.

As with the policy itself, the decision to uphold the policy's reasonableness evinced scant regard for the importance of the treatment provider-patient relationship. Both that decision's assertion that the burden on individual privacy involved here was "minimal" and its finding that the policy was in the "public interest" ignored the real dangers posed to this

relationship. Indeed, its notion that urine tests have become a "routine part of a medical examination" presupposes the very relationship built on trust and confidence that the policy did much to unravel. Similarly, it was only by ignoring the critical defects of the policy and by draining the term of its ordinary meaning that the decision below was able to pronounce the policy "effective" as a matter of constitutional law.

Finally, explicit in Respondents' defense of the policy and (at least) implicit in the "special needs" conclusion of the Fourth Circuit were assumptions that (1) exposure to cocaine *in utero* presents health risks different in kind from those threatened by ingestion of other legal and illegal substances and (2) the policy challenged here was truly a last resort, indeed the "only effective treatment" available. In point of fact, Defendants' policy was neither "treatment" nor "effective" treatment, and any implication that more accepted medical approaches had been tried and failed is simply incorrect.

To the extent that the decision below construed "beyond the normal needs of law enforcement" to mean that maternal cocaine use was uniquely dangerous "criminal" behavior, against which ordinary law enforcement tools were impotent, that assessment was erroneous. Although *Amici* do not wish to minimize the risks posed by *in utero* exposure to different substances, whether alcohol, tobacco, cocaine, excessive sweets, salts, etc., or in having this Court opine on unresolved scientific questions relating to the relative risks posed by different substances, it is important to note the lack of scientific basis, in 1989 through to the present, for the assumption that so plainly animated the policy and its defense: that the dangers of maternal cocaine use are fundamentally different from or more serious than other behaviors that may pose risk of fetal harm. Without denying the obvious advisability of protecting infants from exposure to potential teratogens, scientific research is increasingly finding that the alleged "crack baby" crisis that

impelled prosecutors to override the ethical responsibilities of physicians and nurses to patients, was drastically overstated.

ARGUMENT

I. Medical Personnel Involvement Does Not Justify Relaxing Fourth Amendment Requirements

A. Prosecutors' Purported "Health" Motivations Cannot Excuse Searches Conducted Without Warrants and Probable Cause

To the extent that the decision below held that "medical" motives sufficed to trigger the "special needs" analysis, little discussion is required to show that to be error. If only police and prosecutors had been involved, the fact that particular individuals among them were "motivated by a desire to protect the health of children born at MUSC" would have scant, if any, Fourth Amendment significance. To the contrary, it is black letter law that government actors' subjective motives are irrelevant under the Fourth Amendment, see Whren v. United States, 517 U.S. 806 (1996), and it is no more plausible that "good intentions" could redeem a legally unreasonable search than that "[s]ubjective intent alone . . . [could] make otherwise lawful conduct illegal or unconstitutional." Scott v. United States, 436 U.S. 128, 138 (1978).

Indeed, if concern for third-parties' well-being were sufficient to trigger the "narrow" "special needs" exception, very little would remain of the Fourth Amendment rule. It can be hoped that it is only the rare case where the prosecutors act "vindictively." Nor would the prosecutor's testimony insisting that he was more concerned with "changing behavior" through "legal intervention" than with obtaining convictions and sentences alter the analysis. An interest in rehabilitation, rather than retribution, does not remove a prosecutors' actions from

the realm of "ordinary law enforcement." See Williams v. New York, 337 U.S. 241, 247-48 (1949).[2]

Finally, although it may be true that many of the arrests under the policy did not ripen into full-blown prosecutions – yet another basis advanced for distinguishing this policy from ordinary crime control efforts – that fact does not alter the policy's legal character. Even today, Defendants do not deny that they intended to prosecute those women who did not change their behavior to the prosecutor's satisfaction. Indeed, even if there was no intention to seek convictions, the need for Fourth Amendment protection would not recede: being arrested much less jailed on criminal charges should not be easily brushed aside under any circumstances, let alone those giving rise to this case. Individual Petitioners were subjected to degrading, non-medical, wholly unnecessary and even dangerous handling by the police. Various of them were shackled to their hospital beds, arrested shortly before or immediately after giving birth, often while still dressed in hospital gowns and still suffering pain and bleeding from the childbirth.

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[2] Although the panel majority concluded that the policy did not inflict punishment for its own sake, the evidence illustrates that the policy did seek to achieve another cardinal purpose of the criminal law: specific and general deterrence. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (describing deterrence as "an interest always thought to be furthered by the imposition of punishment for crime"). There was abundant testimony to that effect, and no policy other than deterrence could fully explain how arresting some of the patients after they gave birth served Defendants' professed purposes. Indeed, the Fourth Circuit majority itself stated, in upholding the policy against plaintiffs' privacy claim under the Due Process Clause, that "[i]t is well settled that a state has a compelling interest in the identification of law breakers and in deterring future misconduct." Ferguson v. City of Charleston, 186 F.3d 469, 483 (4th Cir. 1999), *cert. granted*, 120 S.Ct. 1239 (2000).

B. The Recruitment of Government-Paid Health Providers by Prosecutors Is Not Cause for Applying a Less Demanding Fourth Amendment Standard

The manifest constitutional unimportance of purportedly "benign" motives strongly suggests that the decision to apply the "special needs" standard was driven by the fact that many of the government actors in this case were medical personnel and that the searches were carried out by physicians and nurses, in a hospital setting. It is wrong to assume that the involvement of doctors requires less demanding Fourth Amendment review. To the contrary, when physicians and nurses are compelled to abandon their roles as protectors of and independent advocates for their patients' health interests and instead join forces with police and prosecutors, the dangers to freedom and well-being are heightened, not diminished. The need for vigilance may be even greater when the medical staff works for the state. See, e.g., Richard J. Bonnie & Svetlana Polubinskaya, Unraveling Soviet Psychiatry, 10 J. Contemp. Legal Issues 279 (1999); cf. Estelle v. Smith, 451 U.S. 454 (1981). The decision below cursorily assumed what it should have required Defendants to prove: that their policy was, in its design, and execution a genuinely "medical" one and that the patient protections inherent in the provision of medical care made full enforcement of Fourth Amendment safeguards unnecessary.

1. The Hospital Personnel Were Not Functioning As Medical Professionals

"The mere fact that a decision is made by a doctor does not make it 'certain that professional judgment was in fact exercised.'" Washington v. Harper, 494 U.S. 210, 253 (1990) (Stevens, J., concurring in part and dissenting in part) (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)). The record in this case makes clear that the policy required medical

personnel (1) to decide who among their patients would be subject to search and risk of prosecution; (2) to preserve the "chain of custody" of the urine samples taken from Petitioners and other patients, so that the samples could be probative evidence in a criminal proceeding; and (3) to track whether there was "legal grounds to arrest" the individual patients. Hildebrand Tr. 147, Joint Appendix (hereafter "JA") 617-619.

The policy's very nature and design required that physicians and nurses renounce their ethical responsibilities to patients and act in a manner that precludes any suggestion that they were rendering "medical treatment." The American Medical Association's Code of Medical Ethics requires physicians to act in the best interest of individual patients, to "deal honestly with patients", and to "safeguard patient confidences". AMERICAN MEDICAL ASS'N, CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, E - PRINCIPLES OF MEDICAL ETHICS (Preamble). See also id. at §10.01. Physicians are also duty-bound to protect and foster patients' free, uncoerced choices in pursuing treatment, to treat patients equally, and to advocate on the patient's behalf. Id.

The policy respected none of these ethical instructions. Instead, it prompted care providers to be dishonest in their dealings with patients and to use explicit promises of non-disclosure as well as the trust inherent in their professional relationships to extract private and potentially inculpatory information. The policy failed to assure that the patients' consent to the urine screens was informed by the full range of relevant information. The policy short-circuited health providers' obligations to obtain suitable, individualized treatment for the patients who entrusted their care to them. Medical personnel were even compelled to turn patients over to police after they had given birth – behavior that was inconsistent with even the ostensible rationale for the policy – with no apparent regard for the health consequences of jailing

the mother of a newborn. Finally, with respect to the duty to treat patients equitably, the policy was confined to the overwhelmingly poor and disproportionately non-white group of patients seeking care at a public hospital. These indigent persons had few, if any, other health care providers to turn to. The policy required medical personnel to yield their independence of judgment and ally themselves with the interests of law enforcement officials rather than those of the patients who had come to the hospital seeking prenatal care they could not afford to purchase on the private market.

2. The Policy Contravened Basic Principles of Medical Practice

For nearly a century, the medical profession has understood that drug addiction is a disease, not simply the product of a failure of individual willpower. That understanding has received specific endorsement in the opinions of this Court. See Linder v. United States, 268 U.S. 5, 18 (1925) (explaining that drug dependent persons suffer from a disease and should be treated medically); Robinson v. California, 370 U.S. 660, 667 n.8 (1962) (stating that narcotic addiction is an illness which may be contracted "innocently or involuntarily"). See also Chasnoff Tr. 26-27, JA 294-96 ("the process of addiction is . . . not one of rational thought. It's not one of saying: if you keep using cocaine . . . or keep using alcohol here is what is going to happen to you. That doesn't work any better than saying if you keep smoking cigarettes you're going to die of lung cancer... It's a disease process that takes significant treatment and intervention in order to overcome.")

Like other diseases, drug dependency can be controlled and overcome through medical treatment, but for such treatment to be successful it must be informed by a rigorous understanding of the medical, psychiatric, and social dimensions of substance abuse, the interrelationship between

addiction and other medical problems, and the efficacy and limitations of various diagnostic instruments and various treatment approaches. See generally PRINCIPLES OF ADDICTION MEDICINE (Allan W. Graham, & Terry K. Schultz, eds. 2000). When, as here, the crafters of a policy aimed at combating substance abuse have no special training in treating substance abuse, it is incumbent upon them to recognize the limits of their expertise and not simply codify their uninformed hunches.

A starting point of any medical treatment of persons with substance abuse problems must be the recognition of the enormous extent of individual variation. See Chasnoff Tr. 27, JA 296 ("In a process of addiction treatment, [there] must be individualized treatment. You must consider all circumstances for the individual.") Many persons with addiction problems are dependent on more than one substance, and many have medical conditions that must be treated alongside their drug dependancy, such as trauma, depression, hepatitis, or HIV. In many cases, substance abuse is also aggravated by non-medical problems such as lack of adequate education, job skills, employment opportunities, familial support, public assistance and shelter. SHELLY GEHSHAN, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT WOMEN, RESULTS FROM A REGIONAL STUDY (Southern Regional Project on Infant Mortality, 1993). Often the greatest favorable impact for an individual's substance abuse can be achieved by addressing these other aspects of the patient's condition.

For nearly three decades – and thus for many years before the policy at issue here was conceived – researchers have tracked the special treatment needs of pregnant, drug-dependent women, and many successful treatment programs (though not nearly enough to meet the need) are in operation across the country. Jessup Tr. 79, JA 710. Pregnant drug-dependent women suffer from depression at high rates and from low self-

esteem, and many experience intense guilt and sadness about the fetal health consequences of their substance abuse. In all cases, their decision to seek prenatal care is itself a highly positive step. And because such patients often lack the self-confidence that is important for completing treatment, it is particularly critical that they form a strong "therapeutic alliance" with those helping them.

Also, important differences have been found among the populations of men and women with substance abuse problems, indicating distinctive treatment approaches are often in order. For example, large numbers of drug-dependent women have been victims of sexual or other physical abuse, see, Jacqueline Wallen, A Comparison of Male and Female Clients in Substance Abuse Treatment, 9 J. Subst Abuse Treat 243 (1992), and women with substance abuse problems are far more likely than their male counterparts to have childcare responsibilities. See Chasnoff Tr. 31, JA 296 (contrasting substance-dependent men, who say, "I have got to get into treatment, where do I go," with women who often say "okay, I'm ready for treatment . . . .what do I do with my kid"); Ferguson Tr. 194, JA 470 ("I had two kids at home. Six weeks is a long time if you don't have someone to take care of your kids"). For women with children, studies have shown that treatment outcomes improve substantially when treatment programs take into account patients' needs for transportation to appointments, job training, primary medical care, education, child care, and medical care for infants and children. Margaret E. Goldberg, Substance-abusing Women: False Stereotypes and Real Needs, 40 Social Work 789 (1995).

The search and arrest policy at issue here did not proceed from sound premises. Those involved in its development had no relevant expertise and made scant effort to consult those who were knowledgeable. See Haynes Tr. 64, JA 601-02 (failing to seek input from Director of the Office of

Women's Services for SC Commission on Alcohol and Drug Abuse). Indeed, the one prominent expert they did contact expressly urged Defendants not to pursue the policy, Chasnoff Tr. 24, JA 294, warning that the arrest policy would "in fact drive women out the treatment programs and out of prenatal care," id., and that "just focusing on cocaine" would not "move[] [Charleston] toward . . . the stated outcome, improving the health of the child." Chasnoff Tr. 14, JA 283.

Before acting, Defendants made no effort to substantiate their sense that cocaine exposure among neonates was on the increase or, for that matter, that such children were, in fact, suffering health problems distinct from other children born to the hospital's impoverished patient population. The screening criteria used to decide which women risked arrest and criminal liability were entirely unscientific. Indeed, the hospital never conducted universal drug testing of pregnant women or newborns. Thus, Defendants had no way of knowing whether there was any actual increase in cocaine use by pregnant patients, whether there was any increase in health problems that could be associated in newborns, or whether the testing criteria were effective in identifying cocaine users.[3]

Furthermore, Defendants had no evidence on which to base their belief that the arrest policy would have its hoped for deterrent effect. In fact, the policy was continued despite the absence of studies demonstrating the efficacy of arresting pregnant women and a growing body of research predating the policy's implementation that threat-based approaches do not work. See PRENATAL CARE: REACHING MOTHERS, REACHING INFANTS 79 (Inst. of Medicine ed., 1988) ("Pregnant [substance

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[3] It should also be noted that testing – and prosecuting – only females raises serious concerns, in light of evidence that paternal exposure to teratogens can pose health risks to fetuses. Cf. United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991).

abusers] in particular may delay care . . . because they fear that if their use of drugs is uncovered, they will be arrested . . . ."). See also Marilyn C. Poland, Punishing Pregnant Drug Users: Enhancing the Flight from Care, 31 Drug & Alcohol Dependence 199 (1993); U.S. DEPT OF HEALTH AND HUMAN SERVICES, CENTER FOR SUBSTANCE ABUSE TREATMENT, PREGNANT, SUBSTANCE-USING WOMEN, TREATMENT IMPROVEMENT PROTOCOLS SERIES NO. 2 (1993). Indeed, public health organizations and government agencies, treatment professionals and scientific researchers resoundingly repudiated punitive strategies.

When MUSC's own resident bioethicist later reviewed the policy, she concluded that "no evidence suggests that this particular policy promoted healthy pregnancies or reduced costs, instead the policy alienated a patient population. . . ." Mary Faith Marshall et al., Letters to the Editor, 23 J. of Law, Med. & Ethics 299-300 (1995). See also, Philip H. Jos et al., The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale, 23 J. of Law, Med. & Ethics 120 (1995).

Even when a therapeutic component was belatedly added, no attempt was made to adapt the "treatment" to the patients' individualized medical needs. Instead, all patients were referred to the same program, one developed by individuals with no experience or expertise in treating pregnant women. Beckett Tr. 237-238, JA 57 (program operators "learned through the process of working with the clients exactly what we were up against").

II. The Policy's "Benefits" Did Not Justify Its Burdens on Petitioners' Privacy

Although the decision below was wrong to treat the policy as entitled to consideration under the standards established in this Court's "special needs" decisions, that error might well have been harmless had the appeals court fairly applied those cases' teachings in considering constitutional

"reasonableness." Instead, the panel majority fixed on the importance of the policy's stated aim and slighted or ignored entirely the extent of its affront to personal privacy, the important ways that it did not (and, by design, could not have) met its objectives, and the manner by which it caused hard-to-repair damage to public health and medical practice.

A. The Policy Harmed the Relationship Between Treatment Providers and Patients

The fundamental error infecting both the policy and the judicial decision approving it is the failure to respect the importance of the therapeutic relationship between patients and their treatment providers. Although, as discussed above, the obligations of loyalty, confidentiality, and candor that characterize that relationship are ethical and fiduciary imperatives, they also serve a critical, practical purpose in the effective delivery of health care. As this Court recognized in Jaffe v. Redmond, 518 U.S. 1 (1997), confidentiality and trust are not solely matters of principle: "the mere possibility of disclosure [of patients' confidences] may impede development of the . . . relationship necessary for successful treatment." Id. at 10.

> To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people . . . .

Robert Arnold, et al., Medical Ethics and Doctor/Patient Communication, in THE MEDICAL INTERVIEW: CLINICAL CARE, EDUCATION AND RESEARCH 345, 365 (Mack Lipkin, Jr., et al.

eds., 1995); Aaron Lazare, Shame, Humiliation, and Stigma in the Medical Interview, in id. at 333.

Defendants' policy played upon and misleadingly fostered patients' well-founded assumption that their relationship with their health care providers was one of trust. Such assumptions, however, are fragile and cannot long survive breaches of confidentiality of the sort involved here. Even the possibility that treatment professionals will share personal medical records and test results with police – let alone that they might perform such tests with the purpose of obtaining incriminating evidence – does lasting harm to the relationships necessary for medical care and is injurious to the broader public health.

The prospect that confidentiality might be breached (with potentially harsh penal consequences) effects patient care in another important way. Not only are persons needing treatment deterred from seeking medical care, but those who do see physicians and nurses are less likely to provide the sort of candid disclosure that is often vital for effective medical treatment.

Unsurprisingly, what is true about patients generally, applies with particular force to those with substance abuse problems:

> It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery . . . . Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.

Mary Jeanne Kreek & Marc Reisinger, The Addict as a Patient, in SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK 822, 826-27 (Joyce H. Lowinson, et al. eds., 1997). Cf. 42 U.S.C. § 290dd-2 (prohibiting federally assisted drug-abuse treatment

programs from divulging patient identities and records); id. at § 9501(1)(H) (codifying patients' "right to confidentiality" of mental health records).

This is even more urgently the case when drug-dependent patients are pregnant. Such patients are particularly reticent to see physicians, and are especially reluctant to give accurate information concerning the nature and extent of their drug use. See SOUTHERN REGIONAL PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 21 (1993). See also UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SENATE COMM. ON FINANCE, HRD-90-138, at 9-10 (1990) ([S]ome drug-using women are now delivering their infants at home in order to prevent being reported to . . . authorities"). Indeed, research has found that the Charleston policy itself had this effect. See L.G. Tribble et al., Analysis of a Hospital Maternal Cocaine Testing Policy: In Association with Prenatal Care Utilization Patterns (Nat'l Perinatal Ass'n 1993).

B. Erosion of the Treatment Provider-Patient Relationship Undermines the Health of Women and Children

Reluctance to seek medical treatment or confide fully in those providing such treatment can have serious adverse health consequences for pregnant women and their fetuses – the very health interests the policy purported to advance. Open communication with treatment providers regarding drug use is necessary to ensure optimum safety before, during and after deliveries. See David J. Birnbach et al., Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay, 84 Anesthesia Analg. 76 (1997) (patients using cocaine "may have untoward responses to anesthesia"); D. Campbell et al., Unrecognized "Crack" Cocaine Abuse in Pregnancy, 77 British J. Anaesthesiology 553, 555 (1996)

(eliciting concrete information about drug use is important because the "interaction of cocaine with other local anaesthetics makes the calculation of a safe maximum dose difficult").

By contrast, when substance abuse, including cocaine use, is known to care givers, they can focus on providing a number of proven interventions that substantially increase the health outcomes for children after delivery. One of the most effective weapons against infant mortality is early, high-quality, comprehensive prenatal care. See, e.g., SOUTHERN REGIONAL PROJECT ON INFANT MORTALITY, A STEP TOWARD RECOVERY: IMPROVING ACCESS TO SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN 6 (1993). Indeed, prenatal care has been shown to markedly improve pregnancy outcomes among women with addictions: pregnant women who use cocaine, among other substances, but who have at least four prenatal care visits have been found to significantly reduce their chances of delivering low birth weight babies. Andrew Racine et al., The Ass'n Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 JAMA 1581, 1585-86 (1993).

Even if the pregnant patient does not reduce or discontinue drug use, health risks associated with prenatal drug exposure can be mitigated substantially through prenatal care and counseling if the patient embraces the therapeutic relationship. Id. Adequate parenting skills and a supportive environment also appear to help lessen the risk of serious harm. See, e.g., Loretta P. Finnegan & Stephen R. Kandall, Maternal and Neonatal Effects of Alcohol and Drugs in SUBSTANCE ABUSE: A COMPREHENSIVE HANDBOOK, supra at 529. In short, a climate of confidentiality is essential if patients are to disclose drug-use and/or seek continued care and counseling from health professionals in order to reduce the potential harms caused by substance use during pregnancy.

This accumulation of clinical evidence as to the special barriers to, and special benefits of full disclosure by pregnant women with substance abuse problems has led those who have studied this issue to conclude, with an unusual degree of unanimity, that punitive approaches such as the one here are not merely ineffective, they are counterproductive. In fact, *Amici* and every other prominent public health and medical organization to have given the subject serious consideration have rejected the notion of turning to the criminal justice system to address drug use during pregnancy. See, e.g., National Council on Alcoholism and Drug Dependence, WOMEN, ALCOHOL, OTHER DRUGS AND PREGNANCY (1990) ("[A] punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interests of infants and children . . . ."); AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ("ACOG"), COMMITTEE OPINION 55 (Oct. 1987) (resorting to courts "is almost never justified" in treating pregnant women); American Academy of Pediatrics, Comm. on Substance Abuse, Drug-Exposed Infants, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant."); AMERICAN NURSES ASS'N, POSITION STATEMENT (Apr. 5, 1992) (opposing "any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants . . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.") See generally, State v. Luster, 419 S.E. 2d 32, 35 n.2 (Ga. 1992) (listing medical and public health organizations opposing the prosecution of women for cocaine use during pregnancy).

C. The Policy Cannot Be Called "Effective" For Fourth Amendment Purposes

The decision below did not advert to this remarkable scientific and professional consensus that police-centered and prosecution-based approaches cause more harm than good for the children exposed to drugs *in utero*. The panel majority ignored the evidence that the policy was fundamentally misguided and could not have worked, as well as reports that the policy, in practice, failed to achieve its intended effect. Rather, the Fourth Circuit majority summarily pronounced the policy "an effective way to identify and treat maternal cocaine use," going so far as to characterize it as the "only effective means available . . . to reduce health effects on children exposed to cocaine *in utero*." Ferguson, 186 F.3d at 478 (emphasis added). No support for this bold assertion appears in the decision. Indeed, there could be none. Instead, the panel majority essentially held that substantial privacy invasions pass constitutional muster irrespective of whether the policy actually achieved its purported goal.

Although the decision correctly cited this Court's opinion in Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) for the proposition that the Fourth Amendment imposes no obligation on government actors to implement the most effective policy, that decision gave no license to disregard evidence that a policy has effects directly contrary to its purpose. Cf. Chandler v. Miller, 520 U.S. 305, 306 (1997) (policy was not "well designed" to catch lawbreakers and was not a "credible deterrent").

Unlike in Sitz, where claims of ineffectiveness were largely predicated on the low percentage (in absolute terms) of drunk drivers detected, Sitz, 496 U.S. at 445 (distinguishing Delaware v. Prouse, 440 U.S. 648 (1979)), this case involved the singling out of particular individuals for a far more momentous invasion of privacy. Moreover, in cases such as

Sitz, which involved stopping motorists and checking for intoxication, deterrence plays an important and unambiguously positive role in the policy's efficacy: the desire not to be apprehended can lead drivers either not to become inebriated in the first place or make those who do become inebriated more likely to stay home. But here, the consequences of drug-dependent pregnant women's "staying home," *i.e.*, not seeking prenatal care, are calamitous for both mother and fetus, as are the costs of evading detection through dishonesty to a treating physician.[4]

Despite its sweeping pronouncements concerning the policy's effectiveness, the decision below evaded the panel's acknowledged responsibility to evaluate the "effectiveness of the policy . . ." Ferguson, 186 F.3d at 477. Instead, the panel majority's consideration of the issue took a surprising turn, insisting that the court's responsibility was confined to deciding whether the process of urinalysis is "effective." Id. at 478 n.8.

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[4] At least two other distinctions warrant mention. First, although *Amici* are deeply concerned about alcohol-dependency as a disease, it remains true that a substantial portion of those who engage in driving while intoxicated are not alcohol-dependent, and even those who suffer from the disease of alcoholism are not required by law to refrain from either drinking or driving, only from doing both at the same time. There is no dispute that the targets of Charleston policy were exclusively or nearly exclusively pregnant drug-dependent women, and that the nature of drug dependency during pregnancy leaves no room for any similar accommodation. Cf. Johnson v. State, 602 So. 2d 1288, 1294 (1992) ("a woman may abort her child or avoid prenatal care or treatment out of fear of prosecution.") See also People v. Hardy, 469 N.W. 2d 50 (1999). Second, it bears mention that, despite the documented threat to human life posed by intoxicated driving, the sentences for first-time offenders are far less stiff than those which Petitioners confronted. See S.C. CODE ANN. §56-5-2940 (Law. Co-op. 1999) (imposing a fine of $300 or imprisonment of not less than 48 hours and no more than 30 days for first offense).

Although *Amici* do not question that urine screens, when properly conducted, can yield evidence of prior exposure to drugs, it cannot be said that urinalysis itself is a way to "treat" substance use generally, or maternal drug use specifically. Knowing that a policy relies on urine testing says nothing abut whether patients are provided with effective treatment: urine screen results could be thrown away; they could be used for medical research purposes only; they could be used for voluntary counseling of patients, or for a more aggressive medical approach; or, as here, they could be used as the principal part of a policy predicated on "legal intervention." It is also patently absurd to place the same diagnostic label of "addiction" on individuals whose only commonality is a single toxicological result, which even if accurate, cannot distinguish between the first-time-ever user and the chronic user, let alone between the long-term intermittent "chipper" and the individual whose drug dependence is such as to require several dosages each and every day. See AMERICAN MEDICAL ASS'N POLICY H-95.985 ("Drug testing does not provide any information about pattern of use of drugs, abuse of or dependence on drugs, or about mental or physical impairments that may result from drug use."). The correct and legitimate question is whether the policy pursuant to which the samples were taken was sufficiently effective to justify the search, and on that point the evidence is unambiguous: Defendants' policy did not work.

Similarly, although the panel majority's assertion that urine screens are "effective at identifying" instances of fetal cocaine exposure appears at first blush to be a statement of unexceptionable fact, it, too, obscures the relevant medical and Fourth Amendment questions. As noted previously, the bases for selecting patients for screening were wholly unscientific and subjective in their application, raising serious questions as to whether testing was applied even-handedly among MUSC patients who were similarly situated. What is more, the policy assured that the many other women in Charleston who met

precisely the same "criteria" as did Petitioners – but who were not MUSC patients – were not searched at all.

Incredibly, the decision below held that these considerations did not "bear on" the Fourth Amendment inquiry. That holding is plain error. The constitutional right that Petitioners asserted is the right to be free of "unreasonable searches." The general rule, of course, is that searches not based on individualized determinations of probable cause are unreasonable *per se*, but there is no basis for suggesting that in the "narrow" class of cases where the *per se* rule properly does not govern, the dangers of arbitrary or uneven enforcement against which the probable cause requirement protects no longer "bear on" the Fourth Amendment validity of governmental action. Indeed, the Court's opinion in Sitz definitively contradicts any such assertion.

D. "Medical" Urine Screens Entail A Substantial Privacy Intrusion

Just as it gave short shrift to the "effective advancement of the public interest" side of the balance, the decision below slighted the personal privacy rights implicated by the policy. Indeed, much as it relied on the medical setting to find a "special need" in the first place, the majority opinion cited "the context in which the searches at issue here occurred" to support its conclusion that the urine testing in this case did not deserve the full privacy protections afforded by the Fourth Amendment. Ferguson, 186 F.3d at 479. Because "the collection and testing of urine was conducted in the course of medical treatment to which [Petitioners] had consented," the Fourth Circuit explained, and "giving of a urine sample is a normal, routine, and expected part of a medical examination," the court held the privacy invasion only "minimally intrusive." Id.

This explanation ignores precisely what it is that enables physicians and counselors "routine[ly]" to perform intimate tests and elicit medically necessary but embarrassing or

incriminating personal information: the informed consent of the patient, obtained with both explicit and implicit reference to the duties of care and confidentiality. See Jaffe v. Redmond, 518 U.S. 1, 12 (1997) (noting that in absence of therapist-patient privilege, "evidence" sought from therapist's notes would never have come into being).

There is a fundamental difference between a patient's allowing a single doctor or nurse to perform an examination or conduct a test in connection with medical treatment, and having the same procedure conducted or observed, or test results known, by police, prosecutors, and a multitude of others. That difference is not merely intuitive. It has medical and constitutional significance. The identities of those who will have access to test results and the purposes to which those results will be put is "material" information that must be disclosed in order to obtain informed consent. Cf. Wilson v. Layne, 526 U.S. 603 (1999) (finding a constitutionally impermissible intrusion on privacy when a government official, though present in a home pursuant to a valid warrant, is accompanied by members of the press or public).

III. Cocaine Use Among Pregnant Women Does Not Present a "Special Need"

A consistent theme of cases exempting governmental actors from the warrant requirements is that the Fourth Amendment must not be construed as preventing the government from responding "reasonably" to exigent circumstances and crises — a strain that is evident in certain "special needs" cases. See Skinner v. Railway Labor Execs. Ass'n, 489 U.S. 602 (1989); Vernonia Sch Dist. 47J v. Acton, 515 U.S. 646 (1995). In these cases, however, the limitation "beyond those of ordinary law enforcement" has a different connotation: the problems were so formidable that the Fourth Amendment restraint should not apply. The behavior of the Defendants and, to a lesser extent, the opinion of the Fourth

Circuit majority proceed on the assumption that cocaine use by pregnant women presented such a crisis, both because more conventional medical and law enforcement measures had failed to stem the problem and because most of the health hazards risks were different in kind from those with which law enforcement (or the medical profession) usually deal.

Neither of these suppositions is correct. First, it is patently clear that no medically appropriate drug treatment policy had been tried and failed for women, such as Petitioners, who were drug-dependent and pregnant. See, e.g., Horger Tr. 19-20, JA 643-44.

As for Defendant's assumption of cocaine's unique danger when ingested during pregnancy, although that understanding is consistent with the sensationalistic media accounts of the time, it is without support from empirical data.[5]

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[5] See Albert J. Tuboku-Metzger et al., Cardiovascular Effects of Cocaine in Neonates Exposed Prenatally, 13 American J. of Perinatology 1 (1996) (study of chronic cocaine use among pregnant subjects finding no direct effects on the health or development of newborns); Bertis B. Little et al., Is There a Cocaine Syndrome? Dysmorphic and Anthropometric Assessment of Infants Exposed to Cocaine, 54 Teratology 145 (1996) (finding no recognizable constellation of dysmorphic features to distinguish between cocaine-exposed and non-exposed infants); Nancy Stewart Woods et al., Cocaine Use During Pregnancy: Maternal Depressive Symptoms and Infant Neurobehavior over the First Month, 16 Infant Behavior and Dev. 83, 92 (1993) (finding no differences in neurobehavioral performance of cocaine-exposed infants when compared to non-exposed infants); Claire D. Coles et al., Effects of Cocaine and Alcohol Use in Pregnancy on Neonatal Growth and Neurobehavioral Status, 14 Neurotoxicology and Teratology 23, 31-32 (1992) (finding prenatal cocaine exposure effects fetal growth but that cocaine-exposed infants do not appear otherwise impaired physically or behaviorally in the neonatal period); Barry M. Lester et al., Data Base of Studies of Prenatal Cocaine Exposure and Child Outcome, 27 J. of Drug Issues 487 (1997) (concluding that knowledge about the existence or extent of effects of prenatal cocaine exposure on child outcome is limited, scattered, and compromised by methodological shortcomings); Ellen

In so noting, *Amici* do not condone the use of illegal drugs. Furthermore, *Amici* in no way wish to downplay the harm that ingesting any substance could cause to a fetus or child. Indeed, *Amici* share a professional dedication to avoiding and reducing any such dangers. Nonetheless, it is important that this Court not labor under the same misperception as did the Defendants.

The policy at issue was predicated on the unproven assumption that prenatal exposure to cocaine causes long-term, deleterious effects on child development different in scope, degree and kind from risks posed by maternal behavior or exposure to other substances, licit or illicit. In fact, studies have not validated such an assumption. Not long after the Charleston policy was implemented, an article in the Journal of the American Medical Association reported that:

> review of the current literature on the subject [of the adverse effects in infants born to cocaine-using mothers] indicates that available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child grown and development. . . . Findings about neurobehavioral effects in the newborn period have been inconsistent or contradictory. Significantly, no prospective study of unique long-term consequences of intrauterine cocaine, non-opiate exposure has been published in the peer-review literature.

Hutchins, Drug Use During Pregnancy, 27 J. of Drug Issues 463, 466 (1997). See also LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 23-25 (1997) (discussing the failure of longitudinal studies to find statistically significant differences between cocaine-exposed children and non-exposed children).

Linda C. Mayes et al., The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992) (internal citations omitted).[6]

A standard pediatrics textbook published the following year reaches the same conclusion, observing that "[t]o date no hypothesized or demonstrated effect of *in utero* cocaine exposure has been found to be specific to that drug. No studies have shown that prenatal cocaine exposure causes unique developmental dysfunction." Deborah A. Frank et al., Maternal Cocaine Use: Impact on Child Health and Development, 40 Advances in Pediatrics 65, 92 (1993). See also Gail A. Wasserman et al., Prenatal Cocaine Exposure and School Age Intelligence, 50 Drug & Alcohol Dependence 203, 209 (1998) ("prenatal cocaine exposure does not seem to confer an additional risk for adverse developmental outcome"); Hallam Hurt et al., Children with *In Utero* Cocaine Exposure Do Not Differ from Control Subjects On Intelligence Testing, 151 Arch. Ped. Adolesc. Med. 1237 (1997).

In the end, Defendants' purported good intentions carried the day in the court below. However, as a result of these intentions, medical professionals were compelled to ignore the ethical mandates of their discipline, the core teachings of their clinical experience, and the scientific data of peer reviewed research. This Court should not countenance the Charleston policy's unreasonable, counterproductive and wholly unnecessary assault on the professional autonomy of treatment providers, the medical privacy of patients, and the furtherance of public health.

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[6] According to a publication of the Harvard Medical School, two years after the Charleston policy was implemented a "combined analysis of 20 studies on cocaine and pregnancy found few effects that could be specifically attributed to cocaine." Update on Cocaine: Part I, 10 Harv. Mental Health Letter (Harv. Med. Sch.), Aug. 1993, at 3.

Conclusion

It has been and remains a principal object of judicial enforcement of the Fourth Amendment to distinguish between those cases where otherwise unconstitutional law enforcement tactics are truly necessary and those where the claims of "crisis" – even if sincerely subscribed to by "men of zeal" – turn out to be illusory. The Charleston policy falls squarely into the latter category. As explained above, the ongoing effects of the Fourth Circuit's approval of that policy continue to compromise the effective delivery of health care. Accordingly, this Court should reverse the decision of the panel majority below.

Respectfully submitted,

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APPENDIX

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Amicus Curiae American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Amicus Curiae South Carolina Medical Association ("SCMA") is the primary professional association for individuals licensed to practice medicine in South Carolina. SCMA has over 5,500 members representing all medical specialties that provide medical services to the citizens of the state. SCMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina. To this end, SCMA opposes policies and practices that undermine patient confidentiality and weaken the trust between health care providers and patients that promotes positive treatment outcomes.

Amicus Curiae American College of Obstetricians and Gynecologists ("ACOG"), founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. The leading group of professionals providing health care to women, ACOG's more than 38,000 members represent over 90 percent of all obstetricians and gynecologists currently practicing in the United

States. ACOG is dedicated to educating health care professionals, law and policy makers and the general public about women's health care. ACOG is further devoted to assuring that all women have access to prenatal care for the benefit of both the fetus and the mother. Accordingly, ACOG opposes policies, like that implemented by Charleston, that deter substance dependent women from seeking prenatal care.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing this nation's over 2.2 million registered nurses. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal-child health services is particularly critical to efforts to prevent disease and to provide early intervention for health care problems. Thus, it opposes all barriers to prenatal care. ANA is concerned that when health care providers divulge patient information to law enforcement officials, women in need of prenatal care and/or substance abuse treatment are deterred from seeking these essential services.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors, Inc. ("NAADAC") is the nation's largest organization of alcohol and drug counselors, with 17,000 members. NAADAC's members have special expertise in the substance abuse treatment needs of pregnant women. NAADAC joins this brief because it is deeply concerned that the decision below, if permitted to stand, will undermine the quality of care that South Carolina substance abuse professionals can provide pregnant patients, and will deter pregnant women from seeking these essential services.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955,

NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe that the expansion of law enforcement into the treatment context and the blurring of lines between prenatal/obstetrical care providers and peace officers is inimical to family stability and counter to the best interests of the child.

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in primary care Internal Medicine. The Society, which has nearly 3,000 members in the United States (including South Carolina) and 11 other countries, publishes the Journal of General Internal Medicine and is a leader in research and education in the medical care of adults. Many SGIM members have national expertise in issues related to alcoholism and abuse of other substances. SGIM is deeply concerned that the Ferguson decision, if let stand, could deter women in South Carolina and elsewhere from seeking drug-treatment and prenatal services that are essential to the delivery of a healthy child. The failure to maintain proper patient confidentiality (at the heart of MUSC's policy) will not only discourage women from seeking this vital care but will interfere with physicians' ability to provide it when sought.

Amicus Curiae National Council on Alcoholism and Drug Dependence ("NCADD") with its nationwide network of affiliates, provides education, information, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD historically has provided confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. If NCADD affiliates were

required to provide the names and medical information of drug-using pregnant women to law enforcement authorities, it would greatly inhibit their ability to serve this population. In 1990, the NCADD Board of Directors adopted a policy statement on "Women, Alcohol, Other Drugs and Pregnancy" recommending that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services."

Amicus Curiae American Society of Addiction Medicine ("ASAM") is devoted to increasing access to and improving the quality of addiction treatment. ASAM members are physicians from all medical specialties and sub-specialties. They are engaged in private practice, serve as corporate medical directors, work in group practice or other clinical settings, and are also involved in research and education. Through its conferences, continuing medical education courses, and publications, including the quarterly Journal of Addictive Diseases, ASAM actively educates the medical community and the public about addiction disorders and diseases, treatment guidelines and practice parameters in the field of addiction medicine. ASAM staunchly opposes policies that create obstacles to or deter persons from receiving substance abuse treatment and counseling.

Amicus Curiae National Medical Association ("NMA"), established in 1895, is the nation's largest and oldest professional, educational and scientific organization representing the interests of more than 25,000 African American physicians and their patients, as well as more than 100 state and local societies. As the leading force for parity and justice in medicine and the catalyst for the elimination of disparities in health, NMA is committed to improving the health status and outcomes of

minorities and the poor. While NMA has historically focused on health issues related to African American and medically underserved populations, its principles, goals, initiatives and philosophy address and benefit all Americans. To these ends, NMA opposes the Charleston policy because it is counterproductive to public health and infected by the taint of racial and gender bias.

Amicus Curiae American Academy of Addiction Psychiatry ("AAAP") is an international professional membership organization founded in 1985 with approximately 1,000 members in the United States and around the world. The membership consists of psychiatrists who work with addiction in their practices, faculty at various academic institutions, non-psychiatrist professionals who are making a contribution to the field of addiction psychiatry, residents and medical students.

Amicus Curiae South Carolina Nurses Association ("SCNA") is a professional organization which represents registered nurses in South Carolina. SCNA strongly supports health care for a number of vulnerable populations, and believes patients must be secure in the knowledge that their treatment providers are wholly devoted to treatment and are not doubling as the agents of law enforcement. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the breaching of patient confidentiality and the threat of criminal prosecution deters pregnant women who suffer from chemical dependence from seeking and obtaining prenatal care.

Amicus Curiae Association for Medical Education and Research in Substance Abuse ("AMERSA") is a national organization of three hundred health care and social services professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services

professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians, nurses, and social workers who work in general health and social services settings identifying and assisting individuals with alcohol and drug problems; most members are professors at medical schools, nursing schools, or social work programs. To be effective, prenatal care and treatment for pregnant addicts must occur in the context of a confidential, respectful, and trusting relationship between professional and patient. When this relationship is jeopardized net harm to the health of mothers and children will likely occur because women will be deterred from obtaining prenatal care, addiction treatment, and counseling.

Amicus Curiae Physicians for Human Rights ("PHR") is an organization of health professionals, scientists, and concerned citizens that uses the medical and forensic sciences to investigate violations of human rights. PHR is at the forefront of integrating human rights and bioethics, and in 1997 shared the Nobel Peace Prize for its epidemiological investigations of landmines and founding role in the International Campaign to Ban Landmines. A coauthor of *Human Rights and Health: The Legacy of Apartheid*, PHR is committed to exposing the harms that result when the State coerces health workers to abandon their professional training and ethical obligations in order to advance political ends.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and

rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the arrest, jailing and/or prosecution of pregnant women as a method for preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that breaching the medical confidentiality of these women or otherwise hindering their ability to establish a relationship of trust with their treatment providers will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care.

Amicus Curiae Association of Reproductive Health Professionals ("ARHP") is a non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, other clinicians, pharmacists, and researchers, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, the media, legislators, and other professionals. ARHP is deeply concerned that the Charleston policy threatens to undermine the quality of care provided by physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women in South Carolina.

Amicus Curiae Planned Parenthood Federation of America, Inc. ("PPFA"), a New York not-for-profit corporation, is the world's oldest and largest voluntary reproductive health care organization. PPFA provides leadership to 132 autonomous affiliates that manage 900 health centers in 47 states and the District of Columbia that provide education and medical services to nearly five million women and men a year. PPFA and its affiliates are committed to providing confidential medical services in an effort to provide a safe environment where patients are comfortable making important decisions about their reproductive and related health care needs. Thus, PPFA is

profoundly concerned about the Charleston policy at issue and it's impact on the confidential nature of the doctor-patent relationship and related public health issues.

Amicus Curiae Society for Medical Anthropology ("SMA") is a private, voluntary, not-for-profit organization of anthropologists and other social scientists specializing in the anthropological study of health and healing. SMA supports its members in the goal of educating academic and lay audiences about the cultural dimensions of health and disease in order to improve the health of all populations. SMA is concerned about any policy or practice that may prevent persons from seeking medical care during pregnancy. Prenatal care – which includes open and trusting communication between women and their care givers – is vital to positive birth outcomes, especially for low-income women whose poverty increases the risk of adverse health consequences.

Amicus Curiae California Medical Association ("CMA") is the primary professional association for individuals licensed to practice medicine in California. As the largest state medical association in the U.S., CMA has over more than 30,000 members representing all medical specialties that provide medical services throughout the state. CMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in California. CMA thus stands opposed to laws and policies, like the policy being challenged here, that unnecessarily hinder the effective practice of medicine or that have the effect of depriving persons of needed medical care.

Amicus Curiae California Society of Addiction Medicine ("CSAM") is the California chapter of The American Society of Addiction Medicine. CSAM's mission is to increase access to and improve the quality of addiction treatment through education and research, and to reduce the stigma and prejudice

commonly associated with addiction disorders. Accordingly, CSAM opposes the policy being challenged in this case as it has the effect of driving pregnant women away from substance abuse treatment and further stigmatizing chemical dependence by entwining it with criminal justice ramifications.

Amicus Curiae Robert E. Arendt, Ph.D., is an Assistant Professor in the Department of Pediatrics, School of Medicine at Case Western Reserve University. He is the principal investigator on a longitudinal study funded by the National Institute of Drug Abuse to investigate sensory motor development in cocaine exposed children. Dr. Arendt is also a licensed psychologist in the State of Ohio and has extensive clinical experience working with children prenatally exposed to teratogenic substances.

Amicus Curiae Marylou Behnke, M.D., is a neonatologist and Professor of Pediatrics at the University of Florida. She is the Medical Director of a regional developmental evaluation and intervention program for infants age birth to three years old with developmental disabilities. Dr. Behnke is co-principle investigator on a large prospective, longitudinal study of prenatal cocaine exposure and other factors on the development of children from ages birth to seven years old.

Amicus Curiae Maureen M. Black, Ph.D. is professor in the Department of Pediatrics and Director of the Growth and Nutrition Clinic at the University of Maryland School of Medicine. She completed her doctoral training from Emory University in Atlanta, Georgia and has served as president of the Society of Pediatric Psychology and the Division of Children, Youth and Family Services of the American Psychological Associations. Much of her research involves interventions for children with prenatal exposure to substances and she has published over 100 peer reviewed articles and chapters in

journals such as *Pediatrics*, *Child Development*, and *American Psychologist*.

Amicus Curiae Ira J. Chasnoff, M.D., is President of the Children's Research Triangle and a Professor of Clinical Pediatrics at the University of Illinois College of Medicine in Chicago. The author of four books and numerous articles, as well as the principal investigator on more than two dozen federal grants to research the effects of drug use on pregnancy, Dr. Chasnoff is one of the leading researchers in the field. His research projects include multiple studies of the long-term cognitive, developmental, behavioral and educational effects of prenatal exposure to alcohol, cocaine, and other drugs; the effects on birth outcome of prenatal treatment and counseling for pregnant drug abusers; and the effectiveness of both outpatient and residential treatment programs for pregnant drug abusers. Dr. Chasnoff is a Fellow of the American Academy of Pediatrics and the recipient of many awards.

Amicus Curiae Sterling K. Clarren, M.D., is the Robert A. Aldrich Professor of Pediatrics at the University of Washington School of Medicine where he has taught since 1978. Dr. Clarren is also the Associate Director of Inpatient Services at Seattle's Children's Hospital and Regional Medical Center, and the Medical Director of the Washington State Fetal Alcohol Syndrome Diagnostic and Prevention Network.

Amicus Curiae Claire D. Coles, Ph.D., is Director of Maternal Substance Abuse and Child Development and Professor in the Department of Psychiatry and Behavioral Sciences, Emory University School of Medicine, Atlanta. She also holds a joint appointment in the Department of Pediatrics and directs the Fetal Alcohol Center at the Marcus Institute, a Division of Kennedy-Krieger Institute at Emory University, which, among other things, provides diagnostic and clinical

services to children prenatally exposed to alcohol, cocaine and other drugs.

Amicus Curiae Nancy Day, M.P.H., Ph.D., is a Professor in the Departments of Psychiatry, Epidemiology, and Pediatrics at the University of Pittsburgh School of Medicine and the Graduate School of Public Health. Dr. Day is the Director of the Maternal Health Practices and Child Development Project which address the effects of prenatal exposure to alcohol, tobacco, marijuana, and cocaine on the long-term outcome of the offspring. She has published extensively on this research and has served on government committees concerning substance abuse.

Amicus Curiae Virginia Delaney-Black, M.D., M.P.H., is neonatologist and Associate Professor of Pediatrics at Wayne State University. She also serves as the Assistant Director for Health Care Effectiveness of the Children's Research Center of Michigan, a non-profit research organization developed to assess the longitudinal effects of prenatal alcohol and cocaine on child development. Dr. Delaney-Black serves on a grant review committee of the National Institutes of Health and is the author of several articles, chapters and abstracts on drug use during pregnancy.

Amicus Curiae Fonda Davis Eyler, Ph.D., is a licensed developmental psychologist and Professor in Pediatrics at the University of Florida. She is the Developmental Director of a regional developmental evaluation and intervention program for infants birth to three years old with developmental disabilities. Dr. Eyler is co-principle investigator on a large prospective, longitudinal study that has investigated the effect of prenatal cocaine exposure and other factors on the development of a cohort of children from birth to seven years old. She has

published many journal articles and reviews and spoken at international meetings on the topic of prenatal drug exposure

Amicus Curiae Deborah A. Frank, M.D., is Associate Professor of Pediatrics at Boston University School of Medicine and Director of The Growth and Development Program at Boston Medical Center. For ten years she has been the principal investigator of a National Institute of Drug Abuse funded longitudinal study of urban children with and without *in utero* cocaine exposure. Dr. Frank has served on many scientific review committees of the National Institute of Drug Abuse and published several articles on the impact of prenatal exposure to cocaine and other threats, particularly malnutrition, to the development of low income children.

Amicus Curiae Sydney L. Hans, Ph.D., is an Associate Professor of Psychiatry at the University of Chicago. For over twenty years Dr. Hans has investigated the consequences of mothers' substance abuse on parenting behavior and the development of children. Dr. Hans is the principal investigator of the only long-term study that has followed infants prenatally exposed to drugs through adolescence.

Amicus Curiae Hallam Hurt, M.D., is Chairman, Division of Neonatology, Albert Einstein Medical Center in Philadelphia. For the past twenty years, Dr. Hurt has cared for thousands of mothers and infants from inner-city Philadelphia. In the late 1980s, she undertook what has become one of the longest-running studies of children with *in utero* cocaine exposure. In a series of publications, she has discussed her data suggesting that children raised in the inner-city are at risk for suffering cognitive deficits regardless of *in utero* exposure to cocaine.

Amicus Curiae Joseph L. Jacobson, J.D., Ph.D., is Professor of Psychology in the College of Science, Wayne State University. Dr. Jacobson's research on the effects of prenatal exposure to neurotoxic agents on intellectual and behavioral development in childhood has been funded by the National Institutes of Health and published in, among other periodicals, the *New England Journal of Medicine*, *Journal of Pediatrics*, and *American Journal of Public Health*.

Amicus Curiae Helen Johnson, Ph.D., is Professor and Chairperson in the Department of Elementary and Early Childhood Education at Queens College of the City University of New York. For the past 20 years, Dr. Johnson has conducted longitudinal neurobehavioral research, funded by the National Institute on Drug Abuse, examining the development of children born to women who abused drugs during pregnancy. Dr. Johnson has published findings from this work in peer-reviewed journals including *American Journal of Orthopsychiatry*, *Early Development and Care*, *Infant Behavior and Development*, and *Journal of Genetic Psychology*, and has presented the data to many national and international organizations including *American Orthopsychiatric Association*, *American Psychological Association*, *International Society for Infant Studies*, and *National Association for the Education of Young Children*.

Amicus Curiae Stephen Kandall, M.D., served as Chief of Neonatology at Beth Israel Medical Center from 1976 to 1998. As a clinician and researcher, Dr. Kandall has written widely in the area of perinatal drug use. He is author of SUBSTANCE AND SHADOW, WOMEN AND ADDICTION IN THE UNITED STATES and has contributed chapters to many standard textbooks, including SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK AND PRINCIPLES OF ADDICTION MEDICINE. Dr. Kandall was named by *New York Magazine* as one of New York

City's best doctors in both Newborn Medicine and Addiction Medicine.

Amicus Curiae Bernard Z. Karmel, Ph.D., is head of the Neurophysiological Development Laboratory in the Infant Development Department of the New York State Institute for Basic Research in Developmental Disabilities, Staten Island, NY. He also is an adjunct Professor in the Developmental Neuroscience Program of the Biology Department of the City University of New York. He is internationally known for his research on early infant attention and brain-behavior relationships. Dr. Karmel's most recent research has concentrated on early infant neurobehavioral and neurophysiological development in infants assigned to the Neonatal Intensive Care Unit at birth or who were exposed to drugs of abuse *in utero* such as cocaine.

Amicus Curiae Nancy Kass, Sc.D., is Associate Professor and Director of the Program in Law, Ethics, and Health, Johns Hopkins School of Public Health, Associate Professor in the Bioethics Institute, Johns Hopkins University, and a Fellow of the Kennedy Institute of Ethics, Georgetown University. Dr. Kass conducts empirical research in bioethics and health policy, with a focus on matters of confidentiality. She is coeditor of HIV, AIDS and Childbearing: Public Policy, Private Lives (Oxford University Press, 1996).

Amicus Curiae Barry E. Kosofsky, M.D., Ph.D., is the Director of the Laboratory of Molecular and Developmental Neuroscience at Massachusetts General Hospital and is an Associate Professor of Neurology at Harvard Medical School. Dr. Kosofsky also serves as the Director of Substances of Abuse Exposure Follow-up Clinic. He has provided longitudinal care for infants, children and adolescents with developmental, neurologic, and academic compromise secondary to gestational

exposure to drugs of abuse. In addition, Dr. Kosofsky has conducted extensive research on the structural and functional effects of prenatal cocaine exposure on mouse brain development.

Amicus Curiae Barry M. Lester, Ph.D., is Professor of Psychiatry and Human Development and Professor of Pediatrics at the Brown University School of Medicine. He is Director of the Infant Development Center at Women and Infants Hospital, providing research and clinical services for infants at risk and their families. Dr. Lester is the principal investigator on grants from the National Institutes of Health and the Robert Woods Johnson Foundation for prenatal drug exposure and child outcome.

Amicus Curiae Robert David Needlman, M.D., is Associate Professor of Pediatrics at Case Western Reserve University School of Medicine. Dr. Needlman is also an attending physician at Rainbow Babies and Children's Hospital, and has published extensively on prenatal healthcare and the consequences of cocaine use on child development.

Amicus Curiae Daniel R. Neuspiel, M.D., M.P.H., is Associate Chairman of Pediatrics and Associate Medical Director at Beth Israel Medical Center in New York City. He is also Associate Professor of Pediatrics and of Epidemiology and Social Medicine at the Albert Einstein College of Medicine. Dr. Neuspiel is certified in pediatrics, preventive medicine and addiction medicine. Dr. Neuspiel has conducted research on developed clinical programs for women who use cocaine and their children.

Amicus Curiae Robert G. Newman, M.D., is President and Chief Executive Officer of Continuum Health Partners, Inc., comprising four hospitals with a total of 3,100 beds, and with

the largest chemical dependency treatment services of any health care system in the United States. He is Professor of Epidemiology and Social Medicine and Professor of Psychiatry at the Albert Einstein College of Medicine, and a member of the Board of Commissioners of the Joint Commission of Accreditation of Health Care Organizations. Dr. Newman has played a major role in the development of addiction treatment in the U.S., Australia, Asia and Europe.

Amicus Curiae Gale A. Richardson, Ph.D., received her Ph.D. in Developmental Psychology from West Virginia University and is currently an Associate Professor of Psychiatry and Epidemiology at the University of Pittsburgh. She is the Principal Investigator of an NIDA-funded investigation of the long-term effects of prenatal cocaine exposure on child development.

Amicus Curiae Lynn T. Singer, Ph.D., is Professor of Pediatrics and Psychiatry, Case Western Reserve University School of Medicine, Cleveland, Ohio. Dr. Singer is a licensed psychologist who is the principal investigator of two major longitudinal studies of high risk infants funded by the National Institutes of Health and the Maternal and Child Health Service Bureau, one of which is following a large cohort of cocaine-polydrug exposed infants longitudinally. Dr. Singer has published extensively in this area.

Amicus Curiae Robert J. Sokol, M.D., is Director of the C.S. Mott Center for Human Growth and Development, Professor of Obstetrics and Gynecology, and former Dean of the Wayne State University School of Medicine, as well as former Senior Vice President for Medical Affairs of the Detroit Medical Center. Dr. Sokol has conducted research and written widely in the field of prenatal substance exposure and its neurobehavioral impact on offspring.

Amicus Curiae Edward Tronick, Ph.D., is an Associate Professor of Pediatrics at Harvard Medical School and an Associate Professor of Maternal and Child Health at the Harvard School of Public Health. He is Chief of the Child Development Unit at Children's Hospital, Boston, Massachusetts. Dr. Tronick has studied the effects of cocaine and other toxic substances on the neurobehavioral organization of infants and young children, and is the author of numerous scientific articles on this issue.